17-0474-cv

United States Court of Appeals
for the
Second Circuit

John Copeland, Pedro Perez, Native Leather Ltd,
Plaintiff-Appellants,
Knife Rights, Inc., Knife Rights Foundation, Inc.,
Plaintiffs,

– v. –

Cyrus R. Vance, Jr., in his Official as the New York County District Attorney, City of New York,
Defendant-Appellees,
Eric T. Schneiderman, in his Official Capacity as Attorney General of the State of New York,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE DISTRICT ATTORNEY CYRUS R. VANCE, JR.

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PRELIMINARY STATEMENT

Plaintiff-appellants John Copeland, Pedro Perez, and Native Leather appeal from a decision by the district court (Forrest, J.) entering judgment for defendant-appellees City of New York and District Attorney Cyrus R. Vance, Jr. on plaintiffs' as-applied vagueness challenge to New York's gravity knife statute. After a careful review of the record that included credibility determinations which plaintiffs ignore, the district court applied the facts to the legal landscape that governs plaintiffs' claim – whether that claim is characterized as as-applied or facial – and concluded that the statute is not vague as-applied to plaintiffs' conduct and therefore is not facially vague. Plaintiffs' appeal is based on the theory that the district court committed legal error by declining to focus on hypothetical applications of the statute, yet plaintiffs do not explain why the binding precedent of the Supreme Court and this Circuit requiring a district court to "confine [its analysis] to the litigant's actual conduct," *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 189 (2d Cir. 2010) (emphasis in original), does not apply to this case. It does. Because plaintiffs have not identified any error in the district court's conclusion that the gravity knife statute is not vague as-applied to their conduct, their challenge fails.

STATEMENT OF THE ISSUES

1. Did the district court appropriately apply the standard for an as-applied vagueness challenge by focusing on the way the statute was enforced against the plaintiffs rather than on the hypotheticals raised by their counsel?

2. Was it clearly erroneous for the district court to decline to credit testimony from plaintiffs' proposed experts, Bruce Voyles and Paul Tsujimoto, that is contradicted by judicial decisions interpreting the statute and testimony from the individuals who enforce it?

3. Was it clearly erroneous for the district court to decline to credit a knife demonstration by plaintiffs' counsel and Douglas Ritter, the chairman of former-plaintiff Knife Rights, that does not accurately portray the wrist-flick test used by law enforcement or feature knives with any connection to New York County?

STATEMENT OF THE CASE

I. The gravity knife statute and the wrist-flick test

The legislature passed the gravity knife statute in 1958 in response to the increasing use of such knives in violent felonies. SPA5 n.5; A850, 859, 875-76.[1] Penal Law ("PL") §265.00(5), which remains the same today as when first enacted, 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." The statute thus has two requirements: (1) a knife must open in response to gravity or

[1] "SPA" precedes citations to the Special Appendix; "A" precedes citations to the Joint Appendix; and "SA" precedes citations to the Supplemental Appendix. We begin with a discussion of the statute and the wrist-flick test to offer context, but most facts in our Statement of the Case are among the findings of facts by the district court and thus – where challenged – are reviewable only for clear error.

centrifugal force; and (2) once the blade is released, it must lock "automatically" by operation of a device – thereby distinguishing a gravity knife "from one that requires manual locking." *People v. Sans*, 26 N.Y.3d 13, 16 (2015) (quotation omitted); SPA5. Possession of a gravity knife is a misdemeanor offense. PL §265.01(1).

Folding knives are characterized by: (1) a blade attached to the handle with a pivot on one end such that the blade will rotate around the pivot to open; (2) a device that puts tension on the blade, impacting the force required to open it; and (3) on some but not all folding knives, a device that locks the blade automatically once open. SA288-91.[2] For folding knives with all three features, the same device that creates tension on the blade also locks it automatically once open. SPA12 n.15; SA344-45.[3] Plaintiffs do not dispute that folding knives can function as gravity knives as defined by the statute. SPA13 n.16 ("Plaintiffs acknowledge, as they must, that 'it is clear that under New York law, a Common Folding Knife can be considered a gravity knife'"), quoting plaintiffs' Reply Trial Brief; A113-14; SA360-61.

The wrist-flick test is the standard by which law enforcement determines whether a knife functions as defined by the statute. SPA6, 13; A850, 894, 901, 906,

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[2] The third feature is required to qualify a folding knife as a gravity knife. *Compare Sans*, 26 N.Y.3d at 16 *with People v. Zuniga*, 303 A.D.2d 773, 774 (2d Dept. 2003) ("[T]he defendant possessed…a type of 'butterfly knife' which required manual locking. Thus, it does not come within the [statutory] definition of a 'gravity knife'").

[3] In a liner-lock knife, for example, this device is a metal cutout in the side of the handle, called the liner, which snaps across the back of the blade as the blade moves to lock it in the open position. SPA12 n.15; A112, SA344, Ex. P12.

909, 911. The test is "just what its name suggests:" using a "one-handed flick-of-the-wrist to determine" whether a knife will open from a closed position and lock automatically. SPA6; *see also* A848, 893, 901; *Carter v. McKoy*, 2010 U.S. Dist. LEXIS 83246, *2 (S.D.N.Y. Aug. 9, 2010) ("[The officer] examined the knife by holding it in its closed position, then flicking his wrist…this motion unsheathed the blade and locked it in an open position"). New York courts have considered whether a knife must open on every attempt of the wrist-flick test to be considered a gravity knife and found that it does not. SPA7 n.8.[4]

Law enforcement has used the wrist-flick test to identify gravity knives since the statute's effective date. SPA13; A850, 894, 899, 901, 904, 906, 911-912. The Bill Jacket includes a New York Times article from December 1957 that describes a sponsor of the statute operating a gravity knife by "flick[ing] his wrist sharply downward," causing the blade to open and "anchor[ ] firmly in position." Ex. D4 at A879. "Then, as now, knives which could be opened by a flick of the wrist were considered to be particularly dangerous." SPA6 n.6; SA442-45; *Johnson v. City of New York*, 1988 U.S. Dist. LEXIS 9397, *2 n.1 (S.D.N.Y. Aug. 25, 1998) ("A 'gravity knife'

[4] *People v. Cabrera*, 135 A.D.3d 412, 413 (1st Dept. 2016) ("The fact that the officer needed to make several attempts before the knife opened did not undermine a finding of operability"), *lv. denied*, 27 N.Y.3d 994; *Carter*, 2010 U.S. Dist. LEXIS 83246, *5, 13 (denying the defendant's habeas petition even though the officer "had to flick his wrist repeatedly before the blade opened and held its position"); *People v. Smith*, 309 A.D.2d 608, 609 (1st Dept. 2003) ("[T]he fact that the knife malfunctioned on some of the detective's attempts to operate it did not defeat the proof of operability"), *lv. denied*, 1 N.Y.3d 580.

is one in which the blade is exposed by a simple flick of the wrist in a downward motion, locking the blade into position. This feature enhances the dangerousness of the weapon insofar as it can be more easily and quickly opened than, say, a hunting knife").

Police and prosecutors have long applied the statute to folding knives, in particular, via the wrist-flick test. SPA13-15; A852, 894, 900, 905-06, 908; Ex. P30 at A626, 657. Judges and juries have long applied the statute to folding knives via the wrist-flick test, and the resulting convictions are upheld on appeal or on collateral challenge in federal court. SPA28; A850, 857; Exs. D5, D22; *People v. Herbin*, 86 A.D.3d 446, 446 (1st Dept. 2011) ("[T]he officers release[d] the blade simply by flicking the knife with their wrists, which satisfies the definition of a gravity knife"), *lv. denied*, 17 N.Y.3d 859;[5] *Merring v. Town of Tuxedo*, 2009 U.S. Dist. LEXIS 61444, *8-9, 38-40

[5] *See also People v. Parrilla*, 27 N.Y.3d 400, 402 (2016) (affirming a conviction based on the defendant's possession of a "folding utility knife" where "[o]ne of the officers tested the knife to determine whether it was a gravity knife by flicking his wrist with a downward motion" and "the blade opened and locked into place"); *Sans*, 26 N.Y.3d at 17 (finding that a statement in a criminal court complaint that the defendant's knife opened "with centrifugal force" conveyed that the officer "flicked the knife open with his wrist" and was sufficient to support a charge of possession of a gravity knife); *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010) ("[The statutory] definition distinguishes gravity knives from certain folding knives which cannot readily be opened by gravity or centrifugal force"); *People v. Neal*, 79 A.D.3d 523, 524 (1st Dept. 2010) ("The officer demonstrated in court that he could open the knife by using centrifugal force, created by flicking his wrist, and the blade automatically locked in place after being released"), *lv. denied*, 16 N.Y.3d 799, *habeas denied*, *Neal v. Yelich*, 2012 U.S. Dist. LEXIS 173919, *2 (S.D.N.Y. Dec. 7, 2012) (explaining that a gravity knife is "a knife that opens when the user flicks his wrist and causes the blade to lock into place as a result of gravity or centrifugal force"); *People v. Higginson*, 2009 N.Y. Misc. LEXIS 1798, *8 (N.Y. County Crim. Ct. July 8, 2009) ("The allegations in this case sufficiently demonstrate that the

(S.D.N.Y. Mar. 31, 2009) (in a civil suit, finding that the officer's ability to open the plaintiff's folding knife by flicking his wrist supplied probable cause). An appellate decision originating in Brooklyn and dating back to June 1976 describes an arrest for possession of a "folding gravity knife." *People v. Hassele*, 53 A.D.2d 699, 700 (2d Dept. 1976). There is no evidence of an arrest under the statute based on anything other than a folding knife.

The statutory definition is based on present function, not design. SPA6-8 (collecting cases); A911; *People v. Aragon*, 28 N.Y.3d 125, 130 (2016) (gravity knives are identified "based on the way a user opens the device"); *People v. Jouvert*, 50 A.D.3d 504, 505 (1st Dept. 2008) ("An officer…demonstrated for the jury the manner in which the knife operated, which conformed to the statutory definition"), *lv. denied*, 11 N.Y.3d 790. By contrast, other Penal Law provisions incorporate the design of a weapon into the definition. SPA8; PL §265.00(11) ("'Rifle' means a weapon designed…"), §265.00(12) ("'Shotgun' means a weapon designed…"), §265.00(14) ("'Chuka stick' means a weapon designed…"), §265.00(15-a) ("'Electric dart gun' means any device designed…"). When it comes to identifying a gravity knife, "[t]he intended use or design of the knife by its manufacturer is not an element of the crime and is irrelevant to [the knife's classification]." SPA8, quoting *People v. Fana*, 2009 N.Y. Misc. LEXIS 956, *9 (N.Y. County Crim. Ct. Apr. 23, 2009).

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knife allegedly possessed was a gravity knife…The knife is described as having a blade that opens automatically when flicked by the wrist").

II. The amended complaint, the parties, and the prior appeal

Against this backdrop, plaintiffs raise a vagueness challenge to the gravity knife statute as-applied by means of the wrist-flick test to what plaintiffs refer to as "Common Folding Knives" – which, in their estimation, differ from "true" gravity knives in that they are designed with a "bias towards closure." A36-37, 111; Appellants' Br. at 3, 12. The amended complaint, which is the operative pleading, was filed on September 24, 2012 by Copeland, Perez, Native Leather, and former-plaintiffs Knife Rights and Knife Rights Foundation. A36-52.

Native Leather is a retail store located in Greenwich Village that sells folding knives. SPA15; A40, 62-63. In early 2010, the DA's Office opened an investigation into the sale of illegal knives, including gravity knives, in response to a rise in violent felonies committed with such knives and community complaints. A46, 853-54; SA29-31, 37-38, 75. As part of the investigation, undercover officers purchased folding knives at Native Leather that, upon application of the wrist-flick test, functioned as gravity knives. SPA15; A854. In June 2010, Carol Walsh, the owner of Native Leather, signed a deferred prosecution agreement wherein she agreed to stop selling gravity knives and to follow a compliance program. SPA17; A47, 65; Ex. P2.

Copeland describes himself as a world-renown painter and sculptor. A39, 53. In October 2009, he purchased a Benchmaid brand folding knife that he used to cut canvas while working. A43. A year later, Copeland was arrested on the street by officers who "alleged" that his knife was a gravity knife because it opened with a flick

of the wrist. A44, 55. Perez describes himself as an educated "purveyor of fine arts and paintings." A39, 58. In April 2008, he purchased a Gerber brand folding knife that he used to cut canvas and open packages while working. A45. Two years later, Perez was arrested in the subway by officers who "alleged" that his knife was a gravity knife because it could "theoretically" be opened with a flick of the wrist. A45, 59.

In the amended complaint, plaintiffs allege that these enforcement actions arose from their possession of "Common Folding Knives," to which they claim the gravity knife statute cannot constitutionally apply. A43, 45, 47-48. From the inception of this lawsuit, plaintiffs have advanced the theory that the statute may be applied only to German paratrooper knives, which they maintain is the one "true" gravity knife. SPA8-11; A41, 110, 160-61; Appellants' Br. at 3-4, 10-12, 60. Distinct from folding knives, paratrooper knives have a blade that slides (rather than pivots) from the handle and can only be locked in the open position by a release lever. A108-09; Ex. P8. The phrase "Common Folding Knife" adopted by plaintiffs has no meaning under New York law and appears to include all folding knives. SPA8; A110-11, 165; Appellants Br. at 61 ("[T]he gravity knife law cannot be applied to folding knives at all").

On September 25, 2013, the district court granted motions to dismiss filed by the City and District Attorney Vance based on its finding that plaintiffs lacked standing – without reaching the merits of their claim. A14. On September 22, 2015, this Court affirmed the dismissal as to the institutional plaintiffs but vacated the dismissal as to Native Leather, Copeland, and Perez. *Knife Rights v. Vance*, 802 F.3d 377,

379 (2d Cir. 2015). Regarding the latter three, the Court found that their professed wish "to engage in the very conduct that prompted defendants' prior enforcement action[s]" was sufficient to confer standing. *Id.* at 385-87 (emphasis added).

III. Submission of the parties' trial papers

On remand, the parties agreed to a trial on the papers followed by oral argument. A24. On March 11, 2016, plaintiffs submitted their case in chief in the form of declarations from Walsh, Copeland, Perez, Ritter, Voyles, and Tsujimoto, as well as deposition testimony from several defense witnesses. A25. Although the amended complaint raises an as-applied challenge, plaintiffs "[did] not narrow[ ] their [claim] to their specific conduct or [to] specific Common Folding Knives (i.e., those that prompted the previous enforcement actions against plaintiffs)." SPA26. Although the Penal Law uses a functional test, SPA8, plaintiffs did not submit any demonstrative evidence featuring a folding knife that had served as the basis of an allegedly unconstitutional arrest in New York County.

The testimony of Tsujimoto and Voyles is offered – both below and on appeal – in support of plaintiffs' theory that the gravity knife statute must, on pain of a constitutional violation, be limited to German paratrooper knives. SPA8-9. According to Tsujimoto, the wrist-flick test as-applied to folding knives is not a suitable measure of centrifugal force because it is the sudden stopping of the wrist, and the inertia of the blade continuing to move, that causes the blade to open. A114, 117-18. While Tsujimoto concedes that flicking one's wrist creates centrifugal force, he opines that

the statute covers only knives that open without the sudden stopping of the wrist, i.e., a knife that would open if one were to extend her arm and rotate continuously, such as by spinning in a swivel chair (what he refers to as the "Swivel Chair Test"). A109, 117-18. Tsujimoto claims that the type of centrifugal force intended by the statute is only that which is required to open a paratrooper knife via the Swivel Chair Test – an opinion which, he claims, is consistent with that of the knife industry. A108-110, 118.

Voyles – who similarly concludes that the statute may only be applied to paratrooper knives, *see* A160, 162 – offers a narrative of the historical understanding of the term "gravity knife" that begins with George Washington's knife and ends precisely where it should have started, with the passage of New York's gravity knife statute. A165-70. In reaching their shared opinion that application of the statute to folding knives via the wrist-flick test is a "recent" practice in New York City that coincides with the election of DA Vance, neither Tsujimoto nor Voyles reviewed the decisions cited above applying the statute to folding knives and endorsing the wrist-flick test as a measure of centrifugal force. SA12-13, 340-41; *see also* SPA12-13.[6] Nor does either expert point to a "pre-Vance" arrest involving a paratrooper knife or acknowledge the

[6] In preparing his trial declaration, Voyles also removed from the Exhibit he cites as the Bill Jacket the contemporaneous New York Times article describing a sponsor of the statute opening a knife by "flick[ing] his wrist sharply downward." *Compare* A162 and Ex. P20 *with* Ex. D4 at A879. In conducting a review of patents for such knives, Voyles overlooked a patent from November 2002 for a "gravity knife" that is a folding knife. SA13-14.

fact that such a knife requires manual locking, whereas the gravity knife statute requires automatic locking. A104-119, 158-71.

On April 8, 2016, the City and the District Attorney submitted their case in chief in the form of declarations and/or deposition testimony from Assistant District Attorney Dan M. Rather, who has knowledge of the practices of the DA's Office and was involved in the investigation of Native Leather; Sergeant Noel Gutierrez and Detective Ioannis Kyrkos, who were involved in the arrest of Copeland; Lieutenant Edward Luke, who was involved in the arrest of Perez; and Sergeant Tomas Acosta and Lieutenant Daniel Albano, who have knowledge of the practices of the Police Department. A26.[7]

Through ADA Rather, defendants admitted several videos and photograph series depicting counsel for the District Attorney – a female of smaller stature than Walsh – opening several folding knives confiscated from Native Leather via the wrist-flick test. SPA17 n.21, 35; A855-57, 890; Exs. D9-11, D13-15, D17-18, D20-21. Two of the videos and all photograph series were shot in slow-motion such that the blade of the knife can be seen emerging from the handle before the prosecutor's wrist comes to a stop, debunking Tsujimoto's theory that it is inertia, not centrifugal force, that causes the blade to move in response to the wrist-flick test. A855-57; Exs. D9, 11, 13, 15, 18, 21. Defendants also admitted photographs of the folding knife that was the subject of

[7] Defendants also submitted deposition testimony from Walsh and Tsujimoto and moved *in limine* to exclude evidence from Voyles. A26, 943-53.

New York County prosecution *People v. Herbin*, in which the First Department re-affirmed the use of the wrist-flick test as a measure of centrifugal force and upheld the statute against a vagueness challenge. A857; Ex. D22.

On April 13, 2016, after reviewing the demonstrative exhibits submitted by the defense, the district court issued an Order expressing its "particular interest" in the demonstration of "one or more common folding knives that, according to plaintiff[s], are of such a quality that a functional wrist-flick test by different witnesses could result in different outcomes." A150, 924. The district court left it to the parties to debate whether "any knives to be presented would already be in the record before the Court in the opening submissions or on rebuttal, or would [be] general exemplars not directly referenced in this case." *Id.*

On May 6, 2016, plaintiffs submitted their rebuttal case in the form of reply declarations from Copeland and Tsujimoto. A27. Tsujimoto stated that he had viewed defendants' video exhibits and, in his opinion, the folding knives depicted therein – which came from Native Leather's own inventory – had "very light bias towards closure." A929. Tsujimoto did not dispute that the knives were properly classified as gravity knives, nor did plaintiffs argue that application of the statute to folding knives that function in such a manner would run afoul of the Fourteenth Amendment. In their Reply Trial Brief, plaintiffs argued that "[w]hether or not a folding knife actually opens by centrifugal force…or opens by inertia or a combination of the two has no impact on [their] vagueness argument." SPA11 n.14. Plaintiffs did

not request to inspect the knives in defendants' exhibits before submitting their rebuttal case, nor did they submit any demonstrative evidence of their own.

IV. Oral argument

In advance of the argument, plaintiffs arranged to ship a collection of knives from Arizona to the Southern District courthouse. A954-58, 960. Plaintiffs sought permission to videotape a demonstration of these knives, to which the City and the District Attorney objected as plaintiffs had declined to submit any video evidence relevant to their claim on their case in chief or on rebuttal and the knives they now sought to demonstrate were never identified in the litigation and had no connection to the parties or New York County. A960. The district court permitted plaintiffs to hire a videographer, at their expense, to record any demonstration. *Id.*

On June 16, 2016, the parties appeared for oral argument. A975. Over defendants' objection, plaintiffs began to demonstrate some of the knives shipped from Arizona, accomplished through testimony by Ritter and narration by their counsel. *See, e.g.*, A990-91, 1002-08. First, Ritter tested three German paratrooper knives. A1002, 1008. The testimony of Tsujimoto and Ritter, as well as the video of the demonstration, confirm that the blades of paratrooper knives do not lock in place automatically once open. A108-10; A1035-37 ("I [Ritter] don't personally know of any true gravity knives that automatically lock"). Whenever Ritter held an open paratrooper knife towards the ceiling, its blade fell back into the handle. A1002-08 and 1197 at 0:00-2:44 (Ex. P35); A1008-12 and 1197 at 2:44-4:36 (Exs. P36, P37).

Next, plaintiffs proceeded to the folding knives. In his declaration, Ritter presented himself as an expert in the wrist-flick test who had tested "at least multiple hundreds of folding knives, possibly thousands…" A88. He reported "at least 100" occasions where he used a single "coordinated" wrist flick to open knives that other (unidentified) persons allegedly could not open. A92-93.[8] The district court, however, denied plaintiffs' request to compel the female prosecutor appearing for the District Attorney to participate with Ritter, and counsel was unable to recruit an audience member to serve as "a demonstrator to try to show the failure to open." A1013-17. Counsel's use of this phrase in soliciting a volunteer offers insight into the integrity of the demonstration that followed. Ritter, with his unparalleled skill in opening knives, was clearly intended to serve as the demonstrator to show relative "ability to open."

Lacking a suitable foil for Ritter, the "O.J. Simpson bloody glove" situation that counsel predicted earlier in the proceeding had come to pass. A995. Matched, by necessity, with plaintiffs' counsel – a man who is similarly "highly skilled" in opening knives with a flick of the wrist, A1068; Appellants' Br. at 37 – Ritter was inexplicably incapacitated.[9] He huffed, he puffed, he raised his arm over his head and

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[8] There is no evidence that any of these knives were the subject of an arrest in New York County, or that Ritter encountered any of these knives here.

[9] A1018-19 and 1197 at 4:37-5:50 (Ex. P38); A1019-21 and 1197 at 5:50-6:27 (Ex. P39); A1021-22 and 1197 at 6:28-7:27 (Ex. P40); A1023-25 and 1197 at 7:28-9:33 (Exs. P41 and P42); A1026-27 and 1197 at 9:33-10:36 (Ex. P43); A1029-30 and 1197 at 12:34-14:03 (Ex. P44); A1031-35 and 1197 at 14:04-17:35 (Ex. P45). All citations are to the video time-stamp, not to the time of day.

thrashed it so violently that he created audible gusts of wind, prompting the district court to caution him against dislocating his shoulder. A1030 and 1197 at 6:28-45, 9:33-48, 13:12-27, 15:31-44, 16:21-41, 17:06-21. On cross-examination, Ritter testified that his theatrics were an accurate portrayal of the wrist-flick test that plaintiffs challenge. A1038-39. Although Copeland, Perez, or Walsh could have appeared to play the role of the comparatively weak or unskilled knife owner, none of them did – leaving the district court to "imagine" what may have been the result in a proceeding where plaintiffs bore the burden of proof. A1069.

None of the knives used in plaintiffs' demonstration were purchased in New York County or served as the basis of an arrest here. A1018-35, 1041. There was no evidence that Copeland or Perez would purchase any of the knives demonstrated by Ritter and plaintiffs' counsel if allowed to do so. SPA7 n.7. Only one knife – a Buck Model 110 – was identified as being of the same brand as a knife that the monitors identified as a gravity knife when testing Native Leather's inventory, *see*, p. 25, *infra*. A1029-30; Ex. P44. Although the four knives from Native Leather depicted in the defense exhibits were present in the courtroom, A1002, plaintiffs did not use them. On all occasions, there was a clear contrast between plaintiffs' demonstration and the wrist-flick test used by law enforcement. *Compare* A1197 at 6:28-45, 9:33-48, 13:12-27, 15:31-44, 16:21-41, 17:06-21 *with* Exs. D10-11, D14-15, D17-18, D20-21. ADA Rather, a veteran prosecutor, testified that Ritter's contortions are not representative of the wrist-

flick test and that knives which function in such an inconsistent manner would not result in charges under the gravity knife statute. A848, 1046-48.

V. Findings of fact by the district court

On January 27, 2017, the district court issued a decision containing its findings of fact and legal conclusions. SPA1-35. On appeal, plaintiffs often rely on allegations that have been discredited but do not ask this Court to revisit those findings.

A. The statutory framework and the wrist-flick test

Regarding the statutory framework and the wrist-flick test, the district court found that: (1) the statutory definition of a gravity knife is based on function, not design; (2) the wrist-flick test employed by law enforcement measures whether a knife opens by centrifugal force; (3) a folding knife which opens in such a manner may appropriately be deemed a gravity knife under the law; and (4) a knife need not open on every attempt of the test to support a finding that it is a gravity knife. SPA6-8, 10; *Aragon*; *Parrilla*; *Sans*; *Cabrera*; *Herbin*; *Carter*; *Dreyden*; *Neal*; *Fana*; *Merring*; *Smith*; *Johnson*; p. 3-6, *supra*; PL §§265.00(11), (12), (14), (15-a); Ex. D4 at A879. The district court further found the wrist-flick test to be a "known" test with a self-explanatory name: "using the force of a one-handed flick-of-the-wrist to determine whether a knife will open from a closed position." SPA6, 14.

Based on the "distinct difference" between plaintiffs' demonstration and the defense exhibits, as well as the credible testimony of ADA Rather, the district court found that the maneuver used by Ritter and plaintiffs' counsel was exaggerated and did

not reflect the wrist-flick test, and further, that plaintiffs' demonstration did not support a finding of different outcomes under the test. SPA7 n.7; A1046-47. In reliance on the same evidence, as well as the testimony of the officers involved in the challenged arrests, the district court discredited Ritter's testimony that the wrist-flick test is applied in different manners by different individuals and found, to the contrary, that the record supported "consistent application of the wrist-flick test." SPA14 n.7; SPA20-22; A891-92, 894-95, 900-01, 905-06. The district court further noted plaintiffs' failure to adduce evidence that the manner of conducting the wrist-flick test is, in fact, different from officer to officer, or that two officers, each applying the test to the same knife on the same occasion, have had different outcomes. SPA14.

The district court explained that the testimony of Tsujimoto and Voyles did not alter its conclusion that the wrist-flick test applies centrifugal force to identify a folding knife as a gravity knife. SPA10. First, the court noted that, despite the experts' opinion that the statute applies only to German paratrooper knives, plaintiffs did not deny that the wrist-flick test imparts centrifugal force and forfeited any claim to the contrary when they argued – after viewing the photograph series showing the blades of Native Leather's knives opening mid-flick – that whether a knife opens by centrifugal force or inertia is "irrelevant" to their claim. SPA11. Second, the court found no relevance in the experts' discussion of the archaic paratrooper knife or opinion that a folding knife cannot be classified as a gravity knife because it will not open via the Swivel Chair Test. SPA11, 13. In this regard, the court noted that the opinions of

Tsujimoto and Voyles are not addressed to a factual issue, but rather, to the legal issue of whether a folding knife can properly be classified as a gravity knife under the statute – an issue which is outside the scope of their professed expertise and inappropriately addressed by expert testimony. SPA9, 13.

Regarding the mechanics of folding knives, the district court found that several variables can impact a knife's functionality. SPA12. Irregularities in the manufacturing process can result in differences between how knives of the same brand and model open. *Id.*; A115, 851. Use of a knife over time may affect how it opens at one point in time versus another. SPA12; A115; A851, 895 ("I [Lieutenant Luke] understand that the resistance in a folding knife such as the one carried by Perez can change over time, [including] through regular use…"); SA241-42. Loosening in the tension screw resulting from such use may cause a knife to open with a flick of the wrist when it had not previously. SPA12. As Tsujimoto testified, the owner can correct this issue by tightening the tension screw with a torx, a screwdriver, or an Allen Key – and often the required tool is sold with the knife. SA349-50; *see also* A902 ("Based on my [Sergeant Gutierrez's] experience, knives like the one Copeland was carrying can be modified by a tension screw or other device to make them easier or more difficult to open"). Conversely, the district court found that a folding knife that once opened with a flick of the wrist may cease to do so if it is stored in a cold or arid location or exposed to moisture, causing corrosion to form in the blade. SPA12; A851.

B. Enforcement of the statute

The district court rejected plaintiffs' contention that application of the gravity knife statute to folding knives via the wrist-flick test is a "recent" practice adopted by DA Vance. SPA13, 32; Appellants' Br. at 16 (despite this adverse finding, maintaining that defendants "beg[an]" to file charges in 2010 for possession of knives that "could open with a flick of the wrist").[10] Contrary to plaintiffs' theory, the district court found that law enforcement has used the same wrist-flick test to identify gravity knives since the statute's effective date and that consistent application of this "historical practice" has continued under Mr. Vance. SPA13; *see also* A848-50.

Regarding the Police Department, the district court found that officers – including those involved in the subject arrests – are taught the definition of a gravity knife; are "trained to use the same wrist-flick test that officers were trained to use decades ago;" and make arrests "only once a knife has opened in response to the wrist-

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[10] On appeal, plaintiffs continue to ignore decisions documenting pre-2010 arrests for possession of folding knives that opened via the wrist-flick test. *Compare* Appellants' Br. at 16-17 *with Carter*, 2010 U.S. Dist. LEXIS 83246, *2 (defendant was arrested in March 2006 for possessing a knife that the officer opened by "flicking his wrist"); *Merring*, 2009 U.S. Dist. LEXIS 61444, *5, 8, 38 (defendant was arrested in December 2006 for possessing a folding knife that opened with a "flick of [the] wrist"); *Neal*, 2012 U.S. Dist. LEXIS 173919, *2 (defendant was arrested in June 2008 after the officer "confirmed [his knife] was a gravity knife by flicking it open"); *Johnson*, 1988 U.S. Dist. LEXIS 9397, *2 n.1 (defendant was arrested in August 1987 for possessing a knife that opened by "a simple flick of the wrist"). *Herbin*, in which the First Department re-affirmed the wrist-flick test as a measure of centrifugal force and rejected a vagueness challenge to the statute, arose from a judgment of conviction entered in March 2009 – nine months before Mr. Vance was elected. 86 A.D.3d at 446.

flick test." SPA13-14; *see also* A894-95, 901, 906, 908-09, 911-12. Regarding the DA's Office, the district court found that gravity knife prosecutions constitute "a very small fraction" of the total misdemeanor prosecutions filed each year. SPA14-15.[11] The court credited testimony from ADA Rather – who started at our Office in 1985 and regularly trains and supervises Assistants regarding the gravity knife statute – that "prosecutions are not [and were not with regard to plaintiffs here] initiated based on a theoretical possibility that a knife could, might, or should open in response to a wrist-flick; they are commenced only if and when a knife does." SPA15; A851.

C. Carol Walsh and Native Leather

The district court found that the folding knives purchased from Native Leather by the undercover officers functioned as gravity knives, leading the DA's Office

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[11] Below are the statistics relied on by the district court, with January 2010 marking the transition from former-DA Robert Morgenthau to Mr. Vance, who plaintiffs claim has embarked on a "novel and unprecedented expansion" of the statute. A852-53; Appellants' Br. at 1-2.

Year	Gravity Knife Prosecutions	Total Misdemeanor Prosecutions
2005	1,027	68,160
2006	1,189	70,273
2007	1,414	76,720
2008	1,432	74,523
2009	1,513	77,683
2010	1,263	75,643
2011	1,095	74,941
2012	976	76,414
2013	1,096	76,774
2014	1,075	73,909
2015	1,073	63,601

to serve a grand jury subpoena on Walsh seeking all knives in her inventory that met the definition of a gravity knife. SPA15; A63, 854; SA31, 52; Ex. P1.

In her trial declaration, Walsh professed confusion as to what the DA's Office meant by "gravity knife." A63. The subpoena included an explanation that a gravity knife is one which can open "by the application of centrifugal force (such as by the flick of one's wrist)." Ex. P1 at A72.[12] The district court credited testimony from Walsh's deposition wherein she admitted that, upon reviewing the subpoena and the statute, she "understood that she could not sell knives that met the description of 'what the DA's Office was looking for,' but that she could sell anything outside of that description." SPA16-15; SA183, 231. Walsh further admitted at her deposition that a gravity knife is a folding knife that opens with a flick of the wrist and that Native Leather sold such knives before receiving the subpoena. SA205-08. Her attorney sent our Office a letter to that effect, as well. A854; Ex. D7 (acknowledging that Native Leather sold knives that "me[t] the legal definition of a 'gravity knife'").[13]

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[12] Plaintiffs misrepresent that "no document" provided by this Office identified the wrist-flick test as a measure of legality. Appellants' Br. at 29.

[13] Perhaps in furtherance of their theory that DA Vance implemented the wrist-flick test, plaintiffs represent that Walsh only became aware of the test in 2010 when customers began to report that they had been arrested for possession of knives purchased at Native Leather that opened with "a flick of the wrist." Appellants' Br. at 25; A63. This representation is at odds with the claim in Walsh's trial declaration that, in all the years she owned the store, she never sold knives that opened with a flick of the wrist. A65 (which, in turn, is at odds with the admission at her deposition that she did sell such knives, SA207). If Walsh never knew about the test or its significance, she would not have known to consider it – or, more accurately, disregard it – when selecting knives to stock at her store.

The district court found that, prior to receiving the subpoena, Walsh made no meaningful effort to ensure that she was not selling gravity knives at Native Leather. Although she had been in business for several years,[14] Walsh could not be sure that she read the statute until it was brought to her attention via the subpoena. SPA16; SA231. Prior to that point, the only precaution Walsh took to verify the legality of her inventory was a trip, in the "early 2000s," to the 6th Precinct in the Lower East Side to inquire about a retail store called "Iceberg Army Navy" that had its knife inventory "confiscated" (or so Walsh had heard). SPA16 n.20; SA231-33.[15]

The district court found that, in response to the subpoena, Walsh provided to the DA's Office "'almost every folding knife that [she] thought could be opened with one hand, with or without gravity or centrifugal force, for a total of over three hundred knives.'" SPA16, quoting SA238-39. At oral argument, the district court noted the lack of evidence that Walsh attempted to discern, by applying the wrist-flick test, which of her knives functioned as gravity knives before making the production. A984-85. None of the knives that Walsh provided to the DA's Office were German paratrooper knives. SPA17, citing A855.[16]

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[14] Walsh has owned the store since 1996; before purchasing the store, she worked there as a salesperson. SA180, 188-89.

[15] A New York Times article dated November 20, 2003 describes a police raid on "Army & Navy," a retail store in the Lower East Side, which resulted in the recovery of thirty-four gravity knives characterized by blades that opened "with a flick of the wrist." A854; Ex. D6.

[16] Nowhere does Walsh or any other plaintiff claim to have thought the term "gravity knife" to be a reference to paratrooper knives.

ADA Rather and other members of our Office tested each knife and returned the ones that were not illegal. SPA16-17; A854; SA238-39. The knives that operated as gravity knives were, without exception, folding knives. SPA17; A854-55. The defense exhibits depict a prosecutor successfully opening four of those knives, repeatedly, using the wrist-flick test. SPA17 n.21; Exs. D10-11, D14-15, D18, D21. The district court, relying on the exhibits and the testimony of ADA Rather, found that the knives retained from Native Leather opened in response to the wrist-flick test and met the requirements of the statute. SPA23. The district court also found that plaintiffs, by asking hypothetical questions of ADA Rather instead of focusing on actual events, failed to create an issue of fact as to whether there was any ambiguity in the application of the statute to Native Leather's knives, for example – and without conceding that these examples would establish ambiguity – whether multiple attempts of the test were required to open any of the knives or whether individuals had different outcomes when applying the test to the same knife. SPA16-17.[17]

In June 2010, Walsh signed a deferred prosecution agreement with the DA's Office. SPA17; A65; Ex. P2. She agreed, for a period of eighteen months, not

[17] ADA Rather testified that a knife which opens once in ten attempts would not result in a charge under the statute. SA58-59. Plaintiffs did not ask ADA Rather to identify the maximum number of attempts that, in his opinion, would disqualify a knife from prosecution, or how that limit was applied when testing Native Leather's knives. While ADA Rather volunteered in his trial declaration that he is not aware of any prosecution going forward where the officer could not open the knife in less than three attempts, A852, plaintiffs do not argue that such a practice would be an unreasonable application of the statute.

to sell gravity knives at Native Leather; to the appointment of an independent monitor to inspect the records and inventory of the store; and to participate in a compliance program whereby she would personally test her incoming inventory for gravity knives and keep records documenting whether knives arriving to Native Leather passed or failed the test. SPA17, 18; A65-66, Ex. P2; Ex. P3 at A86.

In September 2010, Walsh began testing the knives ordered to her store and opened a logbook to record the results. SPA18; SA215-16. The logbook entries included the date Walsh ordered the knife, the date she received it, and the results of her application of the wrist-flick test. SPA215. The district court found that Walsh applied her experience selling knives for "many, many years" in reviewing her incoming inventory under the compliance program. SPA17, quoting SA197-98. For example, she knew that a knife that did not lock in the open position – such as a Swiss Army knife – did not need to be tested. SPA17-18; SA197. Similarly, she knew that a knife that locked in the closed position did not need to be tested because it could not be opened with one hand. SPA18; SA197. Walsh also understood that certain knives, while not designed to open by the application of gravity or centrifugal force, could nonetheless function as gravity knives. SPA18; SA241-42.

After identifying which of the knives ordered to Native Leather needed to be tested, Walsh applied the wrist-flick test. SPA18; SA198-99. Walsh claims that she felt compelled to reject a knife if she imagined that a "stocky [man]" – such as one of the monitors who later visited the store – could open the knife via the test. SPA18,

quoting SA195-99; *see also* SA215, 235. Not only is the prosecutor seen opening Native Leather's knives in the defense exhibits decidedly not a "stocky man," but Walsh's logbook reflects that she did not reject a single folding knife ordered to the store during the compliance program as being a gravity knife. SA215-16; *see also* SA200-01.

In May 2011, the monitors visited Native Leather and tested knives from the store's inventory by applying the wrist-flick test. SPA18; A66-67, SA50. As Walsh recalls, "if the blade swung out of the knife, it was loose enough to be called a gravity knife;" conversely, "if the blade was snug into the handle [and did not] come out," it was not classified as a gravity knife. SPA18, quoting SA192-93. Walsh identifies only three knives that failed the test when applied by the Kroll employees, all of which were Buck Crosslocks. A67. There is no evidence as to when these specific knives arrived to Native Leather, whether they were in new or used condition, or whether Walsh tested the knives, either as new inventory under the compliance program or at the time of the Kroll employees' visit. At her deposition, Walsh testified that the knives listed in the compliance program logbook – i.e., the knives that were ordered and tested by Walsh from September 2010, onwards – were not among the knives tested by the "stocky" Kroll employee against whose imagined relative strength she purported to measure a knife's legality. SA224-25; *see also* SA215-16; Ex. P2.

D. John Copeland

The district court found that Copeland knew, prior to his arrest, that law enforcement employed the wrist-flick test to identify gravity knives. SPA19-20; A54.

In 2009, shortly after purchasing the knife in question, Copeland showed it to two different police officers. SPA19; A54. Unable to open the knife himself via the wrist-flick test, Copeland asked the officers whether it was legal. A54. Both officers applied the test and concluded that the knife did not function as a gravity knife. SPA19; A54. Thereafter, Copeland regularly used the knife while working as a painter and sculptor. SPA19; A53-54. Despite subjecting the knife to regular use over a significant period, Copeland never attempted to adjust the blade to correct the normal wear and tear that can cause a folding knife to function as a gravity knife. A926.

A year after Copeland purchased the knife, he was stopped on the street by Sergeant Gutierrez and Detective Kyrkos. SPA19; A55, 899-900, 904-05. The knife was clipped to the pocket of Copeland's pants, in plain view to the officers. *Id.*[18] In Copeland's presence, Detective Kyrkos applied the wrist-flick test to the knife by gripping the handle and flicking his wrist. SPA19; A900, 905. The district court found that the knife opened on the first attempt and the blade locked in place. *Id.* The officers placed Copeland under arrest. *Id.* At the precinct, he received a desk appearance ticket and was released from custody. SPA20; A55, 900. Copeland later accepted an adjournment in contemplation of dismissal ("ACD") to resolve the charge, which is a non-merits disposition. SPA20; A55; *Knife Rights*, 802 F.3d at 381.

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[18] The City's Administrative Code makes it "unlawful for any person in a public place, street or park, to wear outside of his or her clothing or carry in open view any knife with an exposed or unexposed blade." Admin. Code §10-133(c).

The district court found that Sergeant Gutierrez and Detective Kyrkos were trained in how to apply the wrist-flick test during their time as probationary police officers; that they both apply the test by holding a knife by its handle and flicking their wrist to apply centrifugal force; and that they have consistently and exclusively used the test to identify gravity knives over the course of their careers, SPA20-21; A900-01, 905-06, which both began in 2004. A899, 904. The district court further found that Copeland's knife "met the definition of a gravity knife" at the time of his arrest and that "the ability of [the] knife to open by application of the wrist-flick test immediately prior to his arrest, as compared to its inability to open a year earlier, was due to usage over time." SPA20. This finding is unchallenged on appeal.[19]

E. Pedro Perez

The district court found that Perez, a purveyor of fine arts, regularly used the folding knife that led to his arrest to cut canvas and open packaging. SPA21; A58-59. On April 15, 2010 – a full two years after Perez purchased the knife – he was stopped in a subway station by Lieutenant Luke after the Lieutenant observed the knife

[19] Plaintiffs argue – without acknowledging this finding or asking this Court to revisit it – that the officers who arrested Copeland only "stated" that the knife opened in response to the wrist-flick test and that Copeland "defended the charge on the merits." Appellants' Br at 20. Neither representation is accurate. Because both Copeland and Perez accepted an ACD, the question of whether their knives "were proscribed gravity knives…was never resolved" in the criminal matters, and the question remained open when this case last appeared before the Circuit. *Knife Rights*, *supra*, at 381. Since then, any ambiguity as to the functionality of their knives has been answered in favor of the District Attorney and the City.

clipped to the pocket of Perez's pants in plain view. SPA21; A59, 892-93. In the presence of Perez and two other officers, Lieutenant Luke applied the wrist-flick test to the knife by gripping its handle and flicking his wrist. SPA21; A892-93. Having determined that the knife functioned as a gravity knife, the Lieutenant placed Perez under arrest. SPA22; A893. Perez received a desk appearance ticket charging possession of a gravity knife and was released from custody. SPA22; A59, 893. He later accepted an ACD to resolve the charge. SPA22; A60.

In his trial declaration, Perez claims that the officers who stopped him could not open his knife using the wrist-flick test but inexplicably arrested him because it was "theoretically" possible to do so. SPA22; A59. Lieutenant Luke, to the contrary, maintains that Perez's knife opened on the first attempt of the wrist-flick test and the blade locked in place automatically. SPA21-22; A893. Noting that plaintiffs carried the burden of proof but did not offer any basis to credit Perez over Lieutenant Luke, the district court found that the knife opened as described by the Lieutenant and met the definition of a gravity knife. SPA22. The court further cited the fact that Perez accepted an ACD and agreed to perform seven days of community service as evidence that he "understood his knife functioned as a gravity knife." *Id.*; A60. This finding is unchallenged on appeal.[20]

[20] As with Copeland, plaintiffs do not acknowledge this adverse finding and proceed as if the allegations in the pleadings still govern. Appellants' Br. at 21.

Finally, the district court found that Lieutenant Luke – a twenty-two year veteran of the Police Department who has been involved in approximately one hundred and fifty arrests involving a gravity knife – received training in how to identify a folding knife as a gravity knife by applying the wrist-flick test; that the Lieutenant consistently and exclusively used the test to identify gravity knives over the course of his career, which began in 1993; and that he would not charge someone with possession of a gravity knife if the knife in question did not open after the first or second application of the wrist-flick test, nor would he charge someone with possession of a gravity knife if he [Lieutenant Luke] could open the knife via the wrist-flick test but another officer could not. SPA21-22 n.22; A891-92, 894-95.[21]

ARGUMENT

THE DISTRICT COURT CORRECTLY FOUND THAT, CONFINED TO THEIR OWN FACTS, PLAINTIFFS FAILED TO ESTABLISH THE ELEMENTS OF AN AS-APPLIED CHALLENGE AND, NECESSARILY, FAILED TO ESTABLISH FACIAL INVALIDITY

Plaintiffs argue that the district court erred by focusing on the way the gravity knife statute was enforced against them, rather than on the hypotheticals raised by their counsel, and by discrediting the interpretation of the statute advanced by their experts. Appellants' Br. at 49-51, 56-57, 60-61. Absent from plaintiffs' brief is any

[21] Sergeant Gutierrez and Detective Kyrkos similarly testified that they would not charge possession of a gravity knife they could not open the knife in question on the first or second attempt of the wrist-flick test. A901, 906.

recognition of the decisions of the Supreme Court and this Circuit that define the scope of as-applied versus facial challenges and the elements of a vagueness claim. As with the decisions giving notice that the statute historically has been applied to folding knives via the wrist-flick test – which, along with the defense testimony, led the district court to discredit the experts' contrary opinion – plaintiffs do not acknowledge the standards that define their claim. The district court, by applying the controlling principles that plaintiffs ignore, correctly concluded that plaintiffs cannot carry their burden of proof by reference to fictional events; that they did not establish a constitutional violation in the application of the statute to their own conduct; and that their failure to do so foreclosed a finding of facial invalidity.

After a bench trial, the district court's legal findings are reviewed *de novo* and its factual findings, whether based on oral or documentary evidence, are reviewed for clear error. *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1176 (2d Cir. 1995). The latter standard applies to all factual findings, including those that are outcome determinative. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015) ("[W]hen reviewing the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*") (quotation omitted). If the district court's account of the evidence is "plausible in light of the record," the appellate court "may not reverse it even though…it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

I. The district court correctly concluded that plaintiffs' vagueness claim is properly viewed against the underlying events, not in the abstract

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (quotation omitted). "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). While a criminal statute is subject to "more than a minimal level of scrutiny," where – as here – the plaintiff does not argue that his conduct implicates a constitutionally protected right, "only a moderately stringent vagueness test [is] required." *Betancourt v. Bloomberg*, 448 F.3d 547, 553 (2d Cir. 2006).[22]

A statute "may be challenged for vagueness on its face or vagueness as-applied to the defendant['s] specific conduct." *United States v. Spy Factory*, 951 F. Supp. 450, 464 (S.D.N.Y. 1997) (Sotomayor, J.). "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015). Facial challenges are disfavored for several reasons: they "often rest on speculation" and thus "raise the risk of premature interpretation;" they "run contrary to the fundamental principle of judicial restraint;" and they "threaten to short circuit

[22] *Betancourt* similarly concerned a criminal statute with no *mens rea* element.

the democratic process." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008). "Under the standard set forth by the Supreme Court in *United States v. Salerno* [481 U.S. 739], to succeed on a facial challenge, the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (quotation omitted).[23]

In contrast, plaintiffs bringing an as-applied challenge must show that the statute either "failed to provide them with notice that [their conduct] was prohibited" or "failed to limit sufficiently the discretion of the officers who arrested them under the statute." *Dickerson v. Napolitano*, 604 F.3d 732, 745 (2d Cir. 2010) (emphasis in original). Review is limited to "the particular facts at issue" and excludes "hypothetical situations designed to test the limits of the [statute's language]." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 22 (2010) (quotation omitted). Thus, "a court's analysis should be confined to the litigant's actual conduct, and a court should not analyze whether a reasonable person would understand that certain hypothetical conduct or situations violate the statute." *VIP of Berlin, LLC*, 593 F.3d at 189 (emphasis in original).[24]

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[23] *See also Patel*, 135 S. Ct. at 2451 ("Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that the law is unconstitutional in all its applications"); *Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir. 2008) (a facial challenge requires the plaintiff to establish that "no set of circumstances exist under which the law would be valid") (quotation omitted).

[24] *See also Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (distinguishing between "the complainant's conduct," which is relevant to an as-applied challenge, and "other hypothetical applications of the law," which are relevant to a facial challenge) (quotation omitted); *Perez v. Hoblock*, 368 F.3d 166, 175 (2d Cir. 2004) ("The evaluation of whether [the statute] is vague as-applied to [the plaintiff] must be made with respect

Regardless of how a party labels his claim, the proper starting point is as-applied to the plaintiff. *Rybicki*, 354 F.3d at 129 ("Panel opinions of this Court have repeatedly held that when…the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only as-applied, i.e., in light of the specific facts of the case at hand and not with regard to the statute's facial validity") (quotation omitted).[25] The preference for as-applied review flows from "the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *United States v. Farhane*, 634 F.3d 127, 138 (2d Cir. 2011) (quotation omitted). Where a plaintiff's as-applied challenge fails, his facial challenge necessarily fails, too. *Diaz*, 547 F.3d at 101.

This lawsuit was not filed by "Common Folding Knives," it was filed by Native Leather, Copeland, and Perez, who complain of a lack of notice that the gravity

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to [the plaintiff]'s actual conduct and not with respect to hypothetical situations at the periphery of the [statute]'s scope or with respect to the conduct of other parties who might not be forewarned by the broad language") (quotation omitted).

[25] *See also Vill. of Hoffman Estates*, 455 U.S. at 495 ("A court should…examine the complainant's conduct before analyzing other hypothetical applications of the law"); *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 265 ("Because plaintiffs pursue this 'pre-enforcement' appeal before they have been charged with any violation of the law, it constitutes a 'facial,' rather than 'as-applied,' challenge"); *United States v. Decastro*, 682 F.3d 160, 163 (2d Cir. 2012) ("When a defendant has already been convicted for specific conduct under the challenged law, a court considering a facial challenge to a criminal statute must examine the complainant's conduct before analyzing other hypothetical applications") (quotation omitted); *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) ("When, as here, the challenged law does not threaten First Amendment interests, we generally evaluate a vagueness claim only as-applied to the facts of the particular case").

knife statute could be applied to the knives they possessed when they were investigated or arrested. The decisions cited above make clear that plaintiffs' claim hinges on what they have proven, or failed to prove, about the enforcement actions underlying their claim. Plaintiffs cannot rely on fictional events unless they are raising a facial challenge, in which case they must satisfy the higher standard for such a claim. Only knives that function as plaintiffs' knives did are relevant to this as-applied challenge. *Dickerson*, 604 F.3d at 746-47 ("In their as-applied challenge, [plaintiffs] must show not that [the statute] provides insufficient notice to some people as to items that are prohibited, but that it provided insufficient notice to the plaintiffs as to the specific items that they were arrested for possessing").[26] To save a law from vagueness, the government is not required to anticipate and account for every hypothetical application. Just as a statute is not facially vague so long as it can constitutionally be applied in certain circumstances, the gravity knife statute is not vague as-applied to all folding knives when the only evidence in the record is of its enforcement against folding knives that fall squarely within the statute's prohibition.

Considering each plaintiff, the officers who arrested Copeland and Perez opened their knives with one application of the wrist-flick test. SPA19, 22. Although

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[26] The brand and model of the knife are not controlling as the statute employs a functional test and the functionality of a knife can change based on several variables, including regular use or intentional modification. SPA8, 12. The ability to instantaneously loosen a blade or, conversely, to tighten it to correct the effect of normal wear and tear was apparent in plaintiffs' demonstration. A1032-35 and 1197 at 14:04-17:35 (Ex. P45).

Copeland claims that he could not open his knife in this manner at the time of purchase, he was arrested a year later, during which time he regularly used the knife and took no action to correct the effect of normal wear and tear. SPA19; A926. The knife's initial inability to open versus its ability to do so at the time of his arrest was due to usage over time. SPA20. Walsh did not attempt to open the knives that she provided from Native Leather's inventory via the wrist-flick test before signing the deferred prosecution agreement; instead, she collected every knife she "thought could be opened with one hand, with or without gravity or centrifugal force." SPA16. The district court found that the knives retained by this Office opened in response to the wrist-flick test and that plaintiffs, by framing their questions of ADA Rather as hypotheticals, failed to offer proof of any ambiguity in the application of the statute to the knives retained from Native Leather. SPA16-17, 23. While Walsh claims that she later felt compelled to reject a knife if she imagined that a stocky man could open it, the records from the compliance program reflect that she did not reject a single knife. SPA18; SA215-16. Her confusion is illusory.[27]

These are not compelling facts. They present a much narrower platform for challenging the statute than the broad theories of vagueness advanced in plaintiffs'

[27] Nor does Walsh claim to have tested the three Buck Crosslock knives that the monitors identified as gravity knives; she claims only that, as a general matter, she has never successfully opened knives of the Buck brand. Appellants' Br. at 28. Brand is irrelevant to whether a knife functions as a gravity knife. SPA8, 12. Plaintiffs, bearing the burden of proof, do not offer any evidence that Walsh and the monitors tested the same knives at the same time and obtained different results.

brief – which include folding knives possessed by other persons and retailers whose alleged experiences are presented through the testimony of Ritter.[28] None of the plaintiffs claim to be the hypothetical person who selects a knife in a store, applies the wrist-flick test with negative results, leaves the store, and immediately encounters an officer who is able to open it. Appellants' Br. at 4-7, 44, 55-56. The imagination of their counsel is the closest plaintiffs come to proof of a scenario where the statute was applied by different individuals to the same knife at the same time, a different result ensued, and the knife was deemed illegal. *See id.* at 52 ("[Copeland] had two…officers test his knife and find it legal, and then got arrested a year later"). Similarly, plaintiffs do not claim that multiple attempts were required to open their knives, which is another hypothetical source of vagueness identified in their brief, *id.* at 54,[29] nor do they claim to have been unaware that the wrist-flick test is used to identify gravity knives. *Id.* at 55 (describing it as a "secret test"). Through seven years of litigation, plaintiffs have never

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[28] Plaintiffs also rely on the difference in operability between the Leatherman tool referenced by ADA Rather during his deposition, *see* A858, which is depicted in Ex. D23, and the two Leatherman tools used during plaintiffs' demonstration, marked as Exs. P41 and P42. Appellants' Br. at 53. There is no evidence that the statute has ever been enforced against a Leatherman tool. Regardless, the blade of the model belonging to ADA Rather is nestled inside the tool, such that it cannot be opened with a flick of the wrist, whereas the blades of the models used in plaintiffs' demonstration are located on the outside of the tool, such that conceivably the blades could open in that manner. A1024-29. Assuming for a moment that plaintiffs' demonstration accurately portrayed the wrist-flick test, Ritter and plaintiffs' counsel both opened the blade of Ex. P41 and plaintiffs' counsel did not "open" the blade of Ex. P42 – he violently shook the tool until all of its appliances flew out. A1197 at 7:28-9:33.

[29] In this regard, plaintiffs (without citation) mischaracterize ADA Rather's testimony described at p. 23 n.17, *supra*, and found at 58-59 of the Joint Appendix.

identified a person who suffered any of the theoretically unfair applications of the statute on which they rely.

Plaintiffs' insistence on the irrelevance of their own facts, Appellants' Br. at 46, 51, underscores why facial challenges are disfavored. The purpose of the gravity knife statute remains relevant today; knives that open by a flick of the wrist continue to be particularly dangerous. SPA6; *Johnson*, p. 4-5, *supra*. Last year, the Governor vetoed an amendment containing the "bias towards closure" language that plaintiffs seek to graft onto the statute out of concern that it would "potentially legalize all folding knives" despite grave public safety issues. A1186 (citing a "staggering" rise in knife violence). Plaintiffs may be upset that they cannot perfectly predict whether a knife – and not just any knife, a knife that they elect to sell or wear visibly in public – will be classified as a gravity knife, but they are not the only ones at the table. The statute represents a choice to respond proactively, not reactively, to knife violence. It would be of little comfort to the victim of a subway slashing that the man who flicked open a folding knife and assaulted her had been stopped weeks earlier for wearing the same knife in public but was not criminally charged because plaintiffs, in reliance on a fictional inequity, secured a declaration legalizing his knife.[30] Especially upon review of

[30] *See, e.g.*, Man Arrested After Slashing Pregnant Woman on Bronx Train, 6/9/17, http://www.ny1.com/nyc/all-boroughs/news/2017/06/9/bronx-subway-slasher-arrested.html; Homeless Woman Accused of Rage-Filled Subway Slashing, 5/28/17, http://nypost.com/2017/05/28/woman-slashed-on-subway-platform-at-grand-central/ (quoting a subway rider as saying, "[T]he reactive approach gets a woman stabbed"); Person Spits in Woman's Face, Pulls Knife on J Train Platform, Police Say,

the clear notice afforded to plaintiffs, *see* Sub-Part II, *infra*, the issues raised by their hypotheticals are appropriately addressed only by the elected officials who represent the interests of all New Yorkers.

II. Appropriately weighing the evidence, the district court correctly concluded that plaintiffs' as-applied challenge for lack of notice fails

The notice element, *Dickerson*, p. 32, *supra*, requires that "[the] statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Mannix*, 619 F.3d at 197. "[I]t is not only the language of a statute that can provide the requisite fair notice; judicial decisions interpreting [the] statute can do so as well." *United States v. Smith*, 985 F. Supp. 2d 547, 588 (S.D.N.Y. 2014); *Mannix*, at 199 (rejecting a vagueness challenge to New York's depraved indifference murder statute where state courts had previously ruled that conduct similar to that of the plaintiffs met the statutory definition). Only an "unexpected and indefensible" application of a statute that gives a defendant "no reason to even suspect that his conduct might be within its scope" will violate due process. *Ortiz v. N.Y. State Parole in Bronx, N.Y.*, 586 F.3d 149, 159 (2d Cir. 2009) (quotation

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4/20/17, https://www.dnainfo.com/new-york/20170420/lower-east-side/j-train-essex-broadway-station-suspect-spits-threatens-with-knife; Man Slashes Subway Rider With Knife on 4 Train in Manhattan, 3/19/17, http://pix11.com/2017/ 03/19/man-slashes-subway-rider-with-knife-on-4-train-in-manhattan/; New York City Slashing Attacks Continue With Three More Within 24 Hours, 2/4/16, http://abc7ny.com/news/new-york-city-slashing-attacks-continue-with-three-more-within-24-hours/1185281/; New York City Has A Subway Slashing Problem, 1/31/16, http://www.cbsnews.com/news/new-york-city-has-a-subway-slashing-problem/.

omitted). As the standard is objective, it is irrelevant "whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held to account for the behavior in question." *Dickerson*, 604 F.3d at 745.

The knives underlying the challenged enforcement actions opened via the wrist-flick test. SPA23. The text of the gravity knife statute and its context within the Penal Law make clear that plaintiffs' conduct – possession of a knife that opens by application of centrifugal force – is criminal and conveys that the design of a knife is irrelevant to its classification. SPA8.[31] The New York Court of Appeals as well as our intermediate appellate court, trial courts, and juries have found the existence of centrifugal force within the meaning of the statute based on application of the wrist-flick test to a folding knife. SPA7-8; *Parrilla*; *Sans*; *Herbin*; *Carter*; *Neal*; *Fana*; *Merring*; *Johnson*, p. 3-6, *supra*; A848-50, 852, 857; Exs. D5, D22. The district court correctly

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[31] Because the functionality of a knife can change over time, accomplishing the goal of the statute – to keep dangerous knives off the streets – requires a definition that is based on present function, not design. *Carter*, 2010 U.S. Dist. LEXIS 83246, *5-6 (the defendant was convicted despite evidence that "[his] knife could be opened like a normal knife – using one hand to hold the knife and the other to bring out the blade – and that...a knife could loosen up over time, so that what may be sold and bought as a perfectly legitimate knife may over time wear out and start behaving as a knife that could be flicked out") (quotation omitted); *Fana*, 2009 N.Y. Misc. LEXIS 956, *9 ("The fact that some knives which meet the statutory definition of a gravity knife are sold in local stores as 'folding knives' which are designed and intended for use as tools does not render the statute unconstitutionally vague…The intended use or design of the knife by its manufacturer is not an element of the crime and is irrelevant"); *Merring*, 2009 U.S. Dist. LEXIS 61444, *8, 38-39 (the ability of the plaintiff's knife to open via the wrist-flick test justified a gravity knife charge, even though the knife belonged to a brand that was "commonly sold in sporting goods stores" and was used by the plaintiff only to open boxes at work).

found that the language of the statute and the judicial decisions interpreting it – which are wholly ignored in plaintiffs' argument and by their experts – provide the requisite notice that the conduct underlying plaintiffs' claim is prohibited. SPA29.

It was not clear error for the district court to discredit testimony from Tsujimoto and Voyles that DA Vance, upon taking office, embarked on a "novel and unprecedented expansion" of the statute by applying it to folding knives via the wrist-flick test. SPA32; Appellants' Br. at 1, 16-17, 59-60. The wrist-flick test is described in the Bill Jacket and pre-existing decisions, and the testimony of the defense witnesses – who have extensive experience with the statute – confirm that law enforcement has applied the statute to folding knives via the wrist-flick test since its effective date. SPA6, 13-14. There is no evidence of an arrest under the statute for possession of the German paratrooper knife identified by Tsujimoto and Voyles as the one "true" gravity knife before or after the District Attorney's alleged expansion of the statute, just as there is no evidence of a knife attack by a defendant in a swivel chair. The paratrooper knife, no matter how predictably it opens, cannot meet the statutory definition because it requires manual locking. A1035-37. The district court's rejection of the experts' testimony in this regard – which amounts to nothing more than an appeal to substitute their view of the criminality of gravity knives for that of New York's legislature and courts – finds ample validation in the record.[32]

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[32] In addition to their expert's testimony, plaintiffs cite a sole federal decision – *United States v. Irizzary*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007) – to argue that folding

Nor was it clear error for the district court to discredit plaintiffs' demonstration or Ritter's claim that the wrist-flick test is applied in different manners with different results. SPA7, 14; Appellants' Br. at 52-53, 57. Ritter's description of himself as an expert in applying a single "coordinated" wrist-flick to open knives that others cannot lost all credibility the moment the demonstration began. Many adjectives could be applied to his performance, including the one adopted by the district court, but "coordinated" is not among them. No plaintiff describes his experience with the wrist-flick test as entailing an officer raising a knife above his head and violently thrashing his arm. Ritter's claim that differences in strength, dexterity, and experience lead to unfairness in the application of the statute is undermined by the ease with which knives from Native Leather's inventory are opened by a female prosecutor. Similarly, there is no evidence that the officers who arrested Copeland or Perez or the members of this Office who tested Native Leather's knives at the time of the deferred prosecution

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knives cannot be classified as a gravity knife because of their design. Appellants' Br. at 15-16. *Irizarry* did not involve a challenge to the use of the wrist-flick test to identify gravity knives. Rather, following a suppression hearing, the district judge held that the arresting officer lacked probable cause to believe that the defendant's knife was a gravity knife – even though it opened via the wrist-flick test – because the officer required "three strenuous attempts" to do so and the knife was "designed and sold as a folding knife." *Irizzary*, at 204, 207, 2010. This holding is contrary to the language of the statute, to the way other district judges have applied the statute, and, as plaintiffs acknowledge, Appellant's Br. at 16, to the way New York courts enforce the statute. Regardless, arising as it does in the context of a suppression hearing, *Irizarry* supports the District Attorney's argument that the issue raised by "close cases" is properly addressed by the protections of our criminal procedure law and the People's burden of proof, *see* p. 42-45, *infra*, not by a federal declaration re-writing a state statute contrary to the way it has been enforced by state courts.

agreement possessed any special attributes relative to plaintiffs. SPA30. Even if one were to credit the demonstration as evidence that Ritter – who presumably is offered by plaintiffs as possessing less strength and skill than their attorney – obtained different results when applying the test, none of the subject knives have any connection to New York County. Defendants' demonstrative and testimonial evidence of what the wrist-flick test entails fully supports the district court's identification of a known, consistent test for identifying gravity knives with a self-explanatory name. SPA14.

More problematic for plaintiffs than the weakness of their proof, though, is the reality that notice exists even with respect to the hypothetical sources of vagueness they identify in the statute and neither source is of due process proportions. Decisions interpreting the statute clarify that it will apply even if multiple attempts of the wrist-flick test are required to open a knife and without regard to the relative strength or skill of the defendant and the officer.[33] Appellants' Br. at 50, 54; *Carter*, 2010 U.S. Dist. LEXIS 83246, *13 ("Under New York Law, a knife need not work consistently in order to support a finding that it is a gravity knife"); *Cabrera*; *Smith*; p. 4, *supra*; *People v. Birth*, 49 A.D.3d 290, 290 (1st Dept. 2008) ("The People had no obligation to prove that the knife would also function as a gravity knife if the officer repeated the test while sitting

[33] Which is necessarily true, as an officer cannot compel a defendant to incriminate himself by testing the knife; nor should an officer arm a suspect who he has stopped on suspicion of carrying an illegal weapon; nor should the government be obligated to accept a defendant's self-serving denial that he can operate his weapon to save the statute prohibiting that weapon from vagueness.

down and using his weaker hand"), *lv. denied*, 10 N.Y.3d 859. Nor does the statute require such specification to afford adequate notice. In support of this point, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). Here, the statute gives clear notice of the "incriminating fact" to be proven – the blade of the knife must open and lock automatically in response to centrifugal force – and the statute does not run afoul of the Fourteenth Amendment simply because the owner claims "difficult[y]" determining whether that fact has been proven. *Id.*

In an analogous case, the Supreme Court rejected a vagueness challenge to a statute that criminalized the mailing of firearms that "could be concealed on the person." *United States v. Powell*, 423 U.S. 87, 88 (1975). The defendant, a female, was convicted for mailing a sawed-off shotgun that was twenty-two inches in length. *Id.* at 93. The statute did not specify whether the person against whom to measure capability of concealment was to be "the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season." *Id.* (quotation omitted). Attributing the "commonsense meaning" to the statute that the person would be of "average" stature and dress, the Court upheld the statute and further noted that the defendant, in mailing the shotgun, assumed the risk that a jury would conclude that her conduct fell within the statute. *Id.* at 93-94.

New York's law criminalizing knives that have "a blade which is released from the handle or sheath thereof by…the application of centrifugal force" gives no less adequate notice – and no less sufficient standards for enforcement – than a law that criminalizes the mailing of a "concealable firearm." Again, the knives owned by Perez and Copeland opened on the first attempt the wrist-flick test; plaintiffs did not adduce any evidence regarding whether multiple attempts were applied to any knives retained from Native Leather; and there is no evidence that the individuals applying the test to plaintiffs' knives were "[any]thing but average." SPA34-35. Were the Court to look beyond the record, any issue as to the number of attempts or the parties' relative attributes relates to the People's burden of proof, not to any alleged vagueness in the statute. *Williams*, 553 U.S. at 306 (while "close cases can be imagined under virtually any statute," the problem they raise "is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt"). Under plaintiffs' theory, so long as there is someone – anyone – who is unable to open a knife, it cannot be deemed a gravity knife. Due process does not require such certainty.

"[As we] know from *United States v. Powell* and many other decisions…just because it is possible to replace a standard with a numeric rule, the Constitution does not render the standard a forbidden choice." *Vrljicak v. Holder*, 700 F.3d 1060, 1061-62 (7th Cir. 2012) (citation omitted). If, for example, an officer requires multiple attempts to open the defendant's knife, the defense can argue to the jury that the People have not established that the knife functions as a gravity knife. The defense could also cross-

examine the officer as to his experience opening knives or his strength relative to the defendant, or could call a witness to demonstrate difficulty opening the knife via the wrist-flick test or to provide evidence concerning the condition of the knife when purchased or at the time of arrest. Or, the defense could request a jury instruction that incorporates the "readily open" dicta from *Dreyden*.[34] All these avenues are open to a defendant to attack the statute's application to his knife, but the statute is not unconstitutional simply because it uses a functional standard rather than the design standard that plaintiffs advocate.

III. The district court correctly concluded that plaintiffs' as-applied challenge for arbitrary enforcement fails

The enforcement element, *see Dickerson*, p. 32, *supra*, targets statutes that do not provide sufficiently "explicit" standards to those who enforce it. *Thibodeau v. Portuondo*, 486 F.3d 61, 66 (2d Cir. 2007) (quotation omitted). This element "does not require meticulous specificity" from a statute, *id.* (quotation omitted), as "effective law enforcement [clearly] requires the exercise of some degree of prosecutorial judgment."

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[34] Plaintiffs argue that *Dreyden* creates a class of folding knives that do not "readily open" to which the statute cannot constitutionally apply. Appellant's Br. at 14. Plaintiffs' own knives "readily" opened, but, in any event, the language on which they rely is dicta in a discussion of the sufficiency of an accusatory instrument that offered no explanation as to how the officer identified the defendant's knife as a gravity knife. *Dreyden*, 15 N.Y.3d at 104. The decision involved a jurisdictional issue unique to that document; *Dreyden* did not implicate the constitutionality of the statute. A year later, the First Department upheld the statute, exactly as written, against a vagueness challenge and the Court of Appeals denied leave. *Herbin*, 86 A.D.3d at 446-47. Since *Dreyden*, the Court of Appeals has upheld an accusatory instrument that did not include the "readily open" language relied by plaintiffs. *Sans*, 26 N.Y.3d at 15, 17.

United States v. Nadi, 996 F.2d 548, 552 (2d Cir. 1993) (quotation omitted). In this regard, courts should consider "the interpretation of the statute given by those charged with enforcing it." *VIP of Berlin*, 593 F.3d at 192 (quotation omitted). Even a statute that provides "what may be unconstitutionally broad discretion if subjected to a facial challenge" will be upheld "if the particular enforcement at issue [is] consistent with the core concerns underlying the [statute]." *Dickerson*, 604 F.3d at 748 (quotation omitted).

The gravity knife statute provides clear instruction as to what it prohibits: Possession of a knife with a blade that opens via the application of centrifugal force and locks automatically. By contrast, meritorious vagueness challenges have involved "statutes that tied criminal culpability to…wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings" – such as "whether the defendant's conduct was 'annoying' or 'indecent.'" *Holder*, 561 U.S. at 20. Officers and prosecutors are taught the statutory definition and are instructed, consistent with appellate decisions interpreting the statute, to apply the wrist-flick test to identify a gravity knife. SPA13-15.[35] As reflected in the exhibits depicting a prosecutor applying

[35] The Legal Aid Society ("LAS"), as amici, suggests that law enforcement uses the statute to target "undesirable" individuals. LAS Br. at 6. That is a label LAS has chosen to apply to its own clients; it is not a label with any meaning to police or prosecutors in enforcing the statute. The allegation of discriminatory enforcement against individuals with prior convictions is undermined by the spotless pedigree of the plaintiffs who filed this lawsuit. Further, two of the LAS clients were arrested for possession of folding knives that opened via the wrist-flick test before the election of DA Vance, LAS Br. at 8, 10, directly undermining plaintiffs' theory that he orchestrated an "unprecedented" expansion of the statute by applying it to folding knives. All anecdotal arrests referenced by LAS involved knives that opened on the first attempt

the test to knives from Native Leather's inventory, it is a simple concept. Further, regardless of whether the general training is satisfactory to plaintiffs, Appellants' Br. at 38-40, the officers who arrested them have a clear, common understanding of how to apply the wrist-flick test to enforce the statute, p. 27-29, *supra*, which is fatal to plaintiffs' claim. *Dickerson*, 604 F.3d at 745 (an as-applied challenge requires plaintiffs to show that the statute "failed to limit sufficiently the discretion of the officers who arrested them") (emphasis in original).

Even if this Court were to find, contrary to the First Department and the district court, that the statute does not provide clear guidance, plaintiffs' conduct falls within its core prohibition. The purpose of the statute is to prohibit knives – including folding knives – that open by the application of centrifugal force. Arrests and prosecutions under the gravity knife statute have arisen from possession of folding knives that function identically to those possessed by plaintiffs and juries have voted for convictions after observing officers apply the wrist-flick test at trial. SPA7-8; p. 5-6, *supra*. It is undisputed that such knives are regularly used to commit crimes and are carried through subways and other public places clipped to the owner's pocket, creating potential danger to unsuspecting civilians. A850, 853, 892, 900, 906, 912; Ex. P1 at A69 (in a letter from the DA's Office to Native Leather, explaining that "[t]his year has

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of the test. The argument of LAS is addressed not to any vagueness in the statutory definition of a gravity knife, but to the perceived unfairness that defendants with prior convictions may be subject to felony indictment. That fact is irrelevant to the clarity of the gravity knife statute itself.

already seen an increase in the number of stabbing homicides"); *see also* p. 37-38 n.30, *supra*. As enforcement against plaintiffs' knives did not represent "an abuse of the discretion afforded under the statute," their as-applied vagueness challenge for lack of adequate enforcement standards fails. *Dickerson*, 604 F.3d at 479 (quotation omitted).

CONCLUSION

Applying appropriate weight to the evidence and upon consideration of the controlling precedent that defines plaintiffs' claim, the district court correctly concluded that plaintiffs failed to establish the elements of a vagueness challenge, either as-applied or facial. This Court should affirm.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2013, and according to that software, it contains 13,999 words, not including the cover, the table of contents, table of authorities, the signature block, and this certificate.

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