13-4840-cv

United States Court of Appeals

for the

Second Circuit

KNIFE RIGHTS, INC., JOHN COPELAND, PEDRO PEREZ,
NATIVE LEATHER, LTD., KNIFE RIGHTS FOUNDATION, INC.,

Plaintiffs-Appellants,

– v. –

CYRUS VANCE, JR., in his Official Capacity as the New York County District Attorney, CITY OF NEW YORK,

Defendants-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, 1:11-CV-3918,
HONORABLE KATHERINE BOLAN FORREST, U.S.D.J.

CORRECTED REPLY BRIEF OF PLAINTIFFS-APPELLANTS

DANIEL L. SCHMUTTER, ESQ.
GREENBAUM, ROWE, SMITH & DAVIS LLP
Attorneys for Plaintiffs-Appellants
Metro Corporate Campus One
P.O. Box 5600
Woodbridge, New Jersey 07095
(732) 549-5600

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INTRODUCTION AND SUMMARY

Defendants' position in this case is remarkable in that it never addresses the fundamental question at issue in this matter: how does a person determine whether a given folding knife is a prohibited gravity knife in New York City? The fact that there is and can be no answer to this question is precisely what makes Defendants' method of enforcing the Gravity Knife Law unconstitutionally vague. No one can answer that fundamental question, and it is telling that Defendants never even try.

Defendants are wrong when they argue that Plaintiffs Copeland, Perez, and Native Leather have not stated a concrete and specific cause of action because they allegedly have not identified the particular knives at issue with sufficient specificity. Plaintiffs have identified a clear and specific category of knives by feature set, which tells the court exactly what type of knives give rise to the constitutional problems with Defendants' enforcement practices. That is all the concreteness that is required to establish standing. Plaintiffs wish to possess and/or sell Common Folding Knives, all of which share the following key features: 1) they fold, 2) they lock open, and 3) they have a "bias toward closure;" that is, they are designed to remain closed for safety purposes until someone exerts deliberate force on the blade to open it.

Every knife in this category potentially subjects a person to arrest and/or prosecution by these Defendants because of the utterly indeterminate manner in

which they enforce the Gravity Knife Law using the highly variable and inconsistent Wrist Flick Test. Because the Wrist Flick Test can vary so greatly from person to person, from day to day, and from seemingly identical specimen to specimen, no predictable means of knowing whether one is in compliance with the law can arise from it. There is simply no way for a person to know when he possesses a Common Folding Knife that Defendants will consider lawful (i.e. one that will *never* "flick" open). The Wrist Flick Test used by Defendants is inherently variable, inconsistent, and unpredictable when applied to knives that are designed with a bias toward closure. This is because no one can ever conclude that such a knife can *never* be flicked open by anyone, and therefore no one can ever know when he or she is within the law. Such a claim is definite and concrete, and Plaintiffs therefore have standing to bring this challenge.

Further, Defendants are incorrect that this Court is bound by the rule against associational standing set forth in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). *Aguayo* cannot be reconciled with the later controlling Supreme Court decision in *Warth v. Seldin*, 422 U.S. 490 (1975), which holds that associational standing is valid in §1983 cases. *Aguayo* is therefore not binding on this Court. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) instructs this panel to disregard *Aguayo* and follow *Warth*. Thus, Knife Rights has properly asserted standing on behalf of its members to bring the within claims.

Additionally, Knife Rights and Knife Rights Foundation each have standing in their own rights as they have each suffered injury-in-fact by making expenditures, irrefutably detailed in discovery, that arise directly as a result of Defendants' unlawful conduct, including providing defense costs for those unlawfully arrested by the NYPD and engaging in educational efforts to warn others about Defendants' unconstitutional practices. It does not matter that these activities are *among* the purposes of the organizational Plaintiffs. There is no rule of law that holds that such costs do not constitute Article III injury and in fact precedent suggests precisely the opposite.

Further, Defendants' assertion that the District Court properly denied Plaintiffs' motion to amend because it would have required additional discovery simply cannot be reconciled with the actual record. Nothing in the proposed Second Amended Complaint required additional discovery. Every change in the proposed pleading provides nothing more than clarification and additional specificity in an attempt to address the District Court's unwarranted concerns on standing. Everything for which Defendants suggest they would need additional discovery could have and should have already been the subject of prior discovery. Defendants simply chose not to seek such discovery in the first instance. Yet even as Defendants decry the possibility of further discovery, they ignore that the case's initial discovery is still incomplete, as Plaintiffs' second expert has not yet been

deposed. Defendants still have ample opportunity to explore their concerns with Plaintiffs' expert, should they desire, without the need of the new rounds of discovery of which they complain. The amendment should have been allowed.

Finally, the Gravity Knife Law is void for vagueness as applied to Common Folding Knives (which have a bias toward closure) because there is no way for a person *ex ante* to determine whether some police officer, somewhere, some day will be able to open it using the Wrist Flick Test. Thus, no one can *ever* assure himself that a given Common Folding Knife would not at some point be considered a gravity knife by these Defendants. Therefore, no one can know how to conform to the requirements of Defendants' enforcement practice, and thus the Gravity Knife law is void for vagueness as applied to Common Folding Knives.

Defendants base their gravity knife arrests and prosecutions on whether *any* police officer, anywhere, at any time can flick the knife open. No one can possibly predict this, and therefore no one can conform to the law as Defendants enforce it. This makes Defendants' application of the Gravity Knife Law vague and unconstitutional.

ARGUMENT

I. Plaintiffs Properly Identified the Knives at Issue by Feature Set, Which Plainly States a Concrete, Particularized Cause of Action.

Plaintiffs and Defendants do not disagree on the standard for stating a concrete and particularized cause of action sufficient to provide Article III standing. Defendants simply choose not to acknowledge the allegations being made and the theory of Plaintiffs' case. Even a cursory review of the record demonstrates that Plaintiffs have set forth a clear and concrete cause of action.

Plaintiffs Copeland, Perez, and Native Leather have alleged that they wish to carry or sell any of a category of knives explicitly and concretely defined in the Amended Complaint as "Common Folding Knives." A227; A235; A237; A238-39. The term Common Folding Knife is defined in the Amended Complaint as a knife with three material features: (1) it has a folding blade; (2) it has a locking blade; and (3) it is designed with a bias toward closure.[1] A227; A234; A236; A238. It is the third feature that distinguishes a Common Folding Knife from a switchblade knife and a true gravity knife. The knives possessed by Copeland and Perez when they were arrested and the knives confiscated from Native Leather by the DA *all* met the definition of Common Folding Knife. A234; A236; A238. Applying the

[1] The Court will recall that a bias toward closure means that the knife is designed such that the blade remains in the handle until the user personally *exerts force on the blade* that exceeds the force acting to keep the blade closed for safety, causing it to rotate out of the handle.

Gravity Knife Law to any knife meeting this definition that covers the vast majority of pocket knives sold in the U.S. today creates the vagueness problem that gives rise to this lawsuit. Applying the Gravity Knife Law to a true gravity knife (as it has been understood by authorities and citizens for more than 50 years) does not because a true gravity knife has no bias toward closure.

Thus, it is simply applying the Gravity Knife Law to a knife with a bias toward closure which creates the problem. Applying a Wrist Flick Test to a knife with a bias toward closure necessarily creates inherent variability of result. The bias toward closure is what allows a knife to wrist flick open for some and not wrist flick open for others. It is what causes a knife to not wrist flick open one day and then wrist flick open the next day. It is what allows one specimen of a knife model to not wrist flick open and another specimen of the *same model* knife to wrist flick open. This unconstitutional indeterminacy is *entirely* caused by trying to apply the Gravity Knife Law to knives that are not true gravity knives.

Thus, Plaintiffs need not identify specific Common Folding Knives they wish to carry or sell because the vagueness problem alleged in the Amended Complaint arises categorically with *every* Common Folding Knife.

Further, requiring Plaintiffs to name particular knives actually sets up Plaintiffs for an obvious mootness trap. If, for example, Mr. Copeland were to allege in his pleading that he wishes to carry the Buck "Vantage" Common Folding

Knife, his pleading could easily be neutralized with a subsequent declaration by Defendants that they consider the Buck Vantage knife to be a gravity knife, thereby immediately mooting his claim. It requires little imagination to see that Defendants could do this repeatedly, mooting Plaintiffs' claim at every turn such that the constitutional issue would permanently evade review.[2]

The very claim of Plaintiffs is that all such Common Folding Knives present the constitutional problem precisely because of the way these Defendants apply the Gravity Knife Law. Plaintiffs wish to carry or sell any of these Common Folding Knives, but it is impossible for them to determine which of them is a legal knife that they may lawfully carry or sell. Because we know that, as a matter of law, not all Common Folding Knives can be considered Gravity Knives, see *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010), Plaintiffs must avoid all such knives for fear of arrest and prosecution, even the ones Defendants might theoretically consider legal. No more specificity than that is required for Article III standing.

Defendants also try to suggest that Plaintiffs were required to allege that the knives they wish to carry or sell "could be opened by the application of centrifugal force or by the 'flick of the wrist.'" But that, again, turns the case on its head. It is precisely because Plaintiffs *cannot know* whether the knives they wish to carry or

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[2] *See, e.g., Roe v Wade*, 410 U.S. 113, 125 (1973) as to claims that are capable of repetition yet evade review.

sell can be opened in such a manner that they have a vagueness claim in the first instance.[3]

Similarly, Defendants insist that Plaintiffs must allege why they cannot use folding knives "that are plainly not . . . gravity knives" – another absurd requirement. Plaintiffs' very claim is that they *cannot determine* what knives are "plainly not gravity knives" according to Defendants. That is the whole point of the lawsuit.

Further, Defendants suggest that under *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), Plaintiffs' claims should be deemed "completely hypothetical and highly speculative." But the facts in *Clapper* are entirely different than those here, and, in fact, the circumstances are so materially different that *Clapper* actually supports reversal of the judgment below.

Clapper involved the application of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a ("FISA"). The plaintiffs tried to assert standing to challenge the law because they thought some day they *might* be subject to surveillance pursuant to FISA. They had nothing more to go on than that. They had no connection to the application of the statute other than pure speculation. There was no allegation presented that they ever *had* been subject to surveillance, and they offered no allegations as to the circumstances under which they would be

[3] This is also an entirely new assertion which was not raised below.

subject to surveillance under FISA in the future. Their allegations were literally pure conjecture. *Id*. at 1148.

Here, the claims relate to the enforcement of a *criminal* statute, and Copeland, Perez, and Native Leather have each already *actually* been subject to arrest and/or prosecution under the Gravity Knife Law. The Amended Complaint explicitly alleges that Defendants' enforcement policies would subject them to arrest and prosecution again if they carried or offered for sale a Common Folding Knife and Defendants were able to open such knives using the Wrist Flick Test. A235; A237-39. Those are concrete and precise allegations in full compliance with the standard set forth in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

Copeland, Perez, and Native Leather each sufficiently demonstrate standing because they allege both that Defendants have previously arrested and/or prosecuted them and that they intend to continue to enforce the law the same way in the future. A234; A236; A237. In the Amended Complaint, Copeland, Perez, and Native Leather each allege that actual enforcement action has already been taken against them. Thus, it is not speculative that Defendants actually enforce the law in the manner alleged. A234-39.

Further, they allege that the enforcement action was taken pursuant to a policy of enforcing the law in this fashion. A229. Thus, it is not speculation that they would be at risk of arrest and/or prosecution if they were in possession of a knife that Defendants could open using the Wrist Flick Test. *Id*.

The concreteness of the claims is plain from the face of Amended Complaint. That Defendants choose to obfuscate the issues does not turn concrete claims into speculative ones. Copeland, Perez, and Native Leather each have standing to challenge Defendants' unconstitutional enforcement of the Gravity Knife Law, and the judgment below should be reversed.

II. Knife Rights and Knife Rights Foundation Have Standing to Bring the Within Action.

A. Knife Rights has Associational Standing under Controlling Supreme Court Precedent

This Court is bound by the holdings of the Supreme Court in *Warth v. Seldin*, 422 U.S. 490 (1975) and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Defendants simply ignore Plaintiffs' arguments in this regard. Defendants rely on *Nnebe v. Daus*, 644 F.3d 147, 156 n.6 (2d Cir. 2011) for the proposition that *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), is controlling precedent in this Circuit, but the panel in *Nnebe* was wrong on that point, and this Court is bound by neither *Nnebe*

nor *Aguayo* on the issue of associational standing.

Defendants ignore that it is unequivocally the law in this circuit that a panel of this Court is not bound by a prior panel's decision that has been put into doubt by intervening Supreme Court precedent. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). The rule in *Aguayo* simply cannot be reconciled with *Warth*. *Aguayo* cannot be good law in this Circuit, and *Zarnel* instructs this panel to disregard *Aguayo*. 619 F.3d at 168.

Defendants obviously recognize this because in their brief they now subtly try to side step that problem by suggesting that *Nnebe,* not *Aguayo,* is the controlling precedent in this Circuit because *Nnebe* post-dates *Warth*. But precedent does not work that way. *Nnebe* does not establish any rule of law of its own. *Nnebe* merely states, *incorrectly*, that *Aguayo* is the law of the Circuit because the Court "reaffirmed the *Aguayo* rule in [*League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985)] nine years after *Warth*." 644 F.3d at 156 n.6.

But *League of Women Voters* did not reaffirm anything. The panel in *League of Women Voters* did not even discuss the Supreme Court's decision in

Warth.[4] Thus, *League of Women Voters* cannot have reaffirmed *Aguayo* since it did not in any way address the conflict between *Aguayo* and *Warth*. Impliedly overruled cases do not get resurrected merely because a subsequent panel mentions the name of the case. The only way *Aguayo* could have been reaffirmed would have been if the panels in *League of Women Voters* or *Nnebe* had somehow held that *Aguayo* is consistent with *Warth* and *Hunt*. Neither panel did so, and therefore neither *League of Women Voters* nor *Nnebe* created or resurrected any binding precedent on this issue.

Thus, this Court is obligated to follow *Warth* and *Hunt* and rule consistent with the principle that associational standing is available in §1983 cases.

As to application of that principle to this case, Defendants correctly cite *Hunt* for the proposition that for an organization to bring suit on behalf its members, its members must have standing in their own right. However, Defendants then make a giant invalid leap beyond the law and assert that Knife Rights was obligated to *identify* those of its members who satisfy the requirements for standing. That is not the law. Defendants cite no case to support that assertion, and in fact courts explicitly hold the other way. *See, e.g.*, *Doe v. Stincer*, 175 F.3d 879, 884 (11th Cir. 1999) ("[U]nder Article III's established doctrines of

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[4] *League of Women Voters* does discuss *this* Court's decision in *Warth,* but that does not in any way address the direct and irreconcilable conflict between *Aguayo* and clear Supreme Court precedent.

representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought."); *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d. 269, 287 (D.N.J. 2003) ("While the Court cannot evaluate such fears, it agrees with Plaintiffs, for the reasons that follow, that FAIR need not reveal its membership list at the pleading stage in order to bring suit on its members' behalf."), *rev'd on other grounds*, 390 F.3d 219 (3d Cir. 2004), *rev'd on other grounds*, 547 U.S. 47 (2006).

To satisfy the elements of associational standing, all that is required of Knife Rights is that it plead the cause of action as to its members, which it has done. Nothing in the law requires that Knife Rights identify its members or state that Copeland, Perez, or Native Leather are members.

Knife Rights has properly demonstrated that it has associational standing to challenge Defendants' unconstitutional enforcement of the Gravity Knife Law, and the judgment below should be reversed.

B. Knife Rights and Knife Rights Foundation have Demonstrated Injury-In-Fact Standing

As set forth in Plaintiffs' opening brief, the only ruling of the District Court as to injury-in-fact standing for Knife Rights and Knife Rights Foundation ("Foundation") was that the injury due to the expenditure of money did not establish standing because the money had to be spent on issues that actually

affected its members. SPA10. The District Court ruled that Knife Rights and Foundation made expenditures that suffered from the same infirmity the court found with the assertions of injury by Copeland, Perez, and Native Leather. *Id.* Thus, the District Court's ruling relies entirely on the same flawed reasoning as its ruling as to Copeland, Perez, and Native Leather.

Now Defendants argue that Knife Rights and Foundation have not even satisfied the basic elements of injury-in-fact standing, but they are incorrect, and they entirely misapply *Nnebe*.

Knife Rights and Foundation have standing because Defendants' practice causes palpable injury that is traceable to them and redressable by this Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992)*; accord Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898, 904 (2d Cir. 1993).

There is abundant evidence in the record (not merely allegations) demonstrating the standing of Knife Rights and Foundation. Knife Rights has expended its time, energy, and money to counsel and assist many individuals charged with violating the Gravity Knife Law with Common Folding Knives. *See* A81-82. 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.* Knife Rights has also spent its time, energy, and money to publish materials that warn the public of Defendants' expansive (and unanticipated) interpretation of

"gravity knife," and to provide general counseling and guidance to concerned individuals. *See* A82. Finally, the diversion of resources to NYPD gravity knife arrests has impacted a number of other organizational priorities. *See* A83-84. Foundation has standing because it has paid some of the financial costs. *See* A298.

These injuries are more than enough to establish the organizational Plaintiffs' standing. This Court 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). This 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.* It is also far more substantial than the showing before the court in *Ragin*, which found a "perceptible" injury where the organization had spent time investigating the conduct and filing an administrative complaint. *See Ragin*, 6 F.3d at 905.

Defendants also assert that there is no injury because the expenditures of time, energy, and money are part of the very purpose of Knife Rights and Foundation. But that position 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 *Nnebe, relied upon heavily by Defendants,* does not actually support Defendants' position. The organizational

plaintiff in *Nnebe* was the New York Taxi Workers Alliance, and this Court concluded that the 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 organization's purposes had *included* this activity, as well as other priorities, *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). This Court *reversed* the district court's conclusion that infrequent counseling of members was not a cognizable injury, instead reasoning that "[e]ven if only a few suspended drivers are counseled by NYTWA in a year, there is 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 (quotation added; alteration in source).

Hence, *Nnebe* actually *supports* standing in this case, since Knife Rights and Foundation do not exist solely to address the NYPD's enforcement of knife laws. Time, energy, and funds that Knife Rights and Foundation spend responding to the NYPD's enforcement threat diminish the time, energy, and funds that are available for other matters. *See* A83-84; A298.

While the Defendants 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* A83. Defendants' expansion of the Gravity Knife Law and its 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.*

Defendants are also incorrect that such expenditures are only in response to "an alleged fear of action." The record is clear that the activities of Knife Rights and Foundation are directly in response to the *actual* enforcement activities of Defendants. In fact, some of the expenditures have been to address *actual arrests* of individuals by the NYPD, whether by advising them and guiding them or by actually retaining counsel for their defense. A81-82. Some of the other monies are for educating and for warning members about the unconstitutional enforcement activities of the City and the DA so they can avoid arrest in the first instance. A82. The idea that these expenditures are based solely on an abstract fear is preposterous in light of the clear record.

Finally, the injury to Knife Rights and Foundation would plainly be redressed by a favorable decision from the Court. A favorable decision would enjoin enforcement of the Gravity Knife Law against anyone carrying a Common Folding Knife – that is, a knife with a folding blade that locks and is designed with a bias toward closure. All of these expenditures arise directly from the unconstitutional enforcement policy of Defendants. Once the illegal conduct of Defendants is

enjoined, these expenditures would necessarily cease.

Knife Right and Foundation have demonstrated injury-in-fact standing to challenge Defendants' unconstitutional enforcement of the Gravity Knife Law, and the judgment below should be reversed.

III. The District Court Abused its Discretion in Refusing to Allow Plaintiffs to Amend Their Pleading to Address the Court's Opinion.

The District Court abused its discretion in refusing to allow Plaintiffs to amend their pleading on the asserted ground that the proposed Second Amended Complaint would require additional discovery that would delay final resolution of this action. Unlike the cases cited by Defendants, the proposed Second Amended Complaint did not add new parties, new claims, or other new material that would call for additional discovery shortly before trial. *See H.L. Hayden of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 112 F.R.D. 417 (S.D.N.Y. 1986) (denying motion to amend to add a new party that was filed nearly two years after the court-ordered deadline for joinder of parties, after the case "ha[d] finally reached the eve of resolution"); *Krumme v. Westpoint Stevens, Inc.*, 143 F.3d 71 (2d Cir. 1998) (affirming trial court's refusal to permit defendant to amend to assert a counterclaim when discovery was complete and the case was near resolution); *Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995) (affirming trial court's

refusal to permit amendment more than two years after the complaint had been field and only three months before the trial).

Rather, the proposed Second Amended Complaint properly clarified the allegations in the Amended Complaint in order to remedy the alleged pleading deficiencies asserted by the District Court. None of the purported changes identified in the DA's Brief (DAb18-19) added new substance to the case.

First, the proposed Second Amended Complaint did not "shift" the focus from "Common Folding Knives" to "locking-blade folding knives." This action has always been about folding knives with locking blades. The Amended Complaint gave notice that the knives at issue in this action were knives with locking blades. The statutory definition of "gravity knife," which is cited in the Amended Complaint (A228), requires that "when released," the blade be "locked in place by means of a button, spring, lever or other device." N.Y. Penal Law § 265.00(5). The Amended Complaint alleged that the knives with which Copeland and Perez were arrested had locking mechanisms that locked their blades in place once opened. A234; A236. Similarly, the Amended Complaint alleged that Native Leather has had to restrict the types of "lock-blade Common Folding Knives" that it sells. A238-39.

Thus, the change from "Common Folding Knives" in the Amended Complaint to "locking-blade folding knives" in the proposed Second Amended

Complaint was a change in terminology only to be more directly descriptive of the types of knives at issue in this action, which is nothing more than a rephrasing of Defendants' existing definition of the phrase used in the Amended Complaint. It was not a shift in focus that would require additional discovery. If, as Defendants suggest, such blades were only “peripherally addressed” in the deposition of the Plaintiffs’ expert, that is a result of Defendants’ discovery strategy, and perhaps Defendants’ lack of understanding of basic principles of design of the very knives they allege to be illegal gravity knives, not of any change in Plaintiffs’ focus. This case has always been about alleged gravity knives, which, under the plain statutory language, must have a locking blade. The change in terminology did not add anything new to the action that was not already raised by the Amended Complaint.

Second, the enhanced allegations regarding Copeland’s and Perez’s inability to possess the knives with which they were arrested do not add anything new to the case. Those allegations merely make explicit a clear inference that was implicit in the Amended Complaint. The Amended Complaint alleges that both Copeland and Perez would purchase Common Folding Knives similar to the ones with which they were arrested, but refrain from doing so because they fear arrest and prosecution. A235; A237. The proposed Second Amended Complaint adds the allegation that Copeland and Perez would also like to carry the *same* model knife that they were carrying when they were arrested. Both of those knives fall with the

definition of Common Folding Knife. If they refrain from carrying *similar* knives for fear of prosecution, it necessarily follows that they would also refrain from carrying the exact knives for which they had already been arrested and charged, for fear of further arrest and prosecution.

In response to the District Court's holding that the Amended Complaint was inadequate because it did not specifically identify the knives that Plaintiffs wished to carry, the proposed Second Amended Complaint added further detail, alleging that both Copeland and Perez would carry the same specific model knife with which he was arrested or a similar knife, but for the impending threat of prosecution. By specifically identifying the knives with which Copeland and Perez were arrested, the proposed Second Amended Complaint did not add anything new. Those knives had already been described in the Amended Complaint since they are Common Folding Knives. A234; A236. The proposed Second Amended Complaint clarifies the issues by overtly expressing a statement that was implicit in the Amended Complaint: That they refrain from carrying the types of knives for which they were arrested for fear of further prosecution. Any discovery relating to the types of knives that Plaintiffs were arrested with, and their ability to continue carrying them, could have been, and should have been, taken in connection with the Amended Complaint. Again, the fact that Copeland and Perez, who were named as Plaintiffs in the Amended Complaint, had not been deposed was the

result of Defendants' discovery strategy, not of any change in the proposed Second Amended Complaint.

Third, the proposed Second Amended Complaint's specific prayer for a declaration that the Wrist Flick Test is void for vagueness does not add anything new to the case. While the Amended Complaint did not include such a pointed prayer for relief, its entire thrust was the unconstitutional indeterminacy of the Wrist Flick Test and the injustice that it causes. *See* A228; A233; A234-35; A236; A238. The Wrist Flick Test was just as much a part of this action under the Amended Complaint as it would be under the proposed Second Amended Complaint. The Second Amended Complaint only clarified the relief requested; it did not add a new issue to the action. There is no discovery regarding the Wrist Flick Test under the proposed Second Amended Complaint that could not have been and should not have been obtained under the Amended Complaint.

Everything for which Defendants suggest they would need additional discovery could have and should have already been the subject of prior discovery. Defendants simply chose not to seek such discovery in the first instance. Yet even as Defendants decry the possibility of further discovery, they ignore that the case's initial discovery is still incomplete, as Plaintiffs' second expert has not yet been deposed. Defendants still have ample opportunity to explore their concerns with

Plaintiffs' expert, should they desire, without the need of the new rounds of discovery of which they complain.

The proposed Second Amended Complaint does not add anything new that was not already raised in the Amended Complaint. It only clarifies and amplifies the claims set forth in the Amended Complaint. The District Court erred in refusing to allow Plaintiffs to attempt to remedy the alleged deficiencies in their pleading, and the judgment below should be reversed.

IV. The Application of N.Y. Penal Law § 265.00(5) and § 265.01(1) to Common Folding Knives is Void for Vagueness

Defendants' entire focus on Plaintiffs' vagueness challenge centers on the specific *language* of the Gravity Knife Law and utterly ignores how the Gravity Knife Law is actually applied by these Defendants. The gravamen of this action is that regardless of how the law *reads*, it cannot constitutionally be applied to Common Folding Knives because it is quite literally impossible to do so with any degree of predictability.

Why the Gravity Knife Law is void for vagueness as applied by Defendants is discussed repeatedly and at length throughout Plaintiffs' Opening Brief and herein and therefore will not be repeated at length in this Point IV. Simply put, the Gravity Knife Law is void for vagueness as applied to Common Folding Knives (which have a bias toward closure) because there is no way for a person *ex ante* to determine whether some police officer, somewhere, some day will be able to open

it using the Wrist Flick Test. Thus, no one can *ever* assure themselves that a given Common Folding Knife would not at some point be considered a gravity knife by these Defendants. Therefore, no one can know how to conform to the requirements of Defendants' enforcement practice, and thus the Gravity Knife law is void for vagueness as applied to Common Folding Knives.

Defendants insist that the Wrist Flick Test is "called for by the plain language of the gravity knife law." That is false. Nowhere in the statute does it mention a wrist flick. The statute says "centrifugal force." It in undisputed that centrifugal force is rotational force as one might experience on a carousel or spinning in an office chair. The "wrist flick" concept appears only in case law.

None of the cases cited by Defendants which approve of the concept that successful wrist flicking constitutes opening "by the application of centrifugal force" address the fundamental issue raised in this case that the Wrist Flick Test is inherently indeterminate and variable. Further, Defendants' argument that the Gravity Knife Law is not vague is fundamentally flawed in that it focuses on whether a *police officer* can determine whether a knife can be opened by wrist flicking, not whether the individual charged can do so.

But that is not the test for vagueness. The test for vagueness focuses first and foremost on the individual charged, that is, whether "men of common intelligence must necessarily guess at [a law's] meaning and differ as to its

application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *accord Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006). Thus, for Defendants' application of the Gravity Knife Law to be constitutionally valid, a person must be able to predict whether at *any time in the future*, *any police officer* will be able to open the knife with a flick of the wrist. This is an impossible task with Common Folding Knives, because the bias toward closure makes this determination extremely variable as explained in great detail in Plaintiffs' Opening Brief.

Unlike with a true gravity knife blade which has no bias toward closure and moves freely in and out of the handle, the bias toward closure of a Common Folding Knife means that the ability to open a given Common Folding Knife with a wrist flick will depend entirely on strength, skill, dexterity, the condition of the knife, the age of the knife, the particular specimen of the knife, and the number of attempts. Therefore there is no way for a person to predict whether, some time in the future, some police officer, somewhere may be able to wrist flick the knife open. Therefore, there is no way for a person to know whether a given knife will be deemed legal by these Defendants or not.

The fundamental problem posed by Defendants' enforcement practice is illustrated well in the recently decided case *People v. Trowells*, Ind. No. 3015/2013 (N.Y. Sup. Ct. Bronx County July 11, 2014), *available at* http://nylawyer.nylj.com/adgifs/decisions14/072414webber.pdf . Trowells was

arrested and prosecuted under circumstances very much like those of Copeland and Perez. He was not threatening anyone, and he was not using the knife for any criminal purpose. Although the court did not specifically identify the knife in question, there can be no doubt that the court is discussing not *true gravity knives* but, in fact, Common Folding Knives. In particular, the court notes that the knives in question are widely sold across the country, used for purely legitimate purposes, and widely carried by many New Yorkers who do not know that they might be arrested for it:

> Notwithstanding their illegality, gravity knives are widely manufactured and sold across the country in hardware and outdoor stores under brand names such as Clip-it, Husky Utility Folding Knives and other brands. They are sold for and are used for purely legitimate purposes. Despite "locking" safety features, many can be "flicked" open with the appropriate amount of force. Thus, these knives are routinely carried by many New Yorkers for legitimate purposes ignorant of the fact that they may be in violation of the law and face a potential automatic one-year jail sentence.

Id. at 4.

What is notable about the opinion is that the court clearly does not understand the difference between true gravity knives (with no bias toward closure) and Common Folding Knives (with a bias toward closure), since the opinion recites the history of gravity knives as one continuous time line from World War II (and their use by tangled paratroopers) to the present -- not realizing

that these are two fundamentally different tools. *Id*. at 3-4. The following quote is noteworthy in this regard:

> While apparently recognizing the societal shift from rampant criminal use of gravity knives of the 1950s to the widespread, legitimate possession of gravity knives of today, in 2011, the New York Assembly passed Bill 2259A.

Id. at 5.

Note how the court does not appear to be aware that it is discussing two entirely different types of knives – true gravity knives in the 1950s and Common Folding Knives today. Yet, the opinion reads as if they are one and the same.

The court then recognizes the substantial criticism of recent attempts to enforce the Gravity Knife Law, even citing to the arrest of Plaintiff Copeland as one such example. *Id*. at 4-5. The court even cites several attempts by the Legislature to amend the law to require proof of criminal intent. *Id*. at 5.

Significantly, all of this comes in the context of a motion to dismiss the indictment in the furtherance of justice pursuant to N.Y. Crim. Proc. Law § 210.40, which the court granted. To be sure, there is no apparent reason why the court chose to do this other than the obvious fact that Trowells posed no danger to anyone. There was no dispute that he was in possession of the knife, and there was no dispute that the court believed the knife to be a gravity knife.

Yet, the court went out of its way to highlight two key facts: (1) millions of law abiding people use and carry Common Folding Knives every day for lawful purposes and (2) enforcement of the law has come under considerable criticism, including by the Legislature, due to the seeming harshness and unfairness to the law abiding people caught up in its web.

The essential concept that pervades the court's opinion in *Trowells* is that there is something fundamentally wrong with these prosecutions. However, the court was unable to put its finger on it exactly, since it appears not have had at its disposal the key facts set forth in the within matter – that these arrests and prosecutions target ordinary people carrying, not true gravity knives, but Common Folding Knives. And when the Gravity Knife Law is applied to Common Folding Knives, it cannot be done in a just and constitutional manner.

At its core, this entire case comes down to one simple question. *How can a person draw the conclusion that a given locking, folding knife (Common Folding Knife) can never be flicked open by anyone*? No one can *ever* draw that conclusion, and therefore no one can *ever* know that he is in compliance with the Gravity Knife Law in the way these Defendants started to enforce the law aggressively just four years ago.

Plaintiffs' case is not about "close calls" or "estimating rightly." For the first 50 years of the Gravity Knife Law everyone knew how to comply. Now that

the law is being applied against Common Folding Knives, *no one* can know how to comply.

Because no one can know how to conform his conduct to the manner in which Defendants enforce the Gravity Knife Law, Defendants' application of the Gravity Knife Law to Common Folding Knives is void for vagueness and is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

/s/ Daniel L. Schmutter
Daniel L. Schmutter
GREENBAUM, ROWE, SMITH
& DAVIS LLP
P.O. Box 5600
Woodbridge, NJ 07095
(732) 549-5600
dschmutter@greenbaumlaw.com

Counsel for Plaintiff-Appellant

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned certifies that the brief complies with the applicable type-volume limitations. The brief contains 6,790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate relies upon Microsoft Word 2010's word count feature; the program used in drafting this brief. The brief complies with the typeface requirements for Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Words' word processing program in 14-point Times New Roman font.

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Respectfully submitted,

/s/ Daniel L. Schmutter

Daniel L. Schmutter
GREENBAUM, ROWE, SMITH & DAVIS LLP
P.O. Box 5600
Woodbridge, NJ 07095
(732) 549-5600
dschmutter@greenbaumlaw.com