17-0474

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,

against

CYRUS R. VANCE, JR., IN HIS OFFICIAL CAPACITY 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 FOR APPELLEE CITY OF NEW YORK

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PRELIMINARY STATEMENT

New York law prohibits as "gravity knives" those folding knives that can be opened and locked with a flick of the wrist. The individual plaintiffs-appellants in this case, John Copeland and Pedro Perez, were arrested for carrying knives that could be opened in this way on the first try by officers of ordinary skill and strength. The commercial plaintiff-appellant, Native Leather Limited, was cited for selling knives that readily opened with a flick of the wrist. Following trial, the U.S. District Court for the Southern District of New York (Forrest, J.) rejected appellants' challenge to the constitutionally of the gravity knife statute, holding that it is not void for vagueness either facially or as applied to appellants' actual or proposed conduct.

This Court should affirm. Appellants challenge the constitutionality of the statute as applied to folding knives that are designed to resist opening, which they refer to as "common folding knives." They claim that the statute is unconstitutionally vague because one can never know with total certainty whether a folding knife meets the definition of a gravity knife. This brief, submitted on behalf of defendant-appellee City of New York, adopts the arguments of the co-

appellee New York County District Attorney as to appellants' as-applied challenge. As that brief explains, the statute gave appellants constitutionally sufficient notice that their own conduct was illegal and gives police officers sufficient guidance for the statute's enforcement. Appellants' challenge therefore founders on the facts of their own cases.

Appellants, however, also make arguments on appeal that go well beyond the circumstances of their as-applied challenge, invoking hypothetical concerns about the application of the gravity knife statute to others. The Court should appropriately decline to reach those questions. This brief addresses additional points supporting affirmance if the Court nonetheless chooses to look beyond the application of the statute to appellants' specific circumstances.

First, the statute as written and enforced provides fair notice to any knife owner of the conduct that it prohibits. The district court correctly held that the statute plainly applies to folding knives and that the "wrist flick test" used to assess a knife's compliance with the statute is a longstanding method, and found that the test produces consistent results. Moreover, contrary to the contention of amici, the statute does not fail to provide fair warning by imposing strict liability.

Second, appellants failed to support their facial challenge to the gravity knife statute as applied to "common folding knives." The district court rejected their contention that the statute is unconstitutionally vague as applied to *all* folding knives. If there were ambiguity as to whether some particular folding knife is unlawful, that uncertainty around the margins would not entitle them to a ruling invalidating the statute as to *every* folding knife. Moreover, there is no evidence that the statute, as applied through the wrist flick test, results in arbitrary and discriminatory enforcement. Indeed the district court held that the record reflects just the opposite: long-term consistent enforcement of the test by the District Attorney and the City.

At its core, the appellants' objection is that persons who wish to use folding knives that function as gravity knives for lawful purposes are barred from doing so by the gravity knife statute. But in 1958, the New York Legislature made a judgment in enacting the statute: regardless of any innocuous uses they may have, knives that, similar to a switchblade, are easily deployable with one hand, should be prohibited because they pose a serious danger to public safety. It may be that the democratic will and balance of priorities have changed. But

this case is not about whether the Legislature can or should craft a different or better statute; it is about whether the current law is unconstitutionally vague. As the district court correctly held, appellants failed to meet the high burden required to strike down a legislative enactment as void for vagueness.

ISSUES PRESENTED FOR REVIEW

1. Does the gravity knife statute, as written and as enforced through the wrist flick test, give fair warning that it applies to "common folding knives" that open with the flick of the wrist?

2. Did the district court correctly hold that the gravity knife statute is not unconstitutionally void for vagueness where appellants failed to show that (a) the statute is vague as applied to all "common folding knives," and (b) the statute, as applied through the wrist flick test, resulted in arbitrary or discriminatory enforcement?

STATEMENT OF THE CASE

For the statement of facts as presented at trial and a discussion of the proceedings and decision below, and in the interest of judicial economy, the City respectfully refers the Court to the Statement of the Case in the appellee's brief of the District Attorney.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

Reviewing the district court's factual findings for clear error and its legal conclusions de novo, *United States v. Am. Express Co.*, 838 F.3d 179, 193 (2d Cir. 2016), this Court should affirm the district court's judgment that the challenged misdemeanor gravity knife statute, Penal Law §§ 265.00(5), 265.01(1), is not void for vagueness.

A folding knife, even one designed with a bias towards closure, can be loose enough—whether as manufactured or due to alteration or use—to open with a flick of the wrist. Simply watch the videos marked as defendants' exhibits D-10/11, D-14/15, D-17/18, D-20/21, where counsel for defendant District Attorney Vance performs the wrist flick test on folding knives confiscated from plaintiff Native Leather, which open so readily that even appellants' expert could not deny they fit the statutory definition of a gravity knife (A 928–29). These knives are just as dangerous as any other knife that opens readily with one hand, whether it be a switchblade or a German paratrooper knife.

In the interest of judicial economy, the City adopts the discussion in the District Attorney's brief regarding the scope of appellees' as-applied challenge, as well as that brief's discussion of how the statute

provides adequate notice and sufficient enforcement guidelines as applied to appellants' own conduct. The appellants have not challenged on appeal the district court's findings that they had notice that the "common folding knives" they possessed or sold fell within the scope of the statute, and that their conduct fell within the statute's core purpose. Thus, the appellants cannot show that the statute is facially vague, or vague as applied to *all* "common folding knives"—the label they coin to describe all folding knives designed with a "bias towards closure."

This brief focuses on appellants' attempts to broaden the scope of their challenge beyond their own conduct. To the extent that these arguments were raised below, the district court rejected them. The Court need not reach these arguments because the gravity knife statute can constitutionally be applied to appellants themselves, which suffices to resolve this suit. But if the Court does consider appellants' broader objections, it too should reject them.

1. Ignoring that their own past conduct shows that the statute can constitutionally be enforced, the appellants argue that the gravity knife statute is unconstitutionally vague because "no one" can ever know whether a folding knife violates the statute (App. Br. 4, 6, 9, 45, 46, 48,

51, 62). In support of this contention that the statute fails to provide fair warning of the conduct that it prohibits, appellants offered lay and expert testimony to the effect that the New York Legislature never intended to criminalize the possession of folding knives and that the wrist flick test inevitably yields inconsistent results. This evidence apparently was designed to show that the City and the District Attorney have improperly expanded the scope of the statute, resulting in a lack of notice of the prohibited conduct.

This Court, like the district court, should reject appellants' attempt to rewrite the language and history of the gravity knife statute to exclude folding knives. To the extent that appellants' experts were opining on a matter of statutory interpretation, a question of law for the court, the district court correctly held that their testimony was irrelevant. In any event, this testimony conflicts with the statute's plain language and legislative history, the case law interpreting and applying the statute, and the testimony of individuals involved in the statute's enforcement.

There is also no merit to the appellants' contention that the wrist flick test is a recent innovation of law enforcement in New York City. To

the contrary, the test has been applied in New York State since the gravity knife statute was enacted more than 50 years ago. The test is also widely recognized in other jurisdictions that prohibit gravity knives as an appropriate means to determine whether a given folding knife is unlawful. This "repeated use for decades" of the wrist flick test for determining whether a knife opens by use of centrifugal force, "without evidence of mischief or misunderstanding," refutes appellants' claim that the statute is incomprehensibly vague. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 268 (2d Cir. 2015).

Amici Law Professors are also mistaken in arguing that the statute is unconstitutionally vague because it imposes strict liability. Convinced that the risk to public safety posed by gravity knives was substantial, the Legislature made the deliberate decision to omit a mens rea requirement from the statute, despite the possibility that it might reach otherwise innocent conduct. That legislative choice may be debatable as a matter of policy, but it does not render the statute unconstitutionally vague.

2. Although appellants have expressly characterized this action as an as-applied challenge to the statute, their arguments appear to raise

a facial challenge to the statute as applied to *all* folding knives. As the district court correctly concluded, appellants failed to meet the heavy burden on a facial challenge of showing that application of the statute to "common folding knives" as a class is so arbitrary that no one possessing such a knife can ever know whether it falls within the statute.

The district court found that appellants' own knives opened consistently regardless of the physical characteristics of the user. And appellants failed to credibly identify any folding knife to which the wrist flick test produces inconsistent results that has been or would be prosecuted as a gravity knife, instead resorting only to hypotheticals. But even if there were some ambiguity around the margins of the statute, it would not warrant invalidation of the statute as to all folding knives. Because the statute provides fair warning and sufficient guidelines for enforcement against folding knives that function in a prohibited way, appellants failed to meet their burden of showing that the statute is unconstitutionally vague as applied to all "common folding knives."

The district court also properly found that appellants failed to adduce evidence showing that the wrist flick test permitted arbitrary and discriminatory enforcement. To the contrary, the evidence reflected that the District Attorney and the City consistently applied the wrist flick test. The anecdotal and extra-record assertions offered by Amici Legal Aid Society do not compel a different result. That the gravity knife statute was enforced against appellants, who had no criminal history, undermines the contention that the gravity knife statute is discriminatorily enforced. There is simply no evidence, with respect to appellants or the five non-plaintiffs chosen for discussion by Legal Aid in their brief, indicating that their knives clearly fell outside the scope of the gravity knife statute.

ARGUMENT

POINT I

THE GRAVITY KNIFE STATUTE PROVIDES FAIR WARNING OF THE CONDUCT THAT IT PROHIBITS

A. The statute's text, legislative history, and judicial application show that it criminalizes knives based on their function, regardless of their design or intended use.

On appeal, appellants maintain that the Legislature intended to prohibit only "true" gravity knives such as the German Paratrooper knife that opens with the force of gravity alone (App. Br. 4, 15, 60–61). In this sense, appellants do not think the statute is vague at all. Rather, they argue that in 2010, the District Attorney and the City adopted an incorrect interpretation of the statutory phrase "centrifugal force" as including knives that open with the flick of the wrist, thereby improperly extending the reach of the statute to include "common folding knives." As an initial matter, the district court properly refused to credit the testimony of appellants' experts about the proper interpretation of the statute. *United States v. Stewart*, 433 F.3d 273, 311 (2d Cir. 2006) ("Clearly, an [expert] opinion that purports to explain the law to the jury trespasses on the trial judge's exclusive territory.");

Dallal v. N.Y. Times Co., 352 F. App'x 508, 512 (2d Cir. 2009) ("To the extent…the experts would … explain how industry participants interpreted applicable law, we identify no error … in the district court's decision to exclude such testimony[.]"). But even if this evidence was offered for factual background on the "nature, function, and history of the various types of knives at issue," as appellants contend (App. Br. 47), appellants' position is contradicted by the plain text of the statute, legislative history, precedent and other evidence in the record.

To determine whether a statute provides adequate notice of what conduct it prohibits, courts look to the statutory language, its context, and legislative gloss. *United States v. Farhane*, 634 F.3d 127, 142 (2d Cir. 2011). Here, when the term "gravity knife" is considered in its statutory context, it is abundantly clear to the ordinary person that the statute criminalizes possession of a knife based on how it *actually* functions—*i.e.*, opens with the flick of the wrist—not how it was designed to function.

1. **The statute's text specifies a functional test.**

Most significant is the text of the statute itself. The statute defines a gravity knife as one where the "blade ... is released from the

handle or sheath thereof by the force of gravity or the application of centrifugal force." *See* Penal Law § 265.00(5). This definition plainly sweeps more broadly than what appellants term "true" gravity knives that open by the force of gravity alone. Moreover, this definition focuses on the manner in which a knife's blade extends—a question of how it functions. Where, by contrast, the Legislature intended to prohibit weapons based on their design, it did so explicitly. *See, e.g.*, Penal Law § 265.11 ("'Rifle' means a weapon designed…"), § 265.12 ("'Shotgun' means a weapon designed…"), § 265.14 ("'Chuka stick' means a weapon designed…"), and § 265.00(15-a) ("'Electric dart gun' means any device designed…").

The statute also explicitly defines a gravity knife as "any knife" that functions in the described manner. Penal Law § 265.00(5). There is no ambiguity as to what the word "any" means in this context. Appellants cannot create an ambiguity merely by claiming that the word "any," contrary to its ordinary meaning, narrows the definition to only "true" gravity knives or the "German paratrooper knife." *See United States v. Powell*, 423 U.S. 87, 93 (1975) ("Such straining to inject doubt as to the meaning of words where no doubt would be felt by the

normal reader is not required by the "void for vagueness" doctrine, and we will not indulge in it.").

Thus, even if the knife industry understands the definition of a "gravity knife" to be so limited, as appellants contend (App. Br. 13), the plain language of the statute reaches all knives that open through the force of gravity or the use of centrifugal force and lock into place, regardless of any other design characteristics.

2. The legislative history shows an intent to cover knives that, like switchblades, are easily deployed and therefore dangerous to public safety.

Contrary to appellants' contention (App. Br. 15), the legislative history does not suggest that the Legislature intended to limit the statute to any particular subset of knives capable of opening by means of centrifugal force. While the German paratrooper knife was an example of one type of knife that the Legislature sought to prohibit, the Legislature's main focus was on criminalizing all knives that function in a similar manner to switchblades—*i.e.*, "whose potential for quick deployment make them per se too dangerous to possess." *People v. Dolson*, 538 N.Y.S.2d 393, 395 (N.Y. County Ct. 1989). For example, Bill

Sponsor, Assembly Member Stanley Steingut stated in a letter to the Governor's office that it was "imperative" that the gravity knife be outlawed as a "successor of the switchblade knife" (A 863). The NYPD similarly recommended criminalizing gravity knives, which it argued was "as much a hazard to the safety of the general public as the switchblade knife," and following the enactment of the switchblade statute, had been "used increasingly as weapons in the perpetration of such crimes as homicides, assault, rape, and robbery" (A 875).

The history also reflects that the Legislature was concerned not only with knives with a blade that slipped out its sheath through the force of gravity alone, but also knives that could be opened through the flick of a wrist and lock automatically without further action by the user. For example, included in the Bill Jacket was a *New York Times* article entitled "Group Seeks Ban on Gravity Knife: Successor to Switchblade is Called a New Tool of Teen-age Crime" (A 879). As stated in the article, the gravity knife statute was proposed by the Committee to Ban Teen-age Weapons (*id.*). The committee's chairman, Supreme Court Justice John E. Cone, provided a demonstration of the type of knife sought to be criminalized, during which he "flicked his wrist

sharply downward and the long blade shot forth and anchored firmly in position" (*id.*).

Nor does the fact that folding knives may be used in an occupational context exempt them from the reach of the statute. By all accounts, the Legislature was aware that by criminalizing a knife based on its function, as opposed to a particular individual's intended use, it would render illegal knives that may be used both as weapons and for legitimate business purposes. The switchblade statute, as originally enacted in 1954, included an exception "for purposes of business, trade or profession, or for use while hunting, trapping and fishing." *United States v. Irizarry*, 509 F. Supp. 2d 198, 206 (E.D.N.Y. 2007) (quoting Act of Mar. 26, 1954, ch. 268, 1954 N.Y. Laws). Two years later, however, the Legislature eliminated that exception, noting that enforcement of the 1954 statute had been "made difficult" because the "purposes of business" defense had been raised frequently and went "far towards vitiating the statute." *Irizarry*, 509 F. Supp. at 206 (quoting New York State Legislative Annual, p. 21 (1956)).

Subsequently, when enacting the gravity knife statute, the Legislature did not include an exception for knives used as part of a

"business, trade or profession." This omission reflected the Legislature's judgment that the danger posed by gravity knives outweighed the concern that not all individuals who possess such knives intend to use them as weapons. *Cf. United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (holding that Congress had a reasonable basis for enacting the Federal Switchblade Act prohibiting manufacture and possession of gravity knifes based on public safety concerns, even "in the face of objections that the new law would penalize legitimate users").

3. Case law consistently supports a functional test.

Consistent with this legislative history, New York courts at all levels, as well as the federal courts in New York, have consistently interpreted the gravity knife statute's prohibition against folding knives that open through use of "centrifugal force" to apply to folding knives that open with the "flick of a wrist." *See, e.g.*, *People v. Sans*, 26 N.Y.3d 13, 17 (2015) (holding it could be "reasonably inferred" from statement in accusatory instrument that officer opened knife "with centrifugal force," in that he "flicked the knife open with his wrist"); *People v. Herbin*, 86 A.D.3d 446, 446 (1st Dep't 2011) (holding knife met statutory

definition of gravity knife based on evidence that officers "release[d] the blade simply by flicking the knife with their wrists"); *People v. Dolson*, 538 N.Y.S.2d 393, 394 (N.Y. County Ct. 1989) ("After being unlocked by removing the safety lever, the blade can, in fact, be released from its sheath by a flick of the wrist, thereby utilizing centrifugal force to expose the blade . . ."); *see also Johnson v. New York*, No. 87-cv-7037, 1988 U.S. Dist. LEXIS 9397, *2 n.1 (S.D.N.Y. Aug. 25, 1988) ("A 'gravity knife' 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."); *United States v. Ochs*, 461 F. Supp. 1, 4 (S.D.N.Y. 1978) ("A gravity knife differs from a penknife in that by depressing its button, accompanied by a flicking of the wrist, the blade exits the handle and locks into place.").

A state court has "[t]he power to determine the meaning of a statute," which "carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (quoting *Smiley* v. *Kansas,* 196 U.S. 447, 455 (1905)). Appellants cannot displace the

interpretation of the statute by New York's highest court, *see Sans*, 26 N.Y.3d at 17, with the knife industry's "understanding" or an expert's parsing of the legislative history. *See Herbin*, 86 A.D.3d at 446 (affirming preclusion of expert testimony that sought to define "centrifugal force" in a manner inconsistent with the statute).

Appellants maintain that this Court should disregard this case law and hold the statute inapplicable to folding knives because the statutory definition is more difficult to apply to those knives than to "true" gravity knives that consistently open by means of centrifugal force (App. Br. 60–61). This argument fails as a factual matter, as even appellants expert agreed that folding knives tested by counsel for District Attorney Vance opened in the same manner as purported "true gravity knives"—*i.e.*, the blade was released during the course of the flicking motion and not by the inertia of the abrupt stop (A 929). But even if it were more difficult to determine whether a folding knife is prohibited, it would not warrant reading the statute to exclude them.

Indeed, the Supreme Court rejected an argument of this precise form in *United States v. Powell*, 423 U.S. 87 (1975), holding that there was no indication that Congress intended to limit the prohibition on

mailing firearms "capable of being concealed on the person" in 18 U.S.C. § 1715 to those firearms that were the size of a pistol or revolver, despite the fact that it may not always be easy to determine whether a larger firearm (such as the approximately 22 inch sawed-off shotgun at issue in that case) can be concealed on a person. To so limit the statute, the Court held, would contravene the legislative purpose "to make it more difficult for criminals to obtain concealable weapons." *Id.* at 91.

Here, the purpose of the gravity knife law was to protect the public from knives that, like switchblades, could be easily deployed. To limit the statute based on how a knife is designed, as opposed to how it actually functions, would completely undermine that purpose.

B. The wrist flick test is a longstanding and widely used method of assessing whether a given folding knife is a gravity knife.

To bolster their claim that the statute as enforced fails to provide adequate notice, or perhaps to explain the lack of evidence supporting their hypothetical scenarios of inconsistent enforcement, appellants argue that the District Attorney's and the City's interpretation of the gravity knife statute as applying to knives that open with a flick of the wrist is a recent and New York City-specific phenomenon (*see* App. Br.

2, 15, 17, 60, 62). In rejecting this assertion, the district court correctly relied on precedent, and appropriately credited testimony of the witnesses actually involved in the enforcement of the gravity knife statute rather than the speculation of appellants' experts as to how the law might hypothetically be enforced.

1. The wrist flick test has long been used to test whether a folding knife is a prohibited gravity knife.

Appellants assert that it was not until 2007 that courts "began to address the contention that a knife can be deemed a gravity knife if it can be opened with the 'flick of the wrist'" (App. Br. 15 (citing *United States v. Irizarry*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007))). This is simply not true. As noted above, many much older decisions recognized this test as the means of determining whether a folding knife is a prohibited gravity knife. *See, e.g.*, *United States v. Ochs*, 461 F. Supp. 1, 4 (S.D.N.Y. 1978); *Johnson v. New York*, No. 87-cv-7037, 1988 U.S. Dist. LEXIS 9397, *2 n.1 (S.D.N.Y. Aug. 25, 1988); *People v. Dolson*, 538 N.Y.S.2d 393 (N.Y. County Ct. 1989). Indeed, consistent with the newspaper's description of the wrist flick used by Justice Cone as legislative committee chair in his gravity knife demonstration, at the

time of the statute's enactment it was well understood that the statute prohibited any knife that could be opened with the sort of "sharp" wrist flick used in the wrist flick test, not just knives that would open with a gentle flick of the wrist.

Similarly, the idea that the statute was applied only to knives such as the German paratrooper knife prior to 2007 is belied by precedent and record evidence of the statute's enforcement. An appellate decision dating back to June 1976 describes an arrest in New York City for possession of a "folding gravity knife." *People v. Hassele*, 53 A.D.2d 699, 700 (2d Dep't 1976). In 1987, the court in *People v. Mott*, held that a "Balisong knife" or butterfly knife, which is a type of folding knife, did not meet the definition of a "gravity knife" because, although it could be rapidly opened with one hand, the blade "does not lock into place at the moment it is released." Index No. 87-1322, 1987 N.Y. Misc. LEXIS 2528, *2–3 (N.Y. County Ct. Dec. 16, 1987).

Further refuting appellants' argument that the wrist flick test is a recent innovation is the fact that, long before 2007, courts grappled with some of the very issues that appellants now raise regarding uncertainty of the statute's application to certain types of knives. For example, in

People v. Smith, the Appellate Division addressed whether the District Attorney could prove that a knife operated as a "gravity knife" even if it did not open with every attempted wrist flick. *See* 309 A.D.2d 608, 609 (1st Dep't 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"). And, in 1989, a criminal court observed that the fact that a knife's ability to be opened with a flick of a wrist resulted from use over time, rather than its original design, did not preclude a finding that it met the definition of a gravity knife. *See Dolson*, 538 N.Y.S.2d at 394 (observing that a knife where the blade could be released "by a flick of the wrist" satisfied the statute's requirement that it open by centrifugal force even though "it [was] difficult to say whether this was possible when it was new, or whether by alteration or use this has become possible").

This precedent is consistent with the evidence the District Attorney and the City submitted regarding law enforcement's interpretation of the statute, which is also relevant on a vagueness challenge. *See VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010). At trial, defendants presented affidavits from individuals

with decades of experience enforcing the gravity knife law, including ADA Dan Rather (31 years) (A 848–90), NYPD Lieutenant Daniel Albano (33 years), Lieutenant Edward Luke (22 years) (A 891–98), Sergeant Noel Gutierrez (12 years) (A 899–903), and Detective Ioannis Kyrkos (12 years) (A 904–07). Without exception, these individuals stated that during their decades of involvement in enforcement of the gravity knife statute, either directly, or through supervision and training of others, the gravity knife statute has been applied to folding knives (A 852, 894, 900, 905), and the wrist flick test has been used to determine whether a folding knife is a gravity knife (A 850, 894–95, 901, 906). In fact, Rather, Luke, Guitierrez, and Krykos were not aware of any instance in which the law was applied to a German paratrooper knife (A 852, 894, 905–06).

Appellants did not even attempt to impeach the credibility of any of these witnesses or their testimony on these issues, and the district court's decision to credit this testimony (SPA 13–14) was "plausible in light of the record viewed in its entirety," and therefore not clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 566 (1985) ("If the district court's account of the evidence is plausible in light of the record

viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

2. Numerous other jurisdictions use the wrist flick test to enforce gravity knife statutes.

Appellants also mischaracterize the history of the gravity knife statute and its enforcement by claiming that New York City is an outlier in its use of the wrist flick test to determine whether a folding knife meets the definition of a gravity knife. Outside of New York City, prohibitions of knives that open by means of centrifugal force have long been understood to include not just what appellants term "true gravity knives," but also folding knives that open with a flick of the wrist. This consistent approach further demonstrates that the language in the New York statute is not unusual or incomprehensible, and therefore provides sufficient notice of what it prohibits. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 268 (2d Cir. 2015) (holding "repeated use for decades, without evidence of mischief or misunderstanding" of statutory language that had been "used in multiple state and federal firearms

statutes ... government reports, judicial decisions, and published books," "suggest[ed] that the language is comprehensible").

The Federal Switchblade Act, enacted in 1958 and modeled after New York's gravity knife statute (A 228), made it illegal to manufacture or possess any knife that "opens automatically ... by inertia, gravity, or both." 15 U.S.C. § 1241(b)(2); *see* 15 U.S.C. §§ 1242, 1243. Until a recent amendment, that law "indisputably" covered folding knives that "require[] some human manipulation in order to create or unleash the force of 'gravity,'" such as a "flick," to open the knife. *Taylor v. United States*, 848 F.2d 715, 720 (6th Cir. 1988); *see Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1016–17 (2d Cir. 1967) (holding that a folding knife that, after modification involving "weakening the restraining spring slightly," could be "opened with a flick of the wrist," fell under the federal statute). A federal circuit court upheld the Switchblade Act against a void-for-vagueness challenge on the ground that the statutory text was sufficient "to put a man of ordinary caution on notice as to what its boundaries are." *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).

Numerous states also prohibited possession of knives that could be opened through centrifugal force. Although the specific language varied from jurisdiction to jurisdiction, the goal of the statutes was the same: to designate knives that, like a switchblade, could be readily deployed as per se dangerous weapons. Some statutes, like the New York statute, prohibited knives that opened through the "force of gravity or the application of centrifugal force."[1] Others more specifically described the knives as "hav[ing] a blade that opens or falls or is ejected into position by the force of gravity or by an outward, downward or centrifugal thrust or movement."[2] Still others prohibited possession or carrying of knives where the blade opened by "inertia, gravity, or both,"[3] "projects or swings into position by force of a spring or by centrifugal force,"[4] or is a pocketknife that can "be opened by a throwing, explosive, or spring

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[1] *See, e.g.*, Colo. Rev. Stat. Ann. §§ 18-12-101(e) (repealed 2017); Mo. Rev. Stat. §§ 571.010(20)(b), 571.020; N.J. Stat Ann §§ 2C:39-1, 39-3; Tex. Penal Code § 46.01(11) (amended 2009 and repealed 2017).

[2] *See, e.g.*, Kan. Stat. Ann. § 21-4201 (repealed 2011); Me. Rev. Stat. Ann. tit. 17-A Sec. 1055 (repealed 2015); N.M. Stat. Ann. § 30-7-8; Wash. Rev. Code Ann. § 9.41.250 (amended 2012).

[3] Haw. Rev. Stat. § 134-52; *see also* Tenn. Code. Ann. § 39-17-1301(17)(b) (opens by "gravity or inertia").

[4] Or. Rev. Stat. § 166.240.

action."[5] As in New York, courts applying these statutes considered the reference to opening by "centrifugal force" to mean a flick of the wrist. *See, e.g.*, *In re K.E.S.*, No. 01-96-00701-cv, 1997 Tex. App. LEXIS 6243, *5–6 (Tex. Ct. App. 1997) ("[The police officer] testified that the knife could be opened by centrifugal force, and he demonstrated how, with just the flick of his wrist, the blade released.").

In fact, courts in Alaska and Ohio held that the statutes in their States, which simply prohibited possession of a "gravity knife," Alaska Stat. § 11.61.200(e)(1)(D) (1978) (repealed 2013); Ohio Rev. Code § 2923.20, were sufficiently clear because it was commonly understood that a knife was an illegal gravity knife if it could be opened by use of "centrifugal force as applied by the flick of the wrist," *State v. Cattledge*, 2010-Ohio-4953, P24 (Ohio Ct. App. 2010), or when "the blade is sprung by a downward snap of the wrist," *State v. Weaver*, 736 P.2d 781, 782 (Alaska Ct. App. 1987). And like the New York courts, both states focused the analysis on the function of the knife, not its technical name or design.

[5] N.C. Gen. Stat. § 14-269(d).

While many of these state statutes and the Federal Switchblade Act have recently been amended or repealed—for which former plaintiff Knife Rights Foundation takes credit[6]—these changes merely reflect that the decision whether to prohibit certain types of knives as per se dangerous weapons is the prerogative of the Legislature. The void-for-vagueness doctrine is not the vehicle to resolve this basic question of public policy.

Indeed, the history of California's similar statute shows why any alteration of the statute's reach is best left to the Legislature. In 1959, California passed a statute, Cal. Penal Code § 653k, that added "gravity knife" to the statute prohibiting switchblades, and "expanded the mode of operation to include a 'flip of the wrist' and 'the weight of the blade.'" *People ex rel. Mautner v. Quattrone*, 260 Cal. Rptr. 44, 44 (Cal. Dist. Ct. App. 1989) (quoting (Stats. 1959, ch. 355, § 1, p. 2278.)). California

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[6] *See* Knife Rights, Legislative & Litigation Accomplishments, http://bit.ly/2vMyJVT (last visited August 31, 2017). Knife Rights, an organization dedicated to "Rewriting Knife Law in America™" touts among its legislative achievements "28 pro-knife bills passed in 20 states" and "8 anti-knife bills stopped!" Not only do they target laws criminalizing gravity knives, but they have also been successful in pushing for the repeal of statutes banning switchblades in numerous states, including Alaska, Colorado, Illinois, Indiana, Kansas, Maine, Michigan, Missouri, New Hampshire, Nevada, Oklahoma, Tennessee, Texas, and Wisconsin. *Id.*

similarly did not limit this prohibition to "true gravity knives," as appellants define them. *See id.* (holding that a folding "butterfly knife" violated the switchblade statute).

In 1996, the California Legislature amended the statute to exempt from the definition of "switchblade" those knives "designed to open with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade." Cal. Penal Code § 653k (1996). The amendment created an "unintended loophole for criminals to carry dangerous weapons." *Switchblade Knives—Exceptions*: Hearing on SB 274 Before the S. Comm. On Public Safety, 2001-2002 Sess. 3–4 (Cal. 2001). This led to a "developing problem where a knife may be so-designed but is subsequently modified so that regardless of design, the knife actually opens with a flip of a wrist." *Id.* at 7. In 2001, the California Legislature amended the statute to focus again on how the knife opens, as opposed to how it was designed.

Last year, the Governor of New York vetoed an amendment containing the "bias towards closure" language that appellants seek to impose onto the statute. The Governor cited concern that this language would "potentially legalize all folding knives" in the face of grave public

safety issues (A1186 (citing a "staggering" rise in knife violence across the City)). Questions about whether and how the statute should be narrowed, and whether and how to avoid thereby creating a loophole that places the public at risk, are ones for the legislative process. It is dispositive for this case that the existing statute is not unconstitutionally vague in its coverage.

C. The statute's imposition of strict liability does not render it unconstitutionally vague.

Amici Law Professors mistakenly argue that the gravity knife statute is void for vagueness because it imposes strict liability. The Legislature made the express determination that gravity knives posed a significant risk to public safety and welfare despite their potential for innocent use. As a result, the Legislature's decision to dispense with a mens rea requirement, *see People v. Parrilla*, 27 N.Y.3d 400, 404 (2016), was constitutionally permissible and consistent with the legislative purpose "to prophylactically intercept the possession and use of weapons in an inordinately armed society," *People v. Saunders*, 85 N.Y.2d 339, 343 (1995); *see United States v. Balint*, 258 U.S. 250, 254 (1922) (in enacting Anti-Narcotic Act, "Congress weighed the possible

injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided").

Amici Law Professors concede (Law Prof. Br. 7), as they must, that although the presence of a mens rea requirement can save an ambiguous statute, its absence does not render an otherwise constitutional statute vague. *Cf. Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (observing that its past decision in *Balint* indicates that the absence of a mens rea requirement does not render a statute ambiguous). Nevertheless, Amici Law Professors argue that the lack of a mens rea requirement in the gravity knife statute—which only requires knowledge of possession of a knife, not knowledge that the knife functions as a gravity knife—contributes to its unconstitutional vagueness because is not a "public welfare offense" (Law. Prof. Br. 8, 13–16)—*i.e.*, one that criminalizes "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota v. United States*, 471 U.S. 419, 433 (1985).

To support this position, they cite the Supreme Court's decision in *Staples v. United States*, where the Court held that National Firearms Act—which makes possession of an unregistered "fully automatic" firearm a felony—was not a public welfare offense for which Congress intended to omit a mens rea requirement (Law Prof. Br. 9–11). 511 U.S. at 619–20. Contrary to the contention of Amici Law Professors, *Staples* does not suggest that a statutory prohibition of a type of weapon is unconstitutionally vague unless it includes a mens rea requirement.

Staples concerned a question of statutory construction—whether Congress intended to include a mens rea requirement in the otherwise silent National Firearms Act—not the question, whether Congress could have constitutionally omitted one. 511 U.S. at 605. Amici Law Professors rely on the Court's acknowledgment in *Staples* that, absent a mens rea requirement, the statute would "criminalize a broad range of apparently innocent conduct" (Law. Prof. Br. 7 (quoting *Staples*, 511 U.S. at 610)). The Court, however, also observed that Congress "remains free to amend [the statute] by explicitly eliminating a mens rea requirement." 511 U.S. at 615 n.11. This statement would not make sense if the Court thought the statute would be unconstitutionally

vague in the absence of a mens rea requirement. And so too here, the Legislature's judgment to omit a mens rea requirement from the gravity knife statute does not render the statute unconstitutionally vague.

POINT II

APPELLANTS FAILED TO SHOW THE STATUTE WAS UNCONSTITITIONAL AS APPLIED TO AND ENFORCED AGAINST ALL FOLDING KNIVES

Although the district court focused on the enforcement of the statute by the officers and prosecutors involved in appellants' 2010 arrests and prosecutions—which as set forth in the District Attorney's brief was legally sound—the court also weighed the evidence addressing the predictability of the statute's application to and enforcement against folding knives generally. Based on this evidence, the district court correctly concluded that, even if appellants could mount a facial challenge as to the statute's application to folding knives, that challenge would nevertheless fail because appellants had not shown that the statute was vague as to all folding knives (SPA 26–27), nor had they shown that the statute permitted arbitrary and discriminatory enforcement (SPA 33–34). Appellants offer no valid basis to disturb the district court's conclusions.

A. The gravity knife statute's clear application to certain folding knives precludes a finding that the statute is vague as applied to all folding knives.

Appellants seek to expand their challenge beyond the facts of their own cases to make a broader argument that the gravity knife statute cannot constitutionally be applied to *any* "common folding knife." To support this argument, they raise hypothetical concerns about indeterminacy of classification of some "common folding knives." In this sense, the appellants challenge is truly a facial one, *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2014) (holding pre-enforcement appeal "constitutes a 'facial,' rather than 'as-applied' challenge"), which is "the most difficult challenge to mount successfully, since the challenger must establish no set of circumstances exists under which the [statute] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, the possibility of "ambiguity as to the margins of [which knives] [are] prohibited under the statute," would not allow appellants to invalidate the statute as applied to all "common folding knives." *Dickerson v. Napolitano*, 604 F.3d 732, 747 (2d Cir. 2010).

So long as there is some application under which the regulation would not be vague—*i.e.*, in all of those cases where a "common folding

knife" can be opened with the flick of a wrist regardless of the users skill or physical characteristics—a facial vagueness claim, or an "as applied" challenge to "all common folding knives" cannot stand. *See Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996) (a restriction on firearms where the pistol grip "protrudes conspicuously" is not facially vague under the "no circumstances" test when "it is obvious in this case that there exist numerous conceivably valid applications"). Here, the evidence shows that there is a broad set folding knives that are clearly gravity knives or not, as predictably determined by the commonsense application of the wrist flick test.

Appellants sought to characterize all folding knives as those where the ability to open them through centrifugal force hinged on the characteristics of the user. This was simply not borne out by the record. There was no evidence that the officers who opened Perez's and Copeland's knives in 2010 with the flick of a wrist had any special skill or strength. Appellants also did not refute that the "common folding knives" seized from Native Leather, which counsel for defendant District Attorney Vance demonstrated opening with a simple wrist flick in video exhibits D-10/11, D-14/15, D-17/18, D-20/21, did not require any

special strength or skill to open. Even their own experts admitted that there are many reasons a "common folding knife" may be loose enough to open by a wrist flick separate and apart from the amount of force applied, including modification, inadequate manufacturing or materials and extended use (A 115–16).

Finally, appellants did not put forth any evidence that the statute had been enforced in a circumstance where the outcome of the wrist flick test varied based on the tester, despite the fact that the wrist flick test has been used for decades both in and outside of New York (SPA 33–34). This history of consistent application refutes their claim. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 266 (rejecting argument that statutory language criminalizing magazine that "can be readily restored or converted" was vague because it "depends upon the knowledge, skill, and tools available to the particular restorer," where there was "no record evidence that [similar language in other statutes] has given rise to confusion at any time in the past two decades").

Thus, because some folding knives—like those possessed by appellants—will open with the flick of a wrist regardless of the characteristics of the person trying to open it, appellants have failed to

show that the statutory definition is vague as applied to *all* folding knives. *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").

B. The gravity knife statute is not facially vague because it is consistently enforced through the wrist flick test.

Appellants also fail to show that the gravity knife statute authorizes arbitrary or discriminatory enforcement. As New York courts had repeatedly held, the "centrifugal force" standard in the statute can be measured by the flick of the wrist. Therefore, by defining a gravity knife as one where the blade is released "through application of centrifugal force," the Legislature included requisite "minimal guidelines to govern law enforcement" that precludes a finding of facial vagueness. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation marks omitted).

Nevertheless, appellants argue that, because there is no explicit guidance for applying the wrist flick test—*e.g.*, detailing the quantum of force required or number of attempts—its use promotes arbitrary and discriminatory enforcement (App. Br. 54–56). Yet despite the absence of

a written or published "how to" guide for the NYPD or public to follow, appellants were still unable to produce any evidence of arbitrary and discriminatory enforcement (SPA 33). To the contrary, the district court found "ample evidence" indicated that the NYPD applies the wrist flick test consistently (SPA 32, 33, 34). Thus, even if such specificity might hypothetically be useful in fringe cases, the statute nevertheless provides sufficient guidelines "to eliminate generally the risk of arbitrary enforcement," and thus is not unconstitutionally vague. *Farrell v. Burke*, 449 F.3d 470, 493–94 (2d Cir. 2006).

Nor is Amici Legal Aid correct in contending that the wrist flick test can be used to target individuals that "merit their displeasure" of an officer or prosecutor (Legal Aid Br. 6). This is not the type of criminal statute that turns on subjective judgments, and it does not afford the level of discretion in enforcement that would truly make it impossible to know whether or not one's conduct fell within a statutes prohibition. *See, e.g.*, *City of Chi. v. Morales*, 527 U.S. 41 (1999) (invalidating loitering law where guilt hinged on officer's "inherently subjective" determination of whether an individual was stationary with "no apparent purpose"). Rather, whether a knife is a gravity knife turns on

objective matters—a knife either does or does not open by the flick of the wrist. The anecdotes offered by Legal Aid regarding five non-plaintiff clients who were arrested and convicted targets the application of a different provision of the penal law (Penal Law § 265.02), covering persons with a past conviction. At most, the anecdotes may raise questions about whether sentences received were unduly harsh. What those anecdotes do not show is that the wrist flick test—applied by officers who lack any control over sentencing—leads by its nature to arbitrary and discriminatory enforcement.

Legal Aid's contention that the District Attorney and the City enforce the statute against individuals they deem "undesirable" (Legal Aid Br. 6) is directly undermined by the efforts of the District Attorney to curb the sale of illegal knives at nationally recognized retail stores, an effort aimed at preventing all members of the public from possessing these knives. It is also belied by the personal background of the plaintiffs who filed this lawsuit: two well-known artists and one owner of a retail store in Greenwich Village, none of whom had a criminal record before they were charged with a violation of the gravity knife statute.

Moreover, there is no indication that the NYPD officers or prosecutors applied the wrist flick test in a way that would enable them to control its outcome or bring within the scope of the statute a knife that did not belong. Indeed, none of the Legal Aid's anecdotes include a claim that police officers required more than one attempt of the wrist-flick test to open the subject knives at the time of the underlying arrests, nor does the Legal Aid Society point to any evidence in the record that those clients were unable to open the knives in the same manner that the officers did.[7]

Finally, the fact that Legal Aid alleges that the makes and models of some of their clients' knives remain available for purchase at retail stores within New York or online hardly establishes that the wrist flick test carries an inherent risk of arbitrary and discriminatory enforcement. The fact that a knife is available for sale does not mean that it is lawful. And more fundamentally, as previously discussed, a gravity knife is defined based on its present function, not design. Thus,

[7] Instead, the Legal Aid Society points to the silence of the record on these fronts and suggests that is a gap the police or the prosecutor should have filled in. But law enforcement cannot compel a defendant to provide evidence against himself.

the fact that a certain brand of knife is available for sale at retail stores is irrelevant to whether a similar knife, after being subjected to deliberate alteration or just years of continuous use, will presently function as a gravity knife.

CONCLUSION

The district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 8,390 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s/ Amanda Sue Nichols
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