No. _____

In The

Supreme Court of the United States

JOHN COPELAND, PEDRO PEREZ, AND NATIVE LEATHER, LTD.,

Petitioners,

-v-

CYRUS VANCE, JR. IN HIS OFFICIAL CAPACITY AS THE NEW YORK COUNTY DISTRICT ATTORNEY, AND CITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL L. SCHMUTTER
Counsel of Record
HARTMAN & WINNICKI, P.C.
74 Passaic Street
Ridgewood, NJ 07450
(201) 967-8040
dschmutter@hartmanwinnicki.com
Counsel for Petitioners

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QUESTION PRESENTED

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), this Court held that to maintain a facial challenge, a plaintiff must establish that "no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. The federal courts of appeals are starkly split on the question of whether this rule was relaxed by the Court in the context of vagueness cases in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The Fourth and Eighth Circuits have answered in the affirmative. *See Kolbe v. Hogan*, 849 F.3d 114, 148 fn.19 (4th Cir. 2017); *United States v. Bramer*, 832 F.3d 908 (8th Cir. 2016). By contrast, the Second Circuit expressly insisted below that no such relaxation has taken place. *Copeland v. Vance*, 893 F.3d 101, 113 fn.3 (2d Cir. 2018).

The question presented is:

Whether a plaintiff need show that a law is vague in all of its applications to succeed in a facial vagueness challenge.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners John Copeland, Pedro Perez, and Native Leather, Ltd. were plaintiffs and appellants below.

Respondents Cyrus A. Vance, in his capacity as New York County District Attorney, and City of New York were defendants and appellees below.

Knife Rights, Inc. and Knife Rights Foundation, Inc. were plaintiffs before the district court and appellants below in a prior appeal. They have been dismissed from the case and have no interest in this Petition.

Barbara Underwood (previously, Eric T. Schneiderman), in her official capacity as Attorney General of the State of New York, was a defendant before the district court. She has been dismissed from the case and has no interest in this Petition.

RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Petitioner Native Leather, Ltd.

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John Copeland, Pedro Perez, and Native Leather, Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), this Court set forth the basic rule applicable to facial challenges. The Court held that to maintain a facial Constitutional challenge a plaintiff must establish that "no set of circumstances exists under which the [challenged law] would be valid." 481 U.S. at 745.

Thus, the *Salerno* rule requires that a law be unconstitutional in all its applications to be deemed facially unconstitutional. This case embraces that issue in the context of a void for vagueness challenge – a context in which the United States courts of appeals are starkly split on how properly to apply this Court's precedents.

Several years prior to *Salerno*, this Court decided *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). In that case, the Court essentially set forth what would eventually become the *Salerno* rule, but applied specifically in the context of a void for vagueness challenge. The

Court held that a court should "uphold the challenge only if the enactment is impermissibly vague in all of its applications." *Id*. at 495.

This appears to have materially changed in 2015 with this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In striking the residual clause of the Armed Career Criminal Act as void for vagueness, this Court held:

> In all events, although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

Id. at 2560-61. *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1222 n.7 (2018) ("But one simple application does not a clear statute make. As we put the point in *Johnson*: Our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'")

Thus, in *Johnson* and *Dimaya*, this Court appears to have impliedly overruled *Village of Hoffman Estates* and has relaxed the *Salerno* rule in the context of vagueness challenges, such that a law

need not be vague in all of its applications in order to be considered unconstitutionally vague.

The Fourth and Eighth Circuits have explicitly recognized this change in the law. However, the Second Circuit steadfastly refuses to accept this conclusion.

This case is a vagueness challenge to the manner in which the Manhattan District Attorney (The "DA") and the New York City Police Department (the "City") enforce New York's gravity knife law (the "Gravity Knife Law").

Petitioners contend that the manner in which the DA and the City enforce the Gravity Knife Law against ordinary individuals possessing ordinary folding pocket knives (knives that are not traditionally understood to be gravity knives) is void for vagueness because no person can ever make the determination of what knife is a legal pocket knife to possess, and therefore *no person can ever know how to conform his conduct to the requirements of the law.*

In its ruling, the Court of Appeals explicitly disregarded *Johnson* and *Dimaya* and affirmed the dismissal of *all* of the Petitioners' claims because, without reaching the Constitutional merits, it held (1) that the claims were facial, App.10a-18a, and (2) that the Gravity Knife Law had been validly applied at least once to *one* of the Petitioners in the past and therefore the *prospective* claims of *all three*

Petitioners' were categorically barred as matter of law. App.27a-30a. Courts frequently improperly use the *Salerno* rule and the facial/as applied dichotomy as a gatekeeping tool to stop cases in their tracks in order to avoid consideration of their Constitutional merits.

This case presents an excellent vehicle to confirm that a court may not reject a vagueness challenge to a statute merely because it can envision one constitutional application of that statute and without even hearing the merits of the challenge. The lower courts are deeply split on this issue, and therefore the Petition should be granted.

OPINIONS BELOW

The decision of the court of appeals, reported at 893 F.3d 101, is reprinted in the Appendix (App.) at App.1a. The district court's opinion, reported at 230 F. Supp. 3d 232, is reprinted at App.40a.

JURISDICTION

The court of appeals entered its judgment on June 22, 2018, and denied a petition for rehearing *en banc* on August 16, 2018. App.81a. On October 25, 2018, Justice Ruth Bader Ginsburg extended Petitioners' time to file the within petition to January 13, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

New York Penal Law § 265.00(5) provides:

> "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

New York Penal Law § 265.01 provides in pertinent part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife . . . .

STATEMENT OF THE CASE

A. Introduction

Petitioners brought this action as an as-applied Fourteenth Amendment vagueness challenge to the novel and unprecedented expansion of the manner in which Respondents apply New York's gravity knife law – a law which had been uncontroversial for its first 50 years. After decades of enforcing this law with clarity and predictability, Respondents now choose to treat nearly any ordinary folding knife ("Common Folding Knife") as an illegal "gravity knife." Regular, law-abiding citizens must now guess if the tools of their trade, used freely throughout the state, will result in their arrest and prosecution in New York City.

The statute contains *language* defining the term "gravity knife" (having "a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device"). But according to Respondents, the only way a person can actually determine whether a knife is a prohibited gravity knife is through a functional test – sharply flicking or thrusting the knife downward with the wrist or arm to open the blade (the "Functional Test" or "Wrist Flick Test"). Petitioners contended below that the test is inherently variable and indeterminate (and thus unconstitutionally vague)

because using that test, no one possessing a Common Folding Knife can ever know he possesses a legal pocket knife versus an illegal gravity knife. This is because the test results are highly dependent on the strength, dexterity, skill, and training of the individual employing the test, the particular specimen of knife, and other variable and unique characteristics. Such variability arises because, unlike true gravity knives which have no resistance on the blade, Common Folding Knives are designed to resist opening for safety purposes.

The DA and the City will arrest and/or prosecute a person for possession of a gravity knife not simply if that person, himself, can flick the knife open, but if *anyone at any time* can flick it open, and thus, the key question before the district court and the court of appeals was as follows: How can a person draw the conclusion that a given folding knife *can never be flicked open by anyone*? Because no one can *ever* draw that conclusion, and therefore no one can ever know that he is in compliance with the Gravity Knife Law, Petitioners argued that Respondents' application of the law is void for vagueness.

One illustration presented at trial was the testimony of Assistant District Attorney Dan Rather, in which he confirmed that a Common Folding Knife could be considered legal in a store because the purchaser could not, himself, flick it open and then one minute later become an illegal

gravity knife simply because a police officer encountered just outside the store *can* flick it open.

In 2010, Petitioners Copeland and Perez were in possession of Common Folding Knives but were arrested by the New York City Police Department ("NYPD") and charged with unlawful possession of what Respondents claim were gravity knives because NYPD officers allegedly managed to open the knives using the Wrist Flick Test. The charges were resolved when both men executed Adjournments in Contemplation of Dismissal. C.A.App.54-55; C.A.App.59-60.

That same year, the DA threatened Petitioner Native Leather with criminal charges on the ground that it was allegedly selling gravity knives, C.A.App.96; C.A.App.102-103; C.A.App.688-690, because Respondents allegedly managed to open certain Common Folding Knives using the Wrist Flick Test. Facing prosecution, Native Leather agreed to pay the City a monetary sanction and turn over most of its Common Folding Knives in exchange for the City's agreement not to prosecute. *Id*. C.A.App.63-66; C.A.App.74-85.

Because Copeland and Perez wish to lawfully possess and use Common Folding Knives within the City, but fear arrest and prosecution if they do so, and because Native Leather wishes to lawfully sell Common Folding Knives within the City, but fears prosecution if it does so, this action was commenced

on or about June 9, 2011 pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief. C.A.App.55-56; C.A.App.60; C.A.App.62.

Petitioners allege that Respondents' application of the Gravity Knife Law, employing the Wrist Flick Test on Common Folding Knives to determine whether they are gravity knives, is void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution because, applying the law in that fashion, no one can determine, *ex ante*, what constitutes a legal knife.

B. Switchblade Knives, Gravity Knives, and Common Folding Knives

Knives that one can carry in one's pocket can be divided, based on custom, industry standard, and history into three distinct categories based on design and function. They are most clearly differentiated by how they are opened, which gives rise to Petitioners' vagueness claim.

A switchblade knife is described as having a "bias toward opening" because the blade is spring-loaded, ready to be thrust open when a lock button is depressed releasing the blade. C.A.App.108; C.A.App.110-111; C.A.App.136.

A gravity knife is traditionally defined as a knife that opens merely by the force of gravity when a lock

holding the blade within the handle is released. A true gravity knife moves freely in and out of the handle without resistance and therefore has no "bias."

A true gravity knife can also be opened when held horizontally by the gentle application of centrifugal force alone, such as is experienced when spinning in a swivel chair or by applying a gentle swing of the arm. *Because there is no resistance, a true gravity knife will operate in the same manner for anyone every time.* C.A.App.89-92; C.A.App.95; C.A.App.101; C.A.App.108-111; C.A.App.134-135; C.A.App.139; C.A.App.160-165; C.A.App.169-170; C.A.App.184-187.

True gravity knives are rare and are not currently produced by any domestic manufacturer. C.A.App.352.

Third, there are folding knives explicitly designed to resist opening due to mechanical tension on the blade (instead of a lock) ("Common Folding Knives"). These knives have a "bias toward closure" which must be overcome by applying manual force to the blade in order to open it. This resistance varies from knife to knife and over time with use. C.A.App.88-89; C.A.App.91-92; C.A.App.98-99; C.A.App.110-113; C.A.App.115-116; C.A.App.137-139; C.A.App.353-356.

The category of Common Folding Knives (knives with a bias toward closure) represents *nearly all* pocket knives legally sold in the U.S. today and carried by millions of Americans and New Yorkers daily. C.A.App.98, C.A.App.107; C.A.App.113-114; C.A.App.139-157; C.A.App.165-168; C.A.App.349-356.

Distinct from a true gravity knife, a Common Folding Knife with a bias toward closure will not open by gravity, or by holding it out while sitting in a spinning chair, or by a gentle waiving of the arm as a true gravity knife will. The Wrist Flick Test that Respondents apply to Common Folding Knives is fundamentally different in that it requires a person to *sharply* flick the wrist and/or arm and then abruptly stop the motion of the knife handle. The blade opens because the handle stops moving but the blade continues to move to the open position. This is distinctly different than how a *true gravity knife* operates. C.A.App.88-95; C.A.App.97-99; C.A.App.101; C.A.App.108-117; C.A.App.134-135; C.A.App.137-147; C.A.App.152-156; C.A.App.160-165; C.A.App.169-170; C.A.App.184-187; C.A.App.352.

Under the Gravity Knife Law, using the Wrist Flick Test, Respondents have been arresting and prosecuting thousands of New Yorkers for possessing, not traditional gravity knives, but rather ordinary folding pocket knives that millions of law

abiding people carry in their pockets every day all over the United States for overwhelmingly lawful, non-criminal purposes.

C. The Statutory Framework

Under New York law, possession of knives, including pocket knives, is generally lawful. *See* N.Y. Penal L. § 265.01(2); *People v. Brannon*, 16 N.Y.3d 596, 599, 925 N.Y.S.2d 393 (2011). However, New York law includes a *per se* prohibition of "gravity knives." *See* N.Y. Penal L. § 265.01(1).

New York law defines a gravity knife as "having a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." N.Y. Penal L. § 265.00(5). The New York Court of Appeals has held that to be a "gravity knife" a knife must open readily by the force of gravity or the application of centrifugal force. *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010). *See also United States v. Irizarry*, 509 F. Supp. 2d 198, 210 (E.D.N.Y. 2007). New York first prohibited gravity knives in 1958, and the definition remains the same. *See* 1958 N.Y. Laws ch. 107, sec. 1, § 1896. (the "Gravity Knife Law.")

There is no *mens rea* requirement under the Gravity Knife Law as to the nature of the knife.

Possession of a gravity knife is a strict liability offense. *See People v. Parilla*, 27 N.Y.3d 400 (2016)

Significantly, under New York law, a "pocket knife" is a folding knife that "cannot readily be opened by gravity or centrifugal force." *Dreyden*, 15 N.Y.3d at 104; *Irizarry*, 509 F. Supp. 2d at 210. Pocket knives are widely and lawfully sold and possessed in New York and nationally. *Id*. at 209-10.

Beginning with the *Irizarry* case, courts in New York began to address the contention that an ordinary folding knife can be deemed a gravity knife if it can be opened by a "flick of the wrist."

In *Irizarry,* the federal district court found that the subject knife was "not *designed* to open by use of centrifugal force [emphasis added]" and had a "construct[ion] so that it has a bias to close." *Id*. at 205, (the knife was a Common Folding Knife.) The mere *ability* to open a folding knife with a "wrist-flick" was not enough.

New York state courts disagreed. Beginning in 2010, in several cases, defendants were successfully prosecuted for possessing gravity knives because the police (not the defendant) could open the knife with a flick of the wrist. *See People v Neal*, 913 N.Y.S.2d 192 (1st Dep't 2010) ("The officer demonstrated in court that he could open the knife by using centrifugal force, created by flicking his wrist . . .");

People v. Herbin, 927 N.Y.S.2d 54 (1st Dep't 2011) (". . . the officers release[d] the blade simply by flicking the knife with their wrists . . ."); *accord Carter v. McKoy*, 2010 U.S. Dist. LEXIS 83246 (S.D.N.Y. 2010) (officer opened knife with flick of wrist).

Thus, New York's 50 year old Gravity Knife Law has taken on a novel and unique (to New York City) application, which has been accepted by New York courts.

D. The Parties

Petitioner Copeland is a citizen and resident of Manhattan, New York. He is a 39 year-old painter whose work is recognized worldwide. Galleries in New York, Copenhagen, and Amsterdam currently feature his work, as have galleries throughout the U.S. and the world. C.A.App.53.

Petitioner Perez is a citizen and resident of Manhattan, New York. Perez is 48 years old and has been employed as a purveyor of fine arts and paintings for the past 22 years. In the course of his art business, he transports artwork and tools throughout the City. One tool he finds useful is a knife, as he often needs to cut canvas and open packaging. C.A.App.58-59.

Petitioner Native Leather operates a retail store at 46 Carmine Street in Greenwich Village in New

York City[1]. The store sells mainly men's accessories, leather goods, and folding pocket knives, operating since 1969. C.A.App.62-63.

E. Respondents' Recent Enforcement of the Gravity Knife Law

On October 10, 2010, NYPD police officers stopped Copeland near his home in Manhattan after observing a metal clip on Copeland's pocket. C.A.App.55.

Copeland was carrying a Common Folding Knife designed so that its blade resists opening from the closed position. C.A.App.54. Copeland selected this knife because he wanted a knife that he could open with one hand, because he needs to use his knife at the same time that he is using his other hand to paint or to hold canvas and also because the lock prevented the blade from closing on his fingers. C.A.App.54.

Copeland was never able to open his knife with a flick or thrust of the wrist, but, exercising caution, twice, he showed his knife to NYPD officers and asked them whether or not his knife was illegal. Both officers tried to open the knife using a "flicking" motion, but they could not, so they told Copeland that the knife was legal. C.A.App.54.

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[1] At the time the case was commenced the store was located at 203 Bleecker Street in New York City.

Subsequently, on October 10, 2010, different NYPD officers stopped Copeland near his home after observing his metal pocket clip. The officers stated that they could open the knife by grasping the knife's handle and forcefully "flicking" the knife downwards, and they alleged that it was therefore a gravity knife, charging him with Criminal Possession of a Weapon in the Fourth Degree. C.A.App.55. Copeland retained counsel and defended the charge on its merits. Copeland entered into an Adjournment in Contemplation of Dismissal on January 26, 2011. C.A.App.55.

In April 2008, Perez purchased a Common Folding Knife designed so that it resists opening. C.A.App.59. Perez selected the knife because he wanted a knife that he could open with one hand, because in his work as an art dealer he needs to carefully cut artwork away from frames, and such a knife allows him to use his other hand to hold the canvas while making a cut. Perez also selected this knife because the blade locks open, preventing the blade from closing on his fingers. C.A.App.59.

On April 15, 2010 NYPD officers stopped Perez in a Manhattan subway station after observing a metal clip on Perez's pocket. C.A.App.59. The officers alleged that his knife was a gravity knife because they asserted that it could be opened using a "flicking" motion. The NYPD officers charged Perez with Criminal Possession of a Weapon in the

Fourth Degree. C.A.App.59. Perez retained counsel and defended the charge on its merits. Perez entered into an Adjournment in Contemplation of Dismissal on November 17, 2010. C.A.App.60.

Copeland and Perez would each carry a Common Folding Knife, but they refrain because they fear that they will again be charged with Criminal Possession of a Weapon, and they are unable to determine whether any particular Common Folding Knife might be deemed a prohibited gravity knife by the DA or NYPD. C.A.App.55; C.A.App.60.

Copeland and Perez argued to the district court and the court of appeals that the Wrist Flick Test is void for vagueness because there is no test they can apply to a folding knife by which they can conclude that it will be considered legal by Respondents. If they try to test the knife with the Wrist Flick Test and fail, they still could not be sure that in the future a police officer could not open the knife in that fashion, subjecting them to arrest and prosecution. C.A.App.55-56; C.A.App.60.

No matter how many times Copeland or Perez try and fail to flick a folding knife open, as long as *any police officer, anywhere, at any time in the future* can open the knife using the Wrist Flick Test, even if it takes multiple attempts, Copeland and Perez would be subject to arrest. *There is no test they can perform on a Common Folding Knife to protect themselves from arrest*. C.A.App.56; C.A.App.60.

In June 2010, the DA announced enforcement actions against knife retailers in New York City (the "NYC Retailers"). He asserted that many of the NYC Retailers' Common Folding Knives were gravity knives and threatened criminal charges. He targeted reputable, established businesses such as Paragon, Orvis, Eastern Mountain Sports, and Home Depot, even deeming common utility knives in hardware stores, exactly the same type of knives found legal and *not* to be a gravity knife in *Irizarry,* to be prohibited. One such NYC Retailer was Native Leather. C.A.App.63-67; C.A.App.74-86; C.A.App.102-103; C.A.App.681-729; C.A.App.737-847.

The alleged gravity knives sold by the NYC Retailers were Common Folding Knives designed to resist opening from the closed position. C.A.App.63-67; C.A.App.74-86; C.A.App.102-103; C.A.App.681-729; C.A.App.737-847.

Facing prosecution, the NYC Retailers, including Native Leather, agreed to pay the DA approximately $2.8 million, enter into Deferred Prosecution Agreements ("DPAs"), and to generally turn over their Common Folding Knives, in exchange for an agreement not to prosecute. C.A.App.63-67; C.A.App.74-86; C.A.App.102-103; C.A.App.681-729; C.A.App.737-847.

Native Leather argued to the district court and the court of appeals that the Wrist Flick Test is void for vagueness because, even if Native Leather sells a knife that Native Leather applies the Wrist Flick Test to and cannot "wrist-flick" open, there is no assurance that some NYPD officer will not be able to "wrist-flick" that knife open in the future, resulting in charges being brought against Native Leather *and* its customer.

F. The Trial Before the District Court.

On June 16, 2016, the district court conducted a trial on the papers, supplemented by oral argument. Douglas Ritter, Chairman of former Plaintiff Knife Rights, Inc. testified at trial regarding the inherent variability of applying the Wrist Flick Test to Common Folding Knives designed with bias toward closure. On numerous occasions, numbering at least 100, since June 2010 when DA Vance issued his press release, Ritter personally experienced individuals who could not open their Common Folding Knives with a wrist flick when *he* was able to do so. C.A.App.87-88; C.A.App.92-93.

Folding knives are neither designed nor intended to be opened with a wrist flick, which is potentially dangerous to persons nearby. Opening a knife with gross motions like a "wrist flick" constitutes serious neglect. C.A.App.113-114.

It is potentially possible to open any folding knife using a "wrist flick" motion. Therefore, under this standard, virtually all folding knives produced by both U.S. and foreign makers would potentially be illegal. C.A.App.114.

The district court also ordered a live demonstration of knife operation to be performed in open court that same day ("Live Knife Demo") C.A.App.924-925; C.A.App.954-958. Although all parties were invited to participate, C.A.App.982, only Petitioners chose to do so. The court entered an order permitting a video record. C.A.App.959-960. The video disc is in the record at C.A.App.1197.

Petitioners brought and demonstrated 11 knives divided into two categories - True Gravity Knives and Common Folding Knives. The knives demonstrated remain sealed and available to the Court.

The Live Knife Demo showed that the True Gravity Knives opened easily and readily by merely inverting them and allowing gravity to draw the blade out of the handle. They also open easily and readily by spinning one's body in place or by flicking the hand forward. The Live Knife Demo showed that True Gravity Knives can be opened easily by anyone regardless of strength, dexterity, or training and that they will open the same way every time.

The demonstration of the Common Folding Knives showed the dramatic variability of the Wrist Flick Test when applied to Common Folding Knives because they have the bias toward closure.

The trial record reveals that NYPD officers learn the Wrist Flick Test informally, not at the Police Academy or from any official source. C.A.App.416-422; C.A.App.471-472; C.A.App.499; C.A.App.503; C.A.App.591-616.

Also, the DA's office never provided any guidance to the NYC Retailers, including Native Leather, as to how to identify a gravity knife other than by generic reference to the Wrist Flick Test, and never identified how many times a knife should be able to open using that test or whether it mattered if one person could open the knife but another person could not. C.A.App.698-701; C.A.App.703; C.A.App.707-709; C.A.App.713-714.

The only live witness to testify at trial, Assistant District Attorney Dan Rather was asked how a person standing in a store wishing to purchase a folding knife could determine if the knife was legal in order to avoid arrest and prosecution. Rather indicated that the person should apply the Wrist Flick Test and attempt to open the blade to the locked position. C.A.App.1057.

Rather testified that if the knife does not open on the first try he should try again and that if the

person cannot flick the knife open on the second try then the knife is not a gravity knife. C.A.App.1057-1058.

However, when asked what if that same person stepped out the door of the store and encountered a police officer who then took that knife and opened it using the Wrist Flick Test, Rather answered that the knife would then be a gravity knife and the person would be subject to prosecution. C.A.App.1059.

Petitioners thus contend that there is no means by which a person can conclude that a given knife is not a gravity knife, even if he applies the Wrist Flick Test and cannot open the knife, because as long as *someone else* can open it with the Wrist Flick Test, the person is subject to arrest and prosecution, and there is no way for a person to make that determination in advance.

G. The Rulings Below.

1. The District Court

In ruling against Petitioners' claims, the district court fundamentally recast the claim into something it is not. Petitioners' claim is simply that the Wrist Flick Test cannot be used effectively to select a legal knife to possess. This is because choosing a legal knife requires that a person successfully predict that *no one will ever* be able to open the knife using the

Wrist Flick Test. That is an impossible prediction to make. Therefore, no one can ever identify a *legal* knife. Petitioners' claim is a *prospective* vagueness claim.

The district court, on the other hand, focused on past events. The court found that Copeland's *previous* knife, and Perez's *previous* knife, and some of Native Leather's *previous* knives did, in fact, open using the Wrist Flick Test, and therefore the Gravity Knife Law was validly applied to them. App.71a-76a. But those events are not the basis of the claim. The district court took a *prospective* claim, ignored the clear constitutional problem with prospective identification of a legal knife, turned it into a retrospective claim, and found for Respondents.

2. The Court of Appeals

The Court of Appeals took the record a step further and in doing so implicated an important issue of federal Constitutional law.

First, the Court of Appeals held, at the outset, that Petitioners claims are facial claims. The court held:

> Because plaintiffs' claims would, if successful, effectively preclude all enforcement of the statute, and because plaintiffs sought to prove their claim chiefly with hypothetical examples of unfair prosecutions that are

> divorced from their individual facts and circumstances, we deem it a facial challenge.

App4a. *See also* App.10a-18a.

Next, the Court of Appeals explained:

> Plaintiffs must therefore show that the gravity knife law is invalid in all applications, including as it was enforced against them in three prior proceedings.

App4a. *See also* App.14a-18a.

In particular, the Court of Appeals stated at footnote 3 as follows:

> Plaintiffs, relying on *Dimaya*, 138 S. Ct. 1204, decided after this appeal was heard, argue that a statute must be clear in all its applications to survive a vagueness challenge. This gets the rule backward. Under a long line of decisions that *Dimaya* did not disturb, a statute will generally survive a facial challenge so long as it is not invalid in all its applications. *See, e.g., Salerno*, 481 U.S. at 745; [*Hoffmann Estates*], 455 U.S. at 494–95. That is the rule we apply here.

App.18a n.3.

Concluding that the Gravity Knife Law was applied validly at least once against Native Leather, the Court of Appeals affirmed the judgment below as against *all* the Petitioners.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts of Appeals Are Intractably Split over Whether a Plaintiff Need Show That a Law is Vague in All of its Applications to Succeed in a Facial Vagueness Challenge, That is, Whether *Salerno* Applies to Vagueness Challenges

This case implicates a clean circuit split over a question of exceptional importance. The Second Circuit has explicitly held that a law must be vague in all of its applications in order to be unconstitutional. The court cited *Salerno* and *Hoffman Estates* to reach this conclusion and explicitly disregarded *Dimaya*.

On the other hand, the Fourth and Eighth Circuits have specifically recognized that *Johnson* and *Dimaya* have abrogated *Salerno* and *Hoffman Estates* to the extent either case required a law to be unconstitutional in all its applications to be stricken as void for vagueness. If it were either Baltimore, Maryland or St. Paul, Minnesota that was arresting and prosecuting law abiding individuals merely for possessing a Common Folding Knife that a police

officer could open by flicking his wrist, such a practice would have certainly been found void for vagueness.

Law abiding individuals who wish to carry ordinary Common Folding Knives for their trade or other lawful purposes should not be subject to criminal liability due to an impossibly indeterminate functional test merely because they happen to live in or travel to New York City and because the Second Circuit refuses to follow precedent of this Court that its sister circuits have acknowledged and embraced.

The Second Circuit's misapplication of facial versus as applied doctrine is particularly problematic in that the court used the doctrine as a gatekeeping device to reject Petitioners' claims prior to consideration of the merits of the Constitutional challenge. Although this Court has made it clear that whether a claim is characterized as facial or as applied properly goes to the scope of the *remedy* available, the Second Circuit's use of the doctrine as an up-front screening method to determine, in the first instance, whether the Constitutional claim is viable allows the Second Circuit to use the doctrine to avoid the merits of a severe vagueness problem involving a criminal statute enforced against ordinary, otherwise law-abiding individuals. This makes the circuit split particularly momentous, as whether or not a court will reach the merits of a

significant Constitutional claim turns on the circuit in which the claim arises.

Further, the Second Circuit's refusal to follow *Johnson* and *Dimaya* and its departure from the approach of the Fourth and Eighth Circuits makes the initial categorization of a claim as facial or as applied all that much more significant and potentially outcome determinative. By pigeon-holing Petitioners' claims into highly strict "facial" or "as applied" boxes, the Second Circuit forced the claims to satisfy rigid criteria in order to warrant review on the merits. The court did this despite this Court's recognition that the categories "facial" and "as applied" are not as rigid as the Second Circuit suggests. In fact, this Court has held that facial vs. as applied is a continuum, not a dichotomy, and the Second Circuit's refusal to follow *Johnson* and *Dimaya* allowed the court of appeals to reject a meritorious Constitutional challenge prior to considering the merits.

A. Background of the *Salerno* Rule.

It is well recognized that there is considerable controversy over this Court's jurisprudence on the difference between and significance of facial vs. as applied challenges. *See, e.g.* Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 Cal. L. Rev. 915 (2011); Alex Kreit, *Making Sense of Facial and As Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657 (2010).

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court held that to maintain a facial Constitutional challenge a plaintiff must establish that "no set of circumstances exists under which the [challenged law] would be valid." 481 U.S. at 745.

Taken literally, the clear implication of the *Salerno* rule is that if there is even one set of facts under which a statute can operate constitutionally then the statute cannot be facially invalidated.

This concept had been specifically addressed in the context of vagueness several years earlier in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). In *Hoffman Estates*, the Court dealt with a facial vagueness challenge to an ordinance prohibiting the sale of drug paraphernalia without a license.

The Court noted that some of the items sold by the defendant were plainly within the reach of the ordinance. The Court explained that to succeed in a facial vagueness challenge "the complainant must show that the law is impermissibly vague in all its applications." *Id*. at 498.

B. *Johnson v. United States* and *Sessions v. Dimaya*.

In *Johnson*, the Court was presented with a facial challenge to the residual clause of the Armed

Career Criminal Act ("ACCA"). The ACCA provides a sentencing enhancement for a person convicted three or more times of certain crimes, including a "violent felony." In the statute, "violent felony" was defined with respect to certain specific, enumerated crimes and then also in what was referred to as the "residual clause" which gave a general description of crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Id*. at 2255-56.

In defending against the facial challenge to the residual clause, the Government argued that there would be some crimes that clearly fall within the clause's language. In rejecting that argument, and facially striking the residual clause, the Court explained:

> In all events, although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

Id. at 2560-61. In so holding, the Court did not explicitly cite or refer to either *Salerno* or *Hoffman Estates,* however, in his concurring opinion, Justice Alito specifically noted the conflict between the Court's broad holding and *Hoffman Estates*. *Id*. at 2580.

Three years later, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court dealt with a very similar residual clause in the Immigration and Nationality Act. In facially striking that residual clause, the Court, again, did not note the conflict with *Salerno* and *Hoffman Estates*, but in his dissenting opinion, Justice Thomas noted, citing *Hoffman Estates*, that "*Johnson* weakened the principle that a facial challenge requires a statute to be vague 'in all applications . . . .'" *Id*. at 1250.

These holdings should come as no surprise as there has been considerable question as to *Salerno's* continuing viability. Justice Stevens famously noted in his concurring opinion in *Washington v. Glucksberg*, 521 U.S 702, 739-40 (1997):

> The appropriate standard to be applied in cases making facial challenges to state statutes has been the subject of debate within this Court. *See Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U. S. 1174 (1996). Upholding the validity of the federal Bail Reform Act of 1984, the Court stated in *United States v. Salerno*, 481 U. S. 739 (1987), that a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id*., at 745. I do not believe the Court has ever

> actually applied such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here.

C. The Circuits are Starkly Split.

There is a stark split among the court of appeals on what, if any, impact *Johnson* and *Dimaya* had on *Salerno* and *Hoffman Estates*. Three courts of appeals have dealt with facial vagueness challenges since *Johnson* was decided.

In *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), the Fourth Circuit dealt with a vagueness challenge to Maryland's Firearm Safety Act. In the course of analyzing the plaintiffs' vagueness claim, the court explicitly noted the direct conflict between *Johnson* and *Salerno*:

> The Supreme Court's *Johnson* decision — which was rendered in June 2015, nearly a year after the district court's Opinion here — precludes the State's contention that we should uphold the FSA's ban on "copies" under *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987) (observing that "[a] facial challenge to a legislative Act" requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid"). In *Johnson*, the Court rejected the notion that "a vague provision is constitutional merely

> because there is some conduct that clearly falls within the provision's grasp." *See* 135 S. Ct. at 2561.

Id. at 148 n.19.

Similarly in *United States v. Bramer,* 832 F.3d 908 (8th Cir. 2016), the Eighth Circuit addressed a vagueness challenge to 18 U.S.C. §922(g)(3), which prohibits possession of a firearm while a person is an unlawful user of a controlled substance. In identifying the applicable standard, the court noted the modification of the *Salerno* rule by the Court in *Johnson*:

> Before *Johnson*, we required defendants challenging the facial validity of a criminal statute to establish that "'no set of circumstances exist[ed] under which the [statute] would be valid.'" *United States v. Stephens*, 594 F.3d 1033, 1037 (8th Cir. 2010) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987)). *Johnson*, however, clarified that a vague criminal statute is not constitutional "merely because there is some conduct that falls within the provision's grasp." *Johnson*, 135 S. Ct. at 2561.

Id. at 909.

In stark contrast, the Second Circuit has, twice, either wholly rejected or entirely ignored *Johnson* and *Dimaya*. In rejecting Petitioners' *prospective* vagueness claim as to the Wrist Flick Test under New York's Gravity Knife Law, the court of appeals held that *none* of the three Petitioners' claims could proceed because the court found (erroneously) that the Gravity Knife Law had been validly applied to *one* of the Petitioners, Native Leather, *in the past*. In fact, the court explicitly rejected the notion that *Dimaya* had any bearing on the vagueness analysis and doubled down on *Hoffman Estates* noting:

> Plaintiffs, relying on *Dimaya*, 138 S. Ct. 1204, decided after this appeal was heard, argue that a statute must be clear in all its applications to survive a vagueness challenge. This gets the rule backward. Under a long line of decisions that *Dimaya* did not disturb, a statute will generally survive a facial challenge so long as it is not invalid in all its applications. *See, e.g., Salerno*, 481 U.S. at 745; [*Hoffmann Estates*], 455 U.S. at 494–95. That is the rule we apply here.

App.18a n.3. *See also New York State Rifle and Pistol Association v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2018) (applying *Salerno* rule to facial vagueness challenge without reference to *Johnson* or *Dimaya*).

In their *prospective* vagueness challenge, Petitioners contend that the Wrist Flick Test is void

for vagueness because it is impossible to identify a legal Common Folding Knife and avoid risking arrest and prosecution. This is because no one can ever make the required prediction that no police officer will ever be able to open the knife using that test. Under *Johnson* and *Dimaya*, this should be sufficient to invalidate the Wrist Flick Test. Yet, the court of appeals steadfastly rejected *Johnson* and *Dimaya* and clung, instead, to *Salerno* and *Hoffman Estates*.

This deep and intolerable split plainly warrants the Court's review.

II. The Court of Appeals Applied the Standard for a Facial Vagueness Challenge in a Way that Directly Conflicts with *Johnson* and *Dimaya*.

Because the decision below addressed this critically important constitutional issue in a way that directly conflicts with the clear holdings of this Court's decisions in *Johnson* and *Dimaya*, this case also calls out for review pursuant to this Court's Rule 10(c). The ruling of the Court of Appeals is directly contrary to the rule set forth by this Court in those cases.

In footnote 3, the Court of Appeals opined that the rule identified in *Dimaya* (first laid out in *Johnson*) is the opposite of what it actually is:

> Plaintiffs, relying on *Dimaya*, 138 S. Ct. 1204, decided after this appeal was heard, argue that a statute must be clear in all its applications to survive a vagueness challenge. This gets the rule backward. Under a long line of decisions that *Dimaya* did not disturb, a statute will generally survive a facial challenge so long as it is not invalid in all its applications. *See, e.g., Salerno*, 481 U.S. at 745; [*Hoffman Estates*], 455 U.S. at 494–95. That is the rule we apply here.

App.18a n.3.

The Second Circuit is 180 degrees wrong on this important rule laid out by the Court in *Johnson* and *Dimaya*. There is simply no way to reconcile footnote 3 with the Court's unambiguously clear statements in *Johnson* and *Dimaya* as follows:

> In all events, although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

Johnson, 135 S. Ct. at 2560-61.

> But one simple application does not a clear statute make. As we put the point in *Johnson*: Our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.

Dimaya, 138 S. Ct. at 1222 n.7.

The Second Circuit has decided this important federal question in a way that directly conflicts with the decisions of this Court. Rule 10(c) exists precisely to address such severe departures from this Court's rulings.

The Second Circuit's rejection of Petitioners' prospective vagueness claim is particularly important because that court used the facial/as applied rubric as a gatekeeping tool to negate Petitioners' claims without reaching the merits of the Constitutional challenge, contrary to several of this Court's precedents.

In *Citizens United v. Federal Election Commission*, 558 U.S 310, 331 (2010), this Court explained that the facial/as applied analysis goes primarily to the question of remedy, not merits. Yet, the court of appeals began its decision below by immediately declaring Petitioners' claims to be

facial. Then by rigidly, and erroneously, applying *Salerno* and *Hoffman Estates*, the court extinguished the claims without having to reach the merits. This is an incorrect approach to Constitutional adjudication. By misusing the facial/as applied rubric as a gatekeeping device, the court of appeals avoided ruling on the merits of a valid Constitutional challenge. Instead, the court should have reached the merits and then applied the facial/as applied rubric to determine the proper remedy.

Further, the court of appeals disregarded this Court's holding in *Doe v. Reed*, 561 U.S. 186 (2010). In *Doe*, the Court explained that "facial" and "as applied" are not rigid categories. This Court recognized that an as applied claim may seek relief broader than as to just the plaintiffs themselves. An as applied claim may *seem* facial because it broadly applies beyond the particular plaintiffs but only to the extent of the facts alleged. The Eleventh Circuit has referred to such broad as applied type claims as "quasi-facial." *See American Federation of State, County and Mun. Employees Council 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013) (quasi-facial claim is facial *to the extent of its reach*).

Here, Petitioners' claim are most properly described as quasi-facial, as they allege that the Wrist Flick Test is void for vagueness as to everyone, not just Petitioners, who wishes to possess and/or sell a Common Folding Knife (as opposed to a true

gravity knife). Instead of recognizing, as required by *Doe*, the continuum from facial to quasi-facial to as applied, the court of appeals applied improperly rigid and narrow categories, and incorrectly finding that Petitioners' claims were facial, erroneously applied *Salerno* and *Hoffman Estates* to extinguish those claims.

Whether a plaintiff in a vagueness challenge must show that the challenged law is vague in all its applications to prevail is undeniably a recurring question of exceptional national importance. The issue arises in every void for vagueness case. It has become the subject of a deep but well-developed and fully percolated split in the courts of appeals, generating opinions on both sides of the merits.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DANIEL L. SCHMUTTER
Counsel of Record
HARTMAN & WINNICKI, P.C.
74 Passaic Street
Ridgewood, NJ 07450
(201) 967-8040
dschmutter@hartmanwinnicki.com
Counsel for Petitioners

JANUARY 14, 2019

App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017

(Argued: January 18, 2018 Decided: June 22, 2018)

Docket No. 17-474

JOHN COPELAND, PEDRO PEREZ, NATIVE LEATHER LTD.,

Plaintiffs-Appellants,

KNIFE RIGHTS, INC., KNIFE RIGHTS FOUNDATION, INC.,

Plaintiffs,

–v.–

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

Defendants-Appellees,

BARBARA UNDERWOOD, in her Official Capacity as Attorney General of the State of New York,

Defendant.*

Before:

KATZMANN, *Chief Judge*,
KEARSE and POOLER, *Circuit Judges*.

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* The Clerk of Court is directed to amend the official caption as set forth above.

Two individuals and a retailer appeal from a judgment entered against them following a bench trial in the United States District Court for the Southern District of New York (Forrest, *J.*). They claim that New York's ban on gravity knives is unconstitutionally vague as applied to common folding knives because New York's functional method of identifying illegal knives is inherently indeterminate. We conclude that this is a facial challenge to the gravity knife law and that the challengers have the burden to show that the statute is invalid in all respects. Because the challengers did not show that the statute was unconstitutionally enforced against the retailer in a prior proceeding, we reject their vagueness claim. Accordingly, the judgment of the district court is AFFIRMED.

DANIEL L. SCHMUTTER, Hartman & Winnicki, P.C., Ridgewood, NJ, *for Plaintiffs-Appellants*.

ELIZABETH N. KRASNOW, Assistant District Attorney (Patricia J. Bailey, Assistant District Attorney, *on the brief*), New York County District Attorney's Office, New York, NY, *for Defendant-Appellee Cyrus R. Vance, Jr.*

CLAUDE S. PLATTON, Assistant Corporation Counsel (Richard Dearing, Amanda Sue Nichols, Assistant Corporation Counsel, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellee City of New York*.

William Gibney, Director, Special Litigation Unit, Criminal Defense Practice, Legal Aid Society, New York, NY, *for Amicus Curiae* Legal Aid Society, *in support of Plaintiffs-Appellants*.

Douglas M. Garrou, Hunton & Williams LLP, Washington, DC, *for Amici Curiae* Profs. Gideon Yaffe, Brett Dignam, Jeffrey Fagan, Eugene Fidell, Stephen Garvey, Heidi Hurd, Douglas Husak, Issa Kohler-Hausmann, Tracy Meares, Gabriel Mendlow, Michael Moore, Stephen Morse, Martha Rayner, Scott Shapiro, Kenneth Simons, James Whitman, and Steven Zeidman, *in support of Plaintiffs-Appellants*.

KATZMANN, *Chief Judge*:

Plaintiffs-appellants John Copeland, Pedro Perez, and Native Leather, Ltd. (collectively, "plaintiffs") appeal from a judgment against them following a bench trial in the United States District Court for the Southern District of New York (Forrest, *J.*). Plaintiffs claim that New York's ban on gravity knives is void for vagueness under the Due Process Clause of the Fourteenth Amendment as applied to "[k]nives that are designed to resist opening from their folded and closed position," or common folding knives. J. App'x 51. New York law defines a gravity knife as a knife that can be opened to a locked position with a one-handed flick of the wrist. Plaintiffs mainly argue that the statute cannot lawfully be applied to common folding knives because the wrist-flick test is so indeterminate that ordinary people cannot reliably identify legal knives.

Key to deciding this case is determining whether the plaintiffs' vagueness claim should be understood as an as-applied challenge or a facial challenge. Because plaintiffs' claim would, if successful, effectively preclude all enforcement of the statute, and because plaintiffs sought to prove their claim chiefly with hypothetical examples of unfair prosecutions that are divorced from their individual facts and circumstances, we deem it a facial challenge. Plaintiffs therefore must show that the gravity knife law is invalid in all applications, including as it was enforced against them in three prior proceedings. Under this strict standard, the challengers' claim will fail if the gravity knife law was constitutionally applied to any one of the challengers. We conclude that Native Leather did not carry its burden. Accordingly, we affirm the judgment of the district court.

BACKGROUND

The State of New York prohibits the possession of a "gravity knife," which is defined as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." N.Y. Penal Law §§ 265.01(1), 265.00(5) ("gravity knife law"). The law, originally passed in 1958, remains unchanged today.[1] The gravity knife law employs a

[1] At least for now. The Governor of New York recently vetoed two attempts to amend the gravity knife law, one of which would have used a design-based definition, and the other of which would have eliminated the centrifugal force clause.

functional, rather than design-based, definition. A knife is a gravity knife if it operates as one – the blade must "release[] from the handle" by gravity or by "the application of centrifugal force" and then "lock[] in place" – even if the manufacturer did not design it to do so. *Id.* § 265.00(5); *see People v. Neal*, 913 N.Y.S.2d 192, 194 (1st Dep't 2010) (finding proof sufficient where "[t]he officer demonstrated in court that he could open the knife by using centrifugal force, created by flicking his wrist, and the blade automatically locked in place after being released"). Some other banned weapons are defined by their design. *See*, *e.g.*, N.Y. Penal Law § 265.00(15-b) ("'Kung Fu star' means a disc-like object with sharpened points on the circumference thereof and is designed for use primarily as a weapon to be thrown.").

Knowledge that a knife responds to the wrist-flick test is not an element of this crime. *See People v. Parrilla*, 27 N.Y.3d 400, 402 (2016) ("[T]he mens rea prescribed by the legislature for criminal possession of a gravity knife simply requires a defendant's knowing possession of a knife, not knowledge that the knife meets the statutory definition of a gravity knife."). Possessing a gravity knife is a misdemeanor offense, but it can be charged as a felony if the offender has previously been convicted of a crime. *See id.* at 404 & n.2.

To determine whether a knife is a gravity knife, police officers and prosecutors "us[e] the force of a one-handed flick-of-the-wrist to determine whether a knife will open from a closed position," a method known as the wrist-flick test. *Copeland v. Vance*, 230 F. Supp. 3d

232, 238 (S.D.N.Y. 2017). Officers are trained in the wrist-flick test at the Police Academy, and each of the officers involved in the events giving rise to this case received this training. "[A]rrests and prosecutions for possession of a gravity knife only occur once a knife has opened in response to the Wrist-Flick test." *Id.* at 242. "[T]he same Wrist-Flick test has been used by the NYPD to identify gravity knives since the statute's effective date" and continuing to the present. *Id.* The district court found that "the evidence supports a known, consistent functional test for determining whether a knife fits the definition of a 'gravity knife' and does not support inconsistent outcomes under that test." *Id.*

John Copeland is an artist who lives in Manhattan. In the fall of 2009, Copeland bought a folding knife at a Manhattan retailer and asked two police officers whether the knife was legal. When neither officer could open the knife with the wrist-flick test, they told him it was. Copeland regularly used the knife over the next year. In October 2010, two police officers stopped Copeland when they saw the knife clipped to his pocket. One of the officers applied the wrist-flick test, and the knife fully opened to a locked position on the first attempt. Copeland was arrested and charged with violating the gravity knife law. He later agreed to an adjournment in contemplation of dismissal of the charge.

Pedro Perez is an art dealer who also lives in Manhattan. In April 2008, Perez bought a folding knife from a Manhattan retailer, and he regularly used the knife to cut canvas and open packaging. On April 15,

2010, three police officers stopped Perez in a subway station when they observed the knife clipped to his pants pocket. One of the officers applied the wrist-flick test, and the knife fully opened to a locked position on the first attempt. Perez was arrested and charged with violating the gravity knife law. Perez did not contest the charge, accepted an adjournment in contemplation of dismissal, and agreed to perform seven days of community service.

Native Leather, Ltd. is a Manhattan-based retailer that sells folding knives. In 2010, investigators from the office of the New York County District Attorney ("D.A.") determined that some of Native Leather's knives could be opened with the wrist-flick test and issued a subpoena requiring Native Leather to produce any gravity knives in its inventory. Carol Walsh, the owner and president of Native Leather, produced over 300 knives that she thought were gravity knives. The D.A.'s office tested each knife, retained any that could be opened with the wrist-flick test at least one time in ten attempts, and returned the balance. On June 15, 2010, Native Leather entered a deferred prosecution agreement under which it agreed to test its inventory for gravity knives and to submit to inspections by an independent monitor. Walsh began testing Native Leather's knives in September 2010 and would not offer a knife for sale if she could flick it open or if she believed a "stocky man" would be able to. *Id.* at 244 (brackets omitted).

On September 24, 2012, Copeland, Perez, and Native Leather, along with Knife Rights, Inc. and Knife

Rights Foundation, Inc., filed an amended complaint against defendants-appellees D.A. Cyrus R. Vance, Jr. and the City of New York challenging the gravity knife law as void for vagueness. Plaintiffs divide gravity knives into two categories that are not recognized by the statute or case law, but are, they maintain, recognized by the knife industry: the "true gravity knife" and the "common folding knife." True gravity knives, in their view, can be opened by the force of gravity alone (although they also respond to the wrist-flick test). As the blade will slide freely out of the handle, this knife is said to lack a bias toward closure. Plaintiffs' paradigmatic true gravity knife is the formidable-sounding "German paratrooper knife." True gravity knives appear to be quite rare. Plaintiffs assert that no domestic manufacturer produces them, and multiple police officers with significant experience enforcing the gravity knife law declared that they have never encountered one. Plaintiffs concede that true gravity knives can constitutionally be banned.

Plaintiffs' vagueness challenge focuses instead on common folding knives, which, they explain, are knives that are designed to have a bias toward closure. These knives resist opening. They cannot be opened by gravity alone; some additional force must be applied. This category includes folding knives openly sold and owned by many law-abiding people. It also includes the knives plaintiffs carried and sold in 2010. The plaintiffs wish to carry (and, in Native Leather's case, sell) common folding knives again, but claim that they cannot determine which knives are legal. They seek a declaration

that the gravity knife law is void for vagueness "as applied to Common Folding Knives" and an injunction restraining the defendants from enforcing the gravity knife law "as to Common Folding Knives." J. App'x 51–52.

On September 25, 2013, the district court dismissed the complaint for lack of standing. We affirmed as to the knife advocacy organizations, but held that Copeland, Perez, and Native Leather have standing. *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 379 (2d Cir. 2015). On remand, the district court conducted a bench trial and held an in-court knife demonstration. Following these proceedings, the district court, based on the findings of fact recounted above, rejected plaintiffs' vagueness claim. The district court concluded that the gravity knife law was constitutionally applied to Copeland, Perez, and Native Leather during the enforcement actions that took place in 2010 (the "2010 enforcement actions") and that it would continue to be constitutionally applied to them prospectively. The district court then concluded that, to the extent plaintiffs' claim could be understood as a facial attack on the gravity knife law, it was unsuccessful. This appeal followed.

DISCUSSION

I. Standard of Review

"On appeal from a bench trial, we review findings of fact for clear error and conclusions of law *de novo*." *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v.*

Nomura Holding Am., Inc., 873 F.3d 85, 138 n.54 (2d Cir. 2017). "Under the clear error standard, factual findings by the district court will not be upset unless we are left with the definite and firm conviction that a mistake has been committed." *Id.* (brackets omitted) (quoting *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 617 (2d Cir. 2006)).

II. Classifying Plaintiffs' Vagueness Challenge

The first issue on appeal is whether, as the district court held, plaintiffs have the burden to show that the gravity knife law was void for vagueness as applied to them in the 2010 enforcement actions. We conclude that they do.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A component of the Due Process Clause, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In any vagueness case, then, the challenger can prevail by showing that the statute either "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

A party challenging a statute as void for vagueness must normally show that any prior enforcement action against the challenger was unconstitutional. That is the essence of an ordinary "as-applied" claim, in which the challenger asserts that a law cannot constitutionally be applied to the challenger's individual circumstances. The claim is typically that the statute provided insufficient notice that her conduct was illegal. *See*, *e.g.*, *Dickerson v. Napolitano*, 604 F.3d 732, 745 (2d Cir. 2010) ("A plaintiff making an as-applied challenge must show that the statute in question provided insufficient notice that his or her behavior at issue was prohibited."). As-applied challenges are often raised as defenses to individual prosecutions. *See*, *e.g.*, *United States v. Nadi*, 996 F.2d 548 (2d Cir. 1993).

A statute may also be challenged as vague "on its face." The claim in a facial challenge is that a statute is so fatally indefinite that it cannot constitutionally be applied to anyone. A facial challenge is "the most difficult challenge to mount successfully" because, as a general matter, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982) (explaining that an ordinary facial challenge will succeed "only if the enactment is impermissibly vague in all of its applications").[2]

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[2] These general principles are more flexible in vagueness cases involving the First Amendment or fundamental rights. *See Farrell v. Burke*, 449 F.3d 470, 496 (2d Cir. 2006). In addition, in certain exceptional circumstances not present here, a criminal

Because this standard is so comprehensive, a facial challenger must show that every prior enforcement action against her was unconstitutional. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) ("We consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" (quoting *Flipside*, 455 U.S. at 495)). If a court concludes that a statute was constitutionally applied to a facial challenger, then it generally need not consider the statute's applicability in other situations. *See Diaz v. Paterson*, 547 F.3d 88, 101 (2d Cir. 2008) ("Because plaintiffs have failed to plead facts establishing that Article 65 is unconstitutional as applied to them, they necessarily fail to state a facial challenge. . . ."). Facial claims are "disfavored" because they "often rest on speculation," flout the "fundamental principle of judicial restraint" that courts should avoid unnecessary constitutional adjudication, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), and "threaten to short circuit the democratic process," *id.* at 451.

Not all proponents of a vagueness challenge must show the infirmity of a prior enforcement action, however. A statute can be attacked as vague before it has

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statute may be struck down as facially vague even where it has some valid applications. *See Johnson v. United States*, 135 S. Ct. 2551, 2557–60 (2015) (invalidating provision that required courts to imagine an ordinary version of a crime and assess whether such idealized conduct implied some degree of risk); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213–16 (2018) (same).

been enforced against the challenger, *see*, *e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015), and a party asserting a pre-enforcement challenge obviously cannot be required to show that a prior action was invalid. And although the matter is not entirely settled, the proponent of a facial vagueness claim may not need to show that a statute was unconstitutionally applied to the challenger if the statute "reaches 'a substantial amount of constitutionally protected conduct,'" particularly rights protected by the First Amendment. *Kolender*, 461 U.S. at 358–59 n.8 (quoting *Flipside*, 455 U.S. at 494); *accord City of Chicago v. Morales*, 527 U.S. 41, 60–64 (1999) (facially invalidating a city ordinance without examining whether it was unconstitutionally applied to the challengers); *Farrell*, 449 F.3d at 496 (explaining that "[w]hen fundamental rights are implicated," a defendant to whom a statute was constitutionally applied may nonetheless "'raise its vagueness . . . as applied to others'" (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 620 (1971))). Neither of these principles has any application here. As recounted above, the gravity knife law was previously enforced against each of the three plaintiffs, and no claim is made that the statute infringes fundamental rights.

Plaintiffs instead argue that they need not show that the 2010 enforcement actions were unconstitutional because they bring an as-applied challenge that seeks only prospective relief. According to the plaintiffs, they need not prove that the 2010 enforcement actions were unconstitutional because they do not seek

any relief from those proceedings (such as, for example, nullification of Native Leather's deferred prosecution agreement). They instead seek prospective relief that would allow them to own folding knives without fear of future prosecution under the gravity knife law.

Courts consider prospective, as-applied vagueness challenges comparatively infrequently. Unlike the ordinary as-applied challenge, where the claim is that a prior enforcement action was invalid, a prospective as-applied challenge seeks to prove that a statute cannot constitutionally be applied to a specific course of conduct that the challenger intends to follow. A recent Supreme Court case is instructive. In *Expressions Hair Design v. Schneiderman*, the Supreme Court considered a vagueness challenge to New York's credit card surcharge ban, which provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." 137 S. Ct. 1144, 1147 (2017) (quoting N.Y. Gen. Bus. Law § 518). The statute had been enforced only rarely, *see id.* at 1154 n.2 (Sotomayor, *J.*, concurring in the judgment), and never against the plaintiffs. Before the Supreme Court, the plaintiffs argued that this law would be unconstitutional if applied to a single scheme of pricing they wished to employ: "posting a cash price and an additional credit card surcharge." *Id.* at 1149. The Court framed this as an "as-applied challenge" of "narrow scope," *id.* at 1149 n.1, and, concluding that "it is at least clear that § 518 proscribes *their* intended speech,"

rejected the vagueness challenge, *id.* at 1152 (emphasis added).

We agree in principle that someone who intends to engage in a course of conduct that differs from the conduct that gave rise to a prior enforcement action against her should be relieved of the burden to show that the prior proceeding was invalid. That a statute was lawfully applied to one set of facts does not necessarily prove that it may lawfully be applied to a different set of facts. More concretely, we think that someone previously convicted for carrying what is indisputably a gravity knife should be permitted to claim that the gravity knife law cannot lawfully be applied to a different knife that she intends to carry and that responds differently to the wrist-flick test.

But plaintiffs have not asserted a prospective, as-applied challenge. Unlike the "narrow" challenge to New York's credit card surcharge ban, *id.* at 1149 n.1, the claim here is for exceedingly broad relief – indeed, so broad that plaintiffs concede it could be seen a [sic] species of facial challenge. Plaintiffs seek, not a declaration that the statute cannot be applied to certain knives they wish to personally carry, but a declaration that the statute cannot constitutionally be applied to *anyone* carrying *any* knife in the very large "common folding knife" category. The evidence shows that the gravity knife law has for decades been enforced mainly, and perhaps exclusively, against such knives. As a consequence, and as plaintiffs conceded at oral argument, their vagueness challenge would, if successful, disable

the entire statute. The challenge thus more resembles a facial challenge than an as-applied challenge.

Plaintiffs' manner of proof also shows that their claim is not a prospective as-applied challenge, but a challenge to the gravity knife law on its face. A party asserting a prospective as-applied challenge must tailor the proof to the specific conduct that she would pursue but for fear of future enforcement. *See VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 189 (2d Cir. 2010) ("[I]n the context of an as-applied vagueness challenge, a court's analysis should be confined to the litigant's *actual* conduct, and a court should not analyze whether a reasonable person would understand that certain hypothetical conduct or situations violate the statute."). The challenger cannot instead rely on hypothetical situations in which the statute could not validly be applied. In *Expressions Hair Design*, for example, the plaintiffs offered a "wide array of hypothetical pricing regimes," but the Supreme Court "limit[ed] . . . review" to the "one pricing scheme [plaintiffs sought] to employ." 137 S. Ct. at 1149.

If this were a true prospective as-applied challenge, we would therefore expect plaintiffs to have offered proof that specific knives they wished to possess responded inconsistently, if at all, to the wrist-flick test. They did not. Plaintiffs instead seek to show that the gravity knife law is vague by positing hypothetical unfair enforcement actions in which the statute could not be constitutionally applied. For example, they invite us to consider the prosecution of someone who, after attempting to flick open a knife several times,

concludes that it is legal and purchases it, only to be immediately stopped by an officer who succeeds in flicking it open. This type of "proof" is simply not cognizable in an as-applied challenge. *See id.* It may, however, be entertained in a facial challenge. *See Farrell*, 449 F.3d at 496.

To be sure, plaintiffs label their challenge "as applied," and, in a bid to avoid the rule that a statute is not vague on its face unless it is vague in all applications, disclaim a full-fledged facial challenge. But plaintiffs use the term "as applied" in an idiosyncratic way. They do not mean that the statute cannot lawfully be applied to their personal facts and circumstances, but that the statute cannot lawfully be applied to a broad class of knives that could be carried by anyone. *Cf. Dickerson*, 604 F.3d at 745 ("To successfully make an as-applied vagueness challenge, the plaintiffs must show that section 14-107 either failed to provide *them* with notice that possession of their badges was prohibited or failed to limit sufficiently the discretion of the officers who arrested *them* under the statute."). The sweeping relief sought and the method of proof advanced persuade us that this is a facial challenge.

And so we reject plaintiffs' contention that they need not show that the gravity knife law was unconstitutionally applied to them in 2010. As plaintiffs conceded below, in an ordinary facial vagueness claim, the challenger must show that the statute is invalid in all respects. *See Salerno*, 481 U.S. at 745 When the enactment has been previously applied to a facial challenger, a court should first evaluate the claim as applied to the

challenger's facts and circumstances, *see Rubin v. Garvin*, 544 F.3d 461, 468–69 (2d Cir. 2008), and if the statute was constitutionally applied to the challenger, then the vagueness claim fails, *see Flipside*, 455 U.S. at 494–95; *Diaz*, 547 F.3d at 101. Accordingly, plaintiffs can prevail on their vagueness claim only if they show that the statute was vague as applied to them in the 2010 enforcement actions.[3]

III. Whether the Gravity Knife Law Was Constitutionally Enforced Against the Plaintiffs

The district court held that the plaintiffs did not show that the gravity knife statute was unconstitutionally applied to them in 2010. On appeal, plaintiffs do little to directly confront this holding, relying primarily on more general contentions that the statute provides insufficient notice of which knives are legal. We conclude that the gravity knife law was constitutionally enforced against at least one of the plaintiffs in 2010.[4]

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[3] Plaintiffs, relying on *Dimaya*, 138 S. Ct. 1204, decided after this appeal was heard, argue that a statute must be clear in all its applications to survive a vagueness challenge. This gets the rule backward. Under a long line of decisions that *Dimaya* did not disturb, a statute will generally survive a facial challenge so long as it is not *invalid* in all its applications. *See*, *e.g.*, *Salerno*, 481 U.S. at 745; *Flipside*, 455 U.S. at 494–95. That is the rule we apply here.

[4] We observe that the defendants do not argue that plaintiffs' concession that the statute can validly be applied to true gravity knives dooms their entire claim. *Cf. N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 265 ("[T]o succeed on a facial challenge, the

A. The Void for Vagueness Doctrine

As noted above, "[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. "The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Betancourt v. Bloomberg*, 448 F.3d 547, 552 (2d Cir. 2006) (quoting *Flipside*, 455 U.S. at 498). Here, because the gravity knife law is a criminal statute that is not claimed to inhibit the exercise of constitutional rights, "only a moderately stringent vagueness test [is] required." *Id.* at 553.

Whether a statute is unconstitutionally vague is an "objective" inquiry in which we must determine "whether the law presents an ordinary person with sufficient notice of or the opportunity to understand what conduct is prohibited or proscribed, not whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held to account for the behavior in question." *Dickerson*, 604 F.3d at 745–46 (internal quotation marks and citation omitted). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been

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challenger must establish that *no set of circumstances* exists under which the Act would be valid." (internal quotation marks omitted)). Defendants instead meet plaintiffs' vagueness challenge as advanced. We take the same approach here.

proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). In other words, a statute is fatally vague if it "proscribe[s] no comprehensible course of conduct at all." *United States v. Powell*, 423 U.S. 87, 92 (1975). "In reviewing a statute's language for vagueness, 'we are relegated . . . to the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it.'" *VIP of Berlin*, 593 F.3d at 186 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)).

B. Whether an Ordinary Person Had Notice that Plaintiffs' Knives Were Banned

Although arbitrary enforcement is "the more important aspect of vagueness doctrine," *Kolender*, 461 U.S. at 358, we understand plaintiffs to focus on the notice element. Plaintiffs argue that the gravity knife law provides constitutionally insufficient notice of which common folding knives are proscribed for three reasons: (i) the defendants allegedly began to enforce the gravity knife law in a novel and unprecedented way in 2010, (ii) the wrist-flick test does not appear in the text of the gravity knife law, and (iii) members of the public allegedly have no way to reliably determine which knives may lawfully be possessed. Finding none of these contentions persuasive, we conclude that the gravity knife law provided constitutionally sufficient notice that at least one of the plaintiffs' knives was unlawful to possess.

Plaintiffs first argue that notice is wanting because the defendants in 2010 unexpectedly began to apply the statute to common folding knives that could be opened with the wrist-flick test. This argument is meritless. The record shows that the gravity knife law has been enforced against individuals who possess folding knives for decades prior to 2010 and that the wrist-flick test has been the diagnostic tool for separating legal knives from illegal ones. Indeed, a booster of the gravity knife law reportedly opened a knife with a flick of the wrist (rather than the force of gravity) to demonstrate the dangers of gravity knives *in 1957*.[5] More to the point, the district court found, based on unchallenged testimony from officers with decades of experience enforcing the gravity knife law against folding knives, that defendants have consistently used the wrist-flick test to identify illegal folding knives since the ban was enacted.

Plaintiffs also contend that an ordinary person would not understand that the statutory phrase "application of centrifugal force," N.Y. Penal Law § 265.00(5), refers to the wrist-flick test. But in evaluating a vagueness claim, we consider not only the text of the statute, but also any judicial constructions, *see VIP of Berlin*, 593 F.3d at 186, and the courts of New

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[5] Emma Harrison, *Group Seeks Ban on Gravity Knife*, N.Y. TIMES, Dec. 19, 1957 ("Judge Cone selected a sleek, silverish object from weapons that the committee had on display. He flicked his wrist sharply downward and the long blade shot forth and anchored firmly in position. 'You see,' he said, 'the blade leaps out with a flip of the wrist and circumvents the law on switchblade knives.' ").

York State have long upheld the application of the gravity knife law to common folding knives via the wrist-flick test. State trial courts have accepted the wrist-flick test as the measure of banned gravity knives since at least the 1980s. *See*, *e.g.*, *People v. Hawkins*, 781 N.Y.S.2d 627 (Table), 2003 WL 23100899, at *1 (N.Y. Crim. Ct. 2003) (upholding complaint alleging that a knife "opened and locked when flipped"); *People v. Dolson*, 538 N.Y.S.2d 393, 394 (N.Y. Co. Ct. 1989) (stating that a knife "appears to meet the first part of the statutory definition of a gravity knife" because its "blade can . . . be released from its sheath by a flick of the wrist"). And although it appears that state appellate courts expressly approved of reliance on the wrist-flick test to prove that a knife met the statutory definition only after some of the 2010 enforcement actions had concluded,[6] they had required proof of "operability" for significantly longer. *See*, *e.g.*, *People v. Smith*, 765 N.Y.S.2d 777 (1st Dep't 2003) (finding evidence sufficient where "[a] detective twice demonstrated the operability of the weapon in open court"); *People v. Mashaw*, 411 N.Y.S.2d 455, 456 (3d Dep't 1978) (vacating conviction where operability not established). Given the holdings of the state trial courts recited above, we think it fair to infer that these convictions

[6] *See People v. Herbin*, 927 N.Y.S.2d 54, 55–56 (1st Dep't 2011) (finding the evidence sufficient to sustain a gravity knife conviction where "officers release[d] the blade simply by flicking the knife with their wrists"); *Neal*, 913 N.Y.S.2d at 194 (similar); *cf. Parrilla*, 27 N.Y.3d at 402 (reciting that an officer "tested the knife to determine whether it was a gravity knife by flicking his wrist with a downward motion").

likewise turned on the results of the wrist-flick test. And in conjunction with the evidence that defendants have consistently used the wrist-flick test to identify illegal gravity knives since long before 2010, this judicial authority is sufficient to have given an ordinary person notice that folding knives that may be opened with a one-handed flick of the wrist are banned by the gravity knife law. *See VIP of Berlin*, 593 F.3d at 186–87.

Plaintiffs' more substantial arguments concern the purported indeterminacy of the wrist-flick test. They argue that even if an ordinary person had sufficient notice that the wrist-flick test is the measure of illegality under the gravity knife law, there is nonetheless no way to reliably identify legal folding knives. This uncertainty, they claim, is a result of two features of the wrist-flick test. First, the test only confirms illegality. A positive result is strong evidence that the knife is illegal, but, because a knife need not always positively respond to the wrist-flick test to be a gravity knife, *see People v. Cabrera*, 22 N.Y.S.3d 418, 420 (1st Dep't 2016), a negative test is inconclusive. Second, the results of the wrist-flick test may vary depending on the tester's skill, practice, and physical traits. One person may be able to successfully flick open a knife that another person cannot. And because guilt turns on whether a law enforcement officer can flick open a knife, not whether the knife owner can, even an individual familiar with the wrist-flick test can never completely assure herself that a folding knife is legal.

To the extent plaintiffs argue that the gravity knife law is unconstitutional because the wrist-flick test only measures illegality, the argument must be rejected. Legislatures may functionally define crimes. *See Powell*, 423 U.S. at 88, 93–94 (rejecting vagueness challenge to statute prohibiting the mailing of firearms "capable of being concealed on the person" (quoting 18 U.S.C. § 1715)); *cf. Vrljicak v. Holder*, 700 F.3d 1060, 1062 (7th Cir. 2012) ("[J]ust because it is *possible* to replace a standard with a numeric rule, the Constitution does not render the standard a forbidden choice."). A legislature that does so need not simultaneously create a safe harbor from prosecution, as plaintiffs seem to seek. In *Powell*, for example, the Supreme Court sustained a proscription on the mailing of concealable firearms without so much as suggesting that there must be some second test to determine when a firearm cannot be concealed. *See* 423 U.S. at 88, 93–94. A functional definition, without more, does not offend the Constitution.

Yet *Powell* does not entirely answer plaintiffs' contention that the wrist-flick test's potential to yield variable results creates serious notice problems. In *Powell*, the Supreme Court had an intermediate option to invalidating the statute on constitutional grounds: imposing a limiting construction. Powell argued that the statute was vague because it did not specify whether the term "person" in the phrase "capable of being concealed on the person" referred to the person mailing the gun, the person receiving it, or a hypothetical average person. *See id.* at 88 (quoting 18 U.S.C. § 1715).

The Supreme Court construed "person" to mean to mean [sic] "an average person garbed in a manner to aid, rather than hinder, concealment of the weapons" and held that, so interpreted, the statute was not unconstitutionally vague. *Id.* at 93.

Because the gravity knife law is a state statute, we must defer to the interpretation given to it by the state courts. *See Morales*, 527 U.S. at 61; *see also Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 199–200 (2d Cir. 2005) ("[W]e are generally obliged to follow the state law decisions of state intermediate appellate courts."). We are aware of no state court decision that has imposed a limiting construction on the gravity knife law of the sort imposed in *Powell*. That is to say, no state court has held that, for example, a knife is a gravity knife only if a person of average skill or practice can open it.[7] And the state courts have held that a knife

[7] Plaintiffs argue that the New York Court of Appeals has held that the gravity knife law reaches only those knives that "readily" respond to the wrist-flick test. *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010) (stating that the gravity knife law "distinguishes gravity knives from certain folding knives that cannot readily be opened by gravity or centrifugal force"). We are not so sure. *Dreyden* held only that a criminal complaint must include facts sufficient to give the defendant notice of the charges against him, *see id.*, and its description of the underlying statute more resembles dicta than statutory construction. This reading is bolstered by a later decision upholding an accusatory instrument containing the bare allegation that a gravity knife opened "with centrifugal force." *People v. Sans*, 26 N.Y.3d 13, 17 (2015). In any event, plaintiffs' reading of *Dreyden* would undercut their vagueness claim. After all, a rule that the gravity knife law only reaches knives that readily respond to the wrist-flick test would *enhance* the public's notice of which knives were proscribed and would do

can be a gravity knife even if it does not always respond positively to the wrist-flick test. *See Cabrera*, 22 N.Y.S.3d at 420 ("The fact that the officer needed to make several attempts before the knife opened did not undermine a finding of operability."); *Smith*, 765 N.Y.S.2d 777 (similar). Given this statutory framework, we think that there are circumstances in which an as-applied challenge to a gravity knife conviction might succeed. For example, a gravity knife conviction might be constitutionally infirm if the knife could be flicked open to a locked position only with great difficulty or by a person with highly unusual abilities. A knife that responds inconsistently to the wrist-flick test might also provide grounds to challenge the law on an as-applied basis. To take an extreme case, an ordinary person would lack "sufficient notice . . . or the opportunity to understand" that the gravity knife law bans a knife that can only be successfully flicked open once in twenty attempts. *Dickerson*, 604 F.3d at 746.[8]

But we must evaluate plaintiffs' notice argument as applied to the plaintiffs' facts and circumstances and not in the abstract. *See VIP of Berlin*, 593 F.3d at

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much to answer plaintiffs' complaint that the wrist-flick test is indeterminate.

[8] Plaintiffs also invoke the possibility of a knife loosening over time, as apparently happened to Copeland's knife. For the reasons discussed below, it is unnecessary for us to decide whether Copeland had constitutionally sufficient notice that his knife was unlawful to possess. Accordingly, we do not resolve whether a future defendant to an enforcement action presenting similar facts may successfully contest her prosecution on an as-applied basis.

189–90. We therefore consider whether the plaintiffs have shown "that the statute in question provided insufficient notice that his or her behavior at issue" – here, possession of the knives that formed the subject of the 2010 enforcement actions – "was prohibited." *Dickerson*, 604 F.3d at 745. And because a facial challenger must show that "no set of circumstances exists under which the Act would be valid," *Salerno*, 481 U.S. at 745, plaintiffs' claim will fail if the gravity knife law was constitutionally applied to even one of the knives that formed the subject of the 2010 enforcement actions.

We conclude that Native Leather did not make this showing. As a seller of knives, Native Leather was responsible for ensuring that its merchandise was legal, and it possessed more resources and sophistication to make that judgment than someone who uses a knife in her trade. *See Flipside*, 455 U.S. at 498 (observing that "businesses, which face economic demands to plan behavior carefully, can be expected to consult the relevant legislation in advance of action" and "may have the ability to clarify the meaning of regulation by its own inquiry"). Yet prior to receiving the gravity knife subpoena in 2010, Walsh made no meaningful effort to verify that Native Leather's knives did not respond to the wrist-flick test. And in responding to the subpoena, Native Leather produced more than 300 knives that Walsh simply guessed might be banned by the statute.

Native Leather's lack of diligence significantly limits its ability to show that the statute provided insufficient notice that it sold banned knives, because it

prevents it from offering evidence that the knives had responded differently to the wrist-flick test prior to the D.A.'s tests. Evidence that Native Leather had scrupulously tested the seized knives and found that they did not respond to the wrist-flick test would certainly have been relevant to its notice argument. Native Leather also made no showing that, for example, the government's testers had any unusual skill, or that the government retained any knives that responded but poorly (if at all) to the wrist-flick test. In sum, Native Leather offered no evidence that *any* of its seized knives responded inconsistently to the wrist-flick test, much less that *all* of them did, as the demanding standard for facial challenges requires. *See id.* at 494–95. Accordingly, Native Leather has not shown that it lacked "sufficient notice . . . or the opportunity to understand" that it sold illegal gravity knives. *Dickerson*, 604 F.3d at 745.

Native Leather makes much of the fact that the investigators arrived at the one-in-ten failure rate on the day they began to test its inventory, but it points to no evidence that any of the knives retained by the defendants in fact responded to the wrist-flick test at such a dismal rate. We therefore need not consider whether applying the gravity knife law to such a knife raises any notice concerns. Native Leather also protests that Walsh and employees of the independent monitor occasionally had different results when testing its knives with the wrist-flick test. However, the record as to any variation in the outcomes of the wrist-flick test is sparse, and thus it is not apparent to us

precisely how these knives responded. In any event, although inconsistent results might give rise to notice concerns, minor variation in the application of the wrist-flick test only suggests that the gravity knife law – like most laws – can give rise to close cases, and "[t]he problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306.

Plaintiffs also place great weight on the results of the in-court knife demonstration, which, they claim, shows that the wrist-flick test produces divergent results. However, we find no clear error in the district court's decision to credit a prosecutor's testimony that one of the demonstrators used an exaggerated technique that did not resemble the wrist-flick test used by law enforcement or prosecutors in New York City. More importantly, the demonstration did not involve the knives that Native Leather produced for testing in 2010, and therefore tells us nothing about whether Native Leather's *own* knives had some characteristics that rendered the application of the gravity knife law unconstitutional.

Plaintiffs also rely on two trial court decisions that declined to apply the gravity knife law to folding knives out of concern that the law would reach seemingly innocent conduct. *See United States v. Irizarry*, 509 F. Supp. 2d 198, 210 (E.D.N.Y. 2007) (suppressing a "folding lock-back utility kni[fe]" that responded to the wrist-flick test because the gravity knife law only covers "items . . . manufactured as weapons"); *People v. Trowells*, No. 3015/2013, at *6 (N.Y. Sup. Ct. July 11,

2014) (dismissing gravity knife complaint "in the furtherance of justice" because of the perceived unfairness of enforcing the statute against people who possessed seemingly legal tools). These decisions do not alter our conclusion. *Irizarry*'s design-based interpretation of the gravity knife law has not been adopted by the state courts, *see Herbin*, 927 N.Y.S.2d at 55, and *Trowells*' discretionary dismissal has no relevance to the issues before us. It remains the case that it was well-established in 2010 that the wrist-flick test provided the measure of guilt, and that there is no evidence that Native Leather's knives responded inconsistently to the wrist-flick test.

We thus conclude that the gravity knife law provided constitutionally sufficient notice that Native Leather's knives were illegal. As a result, we need not decide whether the gravity knife law provided adequate notice that the individual plaintiffs' knives were banned, and we express no view as to those cases. *See Flipside*, 455 U.S. at 494–95.

C. Whether the Gravity Knife Law Provides Adequate Standards to Law Enforcement

We next consider whether the gravity knife law satisfies "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358.

> Courts considering as-applied vagueness challenges may determine either (1) that a

> statute as a general matter provides sufficiently clear standards to eliminate the risk of arbitrary enforcement or (2) that, even in the absence of such standards, the conduct at issue falls within the core of the statute's prohibition, so that the enforcement before the court was not the result of the unfettered latitude that law enforcement officers and fact-finders might have in other, hypothetical applications of the statute.

Farrell, 449 F.3d at 494. Curiously, we understand the plaintiffs not to raise any arbitrary enforcement arguments distinct from their core notice argument. In other words, there is no discrete contention that the gravity knife law "authorizes or even encourages arbitrary and discriminatory enforcement," *Hill*, 530 U.S. at 732; plaintiffs' basic argument is that the statute is void for vagueness because the *public* cannot reliably identify legal folding knives with the wrist-flick test. To the extent this contention can be understood as a complaint about arbitrary enforcement, it fails for the same reason their notice argument fails: Native Leather did not show that the seized knives responded inconsistently to the wrist-flick test. Native Leather's misconduct therefore fell "within the core of the statute's prohibition," and we need not consider whether the statute provides sufficient guidance as a general matter. *Farrell*, 449 F.3d at 494; *accord VIP of Berlin*, 593 F.3d at 191–92 ("For the same reasons that it gave VIP adequate notice regarding its March 2009 application, the language here . . . does not encourage or authorize arbitrary enforcement.").

Amici curiae separately attempt to show that the gravity knife law invited arbitrary enforcement with evidence that the defendants have exempted certain prominent retailers from aspects of the law. Citing five recent cases in which defendants received substantial prison sentences for possession of a gravity knife, they further contend that the defendants use the statute as a tool to harass "those they deem undesirable." Br. of *Amici Curiae* Legal Aid Society at 7. Defendants, for their part, provide no meaningful account of why banned gravity knives continue to be widely available in New York City retailers, and respond to the discriminatory enforcement contention by pointing out that the plaintiffs in this case have a "spotless pedigree." D.A. Br. 46 n.35.

We are troubled by these signs that the defendants selectively enforce the gravity knife law and are not entirely satisfied by the defendants' responses. But a pattern of discriminatory enforcement, without more, would not show that the statute is unconstitutionally vague. What makes a statute unconstitutionally vague is that the statute, as drafted by the legislature and interpreted by the courts, *invites* arbitrary enforcement. *See Kolender*, 461 U.S. at 360–61. The test is whether some element of the statute turns on the law enforcement officer's unguided and subjective judgment. Thus, the Supreme Court has invalidated ordinances whose elements included acting in an "annoying" manner, *Coates*, 402 U.S. at 611, 614–16, and remaining in place without an "apparent purpose," *Morales*, 527 U.S. at 60–64. Such terms are so devoid

of objective content that any enforcement decision necessarily devolves upon an individual law enforcement officer's whim.

Whatever flaws infect the gravity knife law, a totally subjective element is not among them. The gravity knife law has an objective "incriminating fact": either the knife flicks open to a locked position or it does not. *See Williams*, 553 U.S. at 306. In the ordinary case, a law enforcement officer is simply not called upon to make a subjective judgment about whether the criterion of guilt is present. The gravity knife law therefore does not "authorize[ ] or even encourage[ ] arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732.

This is not to say that defendants' enforcement priorities are immune from scrutiny. It has long been the law that selective enforcement of a facially neutral statute can violate the Equal Protection Clause of the Fourteenth Amendment. *See United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) ("A defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." (ellipsis omitted) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886))). Evidence that the defendants target certain classes of people over others, or certain types of retailers over others, would certainly be relevant to an equal protection claim. However, because plaintiffs only advance a vagueness claim, we express no view on whether the

defendants' enforcement priorities are consistent with the Equal Protection Clause. We merely hold that they do not prove that the statute was unlawfully enforced against the plaintiffs.

* * *

For the foregoing reasons, we conclude that at least one plaintiff did not show that the gravity knife law was unconstitutionally vague as applied to it in a prior proceeding. That alone requires us to reject plaintiffs' facial challenge. *See Diaz*, 547 F.3d at 101. Yet even if we were persuaded that the gravity knife law was unconstitutionally applied to each of the three plaintiffs, the facial vagueness claim would not succeed. As noted above, an ordinary facial challenge is, by design, "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745. Even setting aside plaintiffs' own knives, we do not think plaintiffs have met this burden. Plaintiffs acknowledge, for example, that some common folding knives may have a "very light bias toward closure," with a blade that fits only "loose[ly]" in the handle, Reply Br. at 25, but they make no effort to explain why an ordinary person would lack notice that such a knife was proscribed by the gravity knife law. This is to say nothing of plaintiffs' outright concession that the gravity knife law can lawfully be applied to "true gravity knives." Because plaintiffs have not satisfied the demanding *Salerno* standard, their facial challenge to the gravity knife law fails.

IV. Whether the Gravity Knife Law Unconstitutionally Imposes Strict Liability

Finally, *amici curiae* argue that the gravity knife law is unconstitutional because it imposes strict liability on possession of an everyday item and because possession of a gravity knife can, in some circumstances, be charged as a felony. *See Parrilla*, 27 N.Y.3d at 404 & n.2. It is undisputed that the gravity knife law is a strict liability statute in the relevant sense, as knowledge that a knife positively responds to the wrist-flick test is not required for a conviction. *See id.* at 402 ("[T]he *mens rea* prescribed by the legislature for criminal possession of a gravity knife simply requires a defendant's knowing possession of a knife, not knowledge that the knife meets the statutory definition of a gravity knife."). Because many common folding knives can evidently be opened with a one-handed flick of the wrist, many people may be unknowingly violating a statute that can result in several years' imprisonment. *Amici*'s argument that this violates the Constitution can be understood in two ways. We conclude that neither is persuasive.

Amici may be arguing that the lack of a *mens rea* merely exacerbates the statute's vagueness problems. To be sure, "[a] scienter requirement may mitigate a law's vagueness, especially where the defendant alleges inadequate notice," *Rubin*, 544 F.3d at 467 (citing *Flipside*, 455 U.S. at 499), and we have no doubt that a scienter requirement would remedy many of plaintiffs' complaints about the gravity knife law. But the absence of a scienter element, without more, does not

make a law unconstitutionally vague; the inquiry remains whether the statute gives adequate notice to the public and provides sufficient guidance to those charged with enforcing it. *See Hill*, 530 U.S. at 732. For the reasons stated above, we conclude that the gravity knife law was constitutionally applied to at least one plaintiff in 2010 and that plaintiffs' facial challenge accordingly fails.

Amici might also be understood to argue that, independent of the vagueness claim, the statute's lack of a *mens rea* itself violates the Due Process Clause. Whether the Constitution sometimes requires criminal statutes to have a *mens rea* is unsettled.[9] Criminal intent is, of course, foundational to our system of law. *See Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."). Its importance at common law informs a presumption in favor of inferring a *mens rea* requirement into a statute that omits one. *See Staples v. United States*, 511 U.S. 600, 605–06 (1994).

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[9] And has been for some time. In 1962, one commentator summarized the constitutional status of *mens rea* with the quip "[*m*]*ens rea* is an important requirement, but it is not a constitutional requirement, except sometimes." Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 107 (1962).

But the Supreme Court has been at pains not to constitutionalize *mens rea*. *See*, *e.g.*, *Smith v. California*, 361 U.S. 147, 150 (1959) ("[I]t is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of scienter. . . ."); *United States v. Balint*, 258 U.S. 250, 252 (1922) ("[I]n the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." (internal quotation marks omitted)). In particular, the Supreme Court has never held that a strict liability possession statute violates the Due Process Clause. At most, it has suggested in dicta that a legislature might be unable to create a strict liability ban on indisputably harmless and everyday items. *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971) (stating that a strict liability ban on "[p]encils, dental floss, [and] paper clips" "might raise substantial due process questions"). Assuming *arguendo* that *International Minerals* accurately locates the constitutional line, the gravity knife law falls comfortably on the safe side of it. A knife is not a paper clip.

Amici's argument to the contrary relies chiefly on cases interpreting federal statutes. These decisions teach that a court should infer a *mens rea* requirement into federal statutes that forbid possession of "apparently innocent," even if "potentially harmful," devices, including ones as destructive as machine guns. *Staples*, 511 U.S. at 610, 611. *Amici* seem to suggest that

we should adopt the statutory rule as the constitutional rule, if only because it is readily at hand. We reject this invitation. The Supreme Court has long been careful to frame its *mens rea* holdings as matters of statutory interpretation. Indeed, *Staples* itself notes that Congress "remains free to amend [the statute] by explicitly eliminating a *mens rea* requirement." *Id.* at 615–16 n.11. As the Court has no more than sketched a possible outer constitutional limit that lies well beyond the gravity knife law, *see Int'l Minerals*, 402 U.S. at 564–65, we reject the due process argument.

CONCLUSION

Although we conclude that plaintiffs' facial challenge to the gravity knife law is unsuccessful, we note that legitimate questions have been raised about the statute's implementation. The statute's reliance on a functional test and imposition of strict liability on what can be a common, if dangerous, household tool might in some instances "trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108. And while the plaintiffs did not show that the statute invites arbitrary enforcement as that term is used in the vagueness doctrine, *see Morales*, 527 U.S. at 60–64, the sheer number of people who carry folding knives that might or might not respond to the wrist-flick test raises concern about selective enforcement.

For these reasons, we believe that the legislative and executive branches may wish to give further attention to the gravity knife law. Heeding the Supreme

Court's admonition that facial challenges are disfavored because they "threaten to short circuit the democratic process," *Wash. State Grange*, 552 U.S. at 451, we must stay our hand and defer to New York's political branches.

The judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN COPELAND, PEDRO PEREZ, AND NATIVE LEATHER, LTD., Plaintiffs, -v- CYRUS VANCE, JR., in his Official Capacity as the New York County District Attorney, and CITY OF NEW YORK, Defendants.	11 Civ. 3918 (KBF) OPINION & ORDER (Filed Jan. 27, 2017)

KATHERINE B. FORREST, District Judge:

Plaintiffs John Copeland, Pedro Perez, and Native Leather, Inc. ("Native Leather") assert an as-applied constitutional challenge to the validity of New York Penal Law §§ 265.00(5) and 265.01(1), which criminalize the possession of gravity knives (the "Gravity Knife Law" or "Gravity Knife Statute"). (*See* Amended Complaint ¶¶ 59-60, ECF No. 61.) The Gravity Knife Statute defines a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." N.Y. Penal Law § 265.00(5). Defendants employ a functional test – referenced as the "Wrist-Flick test" – to

determine whether a knife falls within the prohibitions of the Gravity Knife Law. Under the New York Penal Law, a person who possesses a gravity knife is "guilty of criminal possession of a weapon in the fourth degree." N.Y. Penal Law § 265.01(1).

Plaintiffs contend that the definition of a gravity knife in the Gravity Knife Statute, as measured by the Wrist-Flick test, is unconstitutionally vague in violation of the Fourteenth Amendment. Specifically, plaintiffs argue that the Gravity Knife Statute is unconstitutionally vague as applied to "Common Folding Knives," which plaintiffs define as "folding pocket knives that are designed to resist opening from the closed position." (Amended Complaint ¶ 1.)

The core of plaintiffs' challenge is that enforcement of the Gravity Knife Statute through use of the Wrist-Flick test prevents an individual from ever knowing whether a Common Folding Knife that they possess (or would like to possess) is an illegal gravity knife. This is so, according to plaintiffs, primarily because the Wrist-Flick test is inherently subjective and indeterminate in that outcomes of the test necessarily reflect personal characteristics of the tester such as skill and dexterity. In support of their position, plaintiffs proffer various hypotheticals. For example, plaintiffs argue that "[a] person's ability to flick open a knife will vary based on degree of tiredness, injury, etc. . . . Suppose a person has a blister or cut on his strong hand, or has injured his hand or arm. That person will be entirely unable to perform the Wrist Flick [t]est, or his ability will be diminished." Plaintiffs likewise

argue that someone might be arrested for possession of a gravity knife if they encounter a strong and well rested police officer, whereas they might not be arrested if they encountered a weak and tired officer. Based on these and other hypotheticals, plaintiffs conclude that application of the Gravity Knife Law to Common Folding Knives is void for vagueness under the Fourteenth Amendment because no one can determine with any reasonable degree of certainty which Common Folding Knives are legal to possess and/or sell. Plaintiffs assert that the Gravity Knife Law ought to prohibit only those knives that can open by the force of gravity alone, using as their prototypical example "German Paratrooper Knives."

After careful review and consideration, the Court determines that plaintiffs' as-applied vagueness challenge fails and judgment must be entered for defendants. In reaching this determination, the Court hews closely to the facts relating to the particular plaintiffs now before the Court. As to these plaintiffs, the statute provided sufficient notice that their conduct was prohibited. With regard to plaintiffs' claims of future harm due to alleged vagueness inherent in the Wrist-Flick test, the Court finds that none of the plaintiffs has demonstrated that the many hypotheticals that the parties have so vigorously debated is in fact reasonably likely to occur to him or her. Furthermore, the Court concludes that the Gravity Knife Law provides sufficiently clear standards for law enforcement, and that in any event, plaintiffs' conduct fell within the core of the statute's prohibitions.

I. PROCEDURAL HISTORY

This case was initially filed on June 9, 2011. After a trip to the Second Circuit and back,[1] the parties conducted discovery and proceeded to trial. The parties agreed to a trial proceeding that was largely on the papers. Plaintiffs presented affirmative evidence in the form of written submissions. Specifically, plaintiffs presented declarations from each of plaintiffs John Copeland, Pedro Perez, and Carol Walsh (for Native Leather); declarations from experts Bruce Voyles and Paul Tsujimoto; and a declaration from Douglas S. Ritter. Defendants also presented evidence in the form of written submissions. Defendants presented declarations from Assistant District Attorney Dan Rather and the following members of the New York Police Department: Sergeant Tomas Acosta, Lieutenant Daniel Albano, Sergeant Noel Gutierrez, Detective Ioannis Kyrkos, and Lieutenant Edward Luke. The Court also received deposition designations for Captain Michael Tighe, Lieutenant Albano, Sergeant Acosta, Assistant D.A. Rather, Walsh, and Tsujimoto.[2]

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[1] This Court initially dismissed plaintiffs' complaint for lack of standing. (ECF No. 80; *see also* ECF No. 95.) The Second Circuit vacated and remanded that decision in part, finding that although one of the plaintiffs did not have standing, plaintiffs Copeland, Perez, and Native Leather had standing to bring the instant challenge. *See Knife Rights, Inc. v. Vance*, 802 F.3d 377 (2d Cir. 2015).

[2] In addition to the papers submitted by the parties, the Court received a motion to file an *amicus curiae* brief by the Legal Aid Society. (ECF No. 159.) The Legal Aid Society submitted their proposed *amicus curiae* brief alongside their motion papers. (ECF

In addition to receiving written submissions, the Court held a live evidentiary hearing on June 16, 2016, which included a presentation by Douglas Ritter[3] (subject to cross-examination) and a cross-examination of Assistant District Attorney Rather. Both sides also presented closing arguments.

II. FINDINGS OF FACT[4]

A. Statutory Framework

1. New York Penal Law §§ 265.00(5) and 265.01(1)

Under the New York Penal Law, "[a] person is guilty of criminal possession of a weapon in the fourth degree when: (1) he or she possesses any . . . gravity knife." N.Y. Penal Law § 265.01(1). Criminal possession of a weapon in the fourth degree is a class A

No. 159-1.) The Court also received an opposition to the motion from defendants (ECF No. 162) as well as a reply from the Legal Aid Society (ECF No. 163). Having considered these submissions, the Court denies the motion by the Legal Aid Society (ECF No. 159). District courts have discretion in deciding whether to accept *amicus* briefs. Under the particular circumstances presented here, the Court declines to entertain or accept the filing. In their proposed *amicus curiae* brief, the Legal Aid Society presents various facts outside of the trial record and relating to individuals other than plaintiffs here. In all events, neither the facts presented nor the arguments would alter the outcome of this matter.

[3] Ritter is the founder and Chairman of Knife Rights, a former plaintiff in this case. (Ritter Decl. ¶ 1.)

[4] The majority of the facts in the trial record are undisputed. To the extent that the Court must make a finding as between competing assertions, it does so based upon the preponderance of the evidence.

misdemeanor. N.Y. Penal Law § 265.01. The statute defines a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." N.Y. Penal Law § 265.00(5) (together with § 265.01(1), the "Gravity Knife Law" or "Gravity Knife Statute").[5] Thus, the Gravity Knife Statute consists of two separate requirements: (1) a knife must open by force of gravity *or* the application of centrifugal force, and (2) once the blade of the knife is released, it must lock in place by means of a button, spring, lever or other device. *See* N.Y. Penal Law § 265.00(5).

To meet the first statutory requirement of the Gravity Knife Law, it is clear that a knife need not open by both gravity and the application of centrifugal force; if a knife opens by centrifugal force alone and the blade locks in place once released, the knife is an illegal gravity knife. *See U.S. Customs Serv., Region II v. Fed. Labor Relations Auth.*, 739 F.2d 829, 832 (2d Cir. 1984) ("When 'or' is inserted between two clauses, the clauses are treated disjunctively rather than conjunctively.");

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[5] New York first prohibited gravity knives in 1958, and the definition of such knives remains the same today. *See* 1958 N.Y. Laws ch. 107, sec. 1, § 1896. The Court notes that on December 31, 2016, Governor Andrew Cuomo vetoed Assembly Bill 9042-A, entitled: "AN ACT to amend the penal law, in relation to definitions of a switchblade knife and a gravity knife." (*See* ECF No. 193.) The vetoed bill, which would have altered the statutory definition of a gravity knife, has no effect on the issues before the Court (and no impact on the Court's decision).

see also Mizrahi v. Gonzales, 492 F.3d 156, 164 (2d Cir. 2007) ("It is a standard canon of statutory construction that words separated by the disjunctive ['or'] are intended to convey different meanings unless the context indicates otherwise."). As described below, the Court finds that the Wrist-Flick test measures whether a knife opens by centrifugal force.

2. The "Wrist-Flick test"

There is no dispute that the definition of a gravity knife, as drafted in the statute, is a functional one. To determine whether a particular knife meets that statutory definition, defendants utilize the "Wrist-Flick test." The Wrist-Flick test is just what its name suggests: using the force of a one-handed flick-of-the-wrist to determine whether a knife will open from a closed position. Both the statutory text[6] and existing New York precedent make clear that the Wrist-Flick test measures whether a knife opens by centrifugal force.

Centrifugal force is defined as "the apparent force that is felt by an object moving in a curved path that acts outwardly away from the center of rotation." *Centrifugal force*, Merriam-Webster Online Dictionary,

[6] The Court also notes that at least some of the Gravity Knife Statute's legislative history supports this conclusion. The 1957 Bill Jacket of the Gravity Knife Law included a New York Times article from December 1957 that describes a sponsor of the statute opening a gravity knife by "flick[ing] his wrist sharply downward." (Ex. D-4 at 20.) Then, as now, knives which could be opened by a flick of the wrist were considered to be particularly dangerous.

https://www.merriamwebster.com/dictionary/centrifugal force (last visited Dec. 22, 2016). At trial, plaintiffs' counsel and Douglas Ritter both repeatedly sought to demonstrate what they purported was the Wrist-Flick test.[7] The New York Court of Appeals recently confirmed that a knife that opens via the Wrist-Flick test meets the statutory definition of a gravity knife.[8] *See*

[7] Portions of this demonstration were videotaped. Plaintiffs' counsel and Mr. Ritter demonstrated a number of knives, none of which were the make and model of the knives possessed by Copeland and Perez at the time of their arrests. (*See* June 16, 2016, Tr., ECF No. 191, at 26:09-22.) Furthermore, there was no evidence that either of these two plaintiffs would purchase one of the specific knives demonstrated if allowed to do so. Of the knives demonstrated, only one – a "Buck Crosslock" – was specifically identified as a knife that may have been confiscated from Native Leather or was a knife that Native Leather would sell. (*See* id. at 24:12-25:10, 26:23-27:04; *see also* Walsh Decl. ¶ 21.) In all events, there was a distinct difference between the maneuver employed by plaintiffs' counsel and Ritter and the Wrist-Flick test that is employed by NYPD officers and the D.A.'s Office. Assistant D.A. Rather testified credibly on this point. (*See* June 16, 2016, Tr., at 72:23-73:18.) Rather testified, and the Court credits, that the motion utilized by plaintiffs' counsel and Ritter was exaggerated and was not the Wrist-Flick test. (*See id.*) Accordingly, the Court found the demonstration interesting, but not relevant to the question of whether different applications of the Wrist-Flick test would have different outcomes.

[8] Courts have examined whether a knife must open on every attempt in order to be considered a gravity knife and have found that it does not. *See*, *e.g.*, *People v. Smith*, 309 A.D.2d 608, 609, 765 N.Y.S.2d 777 (1st Dep't 2003) (upholding conviction under the Gravity Knife Statute against evidentiary challenge where "the knife malfunctioned on some of the detective's attempts to operate it"); *see also Carter v. McKoy*, 2010 U.S. Dist. LEXIS 83246 at *13 (S.D.N.Y. Aug. 9, 2010) (noting that "under New York law, a knife need not work consistently in order to support the finding that it is a gravity knife"). This is plainly correct as the statute

People v. Sans, 26 N.Y.3d 13, 17, 41 N.E.3d 333 (2015) (statement in criminal complaint that the defendant's knife opened "with centrifugal force" conveyed that the officer "flicked the knife open with his wrist"); *see also People v. Herbin*, 927 N.Y.S.2d 54, 55-56 (1st Dep't 2011) (statutory definition of a gravity knife satisfied where "officers release the blade simply by flicking the knife with their wrists"); *People v. Neal*, 913 N.Y.S.2d 192, 194 (1st Dep't 2010) (operability of knife conformed to statute where officer opened the knife "by centrifugal force, created by flicking his wrist"); *Johnson v. New York*, 1988 U.S. Dist. LEXIS 9397, at *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.").

As the statutory text and above analysis illustrates, New York Penal Law § 265.00(5) employs a functional test to identify a gravity knife. "The intended use or design of the knife by its manufacturer is not an element of the crime and is irrelevant to the issue of whether the knife is a gravity knife." *People v. Fana*, 2009 N.Y. Misc. LEXIS 956, at *9 (N.Y. County Crim. Ct. 2009). By contrast, other Penal Law provisions incorporate the design of a weapon into their definitions. *See*, *e.g.*, Penal Law § 265.00(11) ("'Rifle' means a weapon designed . . . "); § 265.00(12) ("'Shotgun' means a weapon designed . . . "); § 265.00(14) ("'Chuka stick' means a weapon designed . . . "); § 265.00(15-a)

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does not, on its face, require any particular number of applications of gravity or centrifugal force.

(" 'Electric dart gun' means any device designed . . . "). Furthermore, under the Gravity Knife Statute, a gravity knife is a *per se* illegal weapon: if a person possesses one, whether or not he knows that it is a gravity knife, he is in violation of § 265.01(1). *See* N.Y. Penal Law § 265.00(5).

Throughout this case, plaintiffs have maintained that the Wrist-Flick test inappropriately expands the boundaries of the Gravity Knife Statute and that, in fact, gravity knives are and should be limited to a very specific subset of knives – those that are capable of opening solely as a result of gravity, that is, holding the knife upside down. According to plaintiffs, "Common Folding Knives" – which plaintiffs define as "folding pocket knives that are designed to resist opening from the closed position" – are not gravity knives.[9] In support of this argument, plaintiffs point to the legislative history of the Gravity Knife Statute[10] and have

[9] The term "Common Folding Knife" used by plaintiffs has no meaning under New York law.

[10] Plaintiffs also cite *United States v. Irrizary*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007) to argue that a folding knife cannot be classified as a gravity knife because of its design. (Plaintiffs' Opening Trial Brief and Proposed Findings of Fact and Conclusions of Law ("Pltfs' PFOF"), ECF No. 128, at 14 ¶ 32.) *Irizarry* did not involve a vagueness challenge, or a challenge to law enforcement's practice of using the Wrist-Flick test to identify gravity knives. Rather, in that case, the court held that the arresting officer did not have probable cause to believe that the defendant's knife was a gravity knife – despite the fact that it opened by application of the Wrist-Flick test – because the knife was "designed, sold, and used as a folding knife" and "was obviously not designed to be opened [by a Wrist-Flick] and does not readily open through such force." *Irizarry*, 509 F. Supp. 2d at 210.

proffered expert opinions from Paul Tsujimoto, who is an expert in knife design,[11] and Bruce Voyles, who has experience in the history of knives.[12] Plaintiffs have also offered testimony from Douglas Ritter, who is the founder and Chairman of Knife Rights, Inc., a former plaintiff in this case.

Tsujimoto and Voyles purport to offer factual, not legal opinions. Yet, their opinions are primarily directed at how the Gravity Knife Statute should be interpreted in order to implement what they describe as the historical origins of gravity knives and the historical usage of the term "gravity knives." Before proceeding further, the Court therefore notes that it could largely ignore Tsujimoto and Voyles's opinions on relevancy grounds alone, as the legal interpretation of the Gravity Knife Statute is beyond the proper scope of their expertise. The Court nevertheless provides an

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The facts of that case are important and distinguishable from those here. There, the arresting officer could not "readily open" the defendant's knife by application of the Wrist-Flick test and required "three strenuous attempts" to do so. *Irizarry*, 509 F. Supp. 2d at 204, 210. In addition, and perhaps based on its particular facts which rendered certain distinctions less meaningful, the court then stated that the knife at issue "was designed and sold as a folding knife," when the test is *functional* and not design based.

[11] Tsujimoto is currently Vice President of Engineering for Ontario Knife Company and states that he has "spent the last 27 years of [his] 39 year working career in the cutlery industry." (Tsujimoto Decl. ¶ 3.)

[12] Voyles is currently Editor-at-Large at Knife Magazine, and states that he has been a cutlery journalist and writer since 1977 and has owned a knife auction company since 1999. (Voyles Decl. ¶¶ 4-5.)

overview of Tsujimoto and Voyles's opinions, as plaintiffs rely heavily upon them. These opinions do not alter the Court's conclusion that the Wrist-Flick test appropriately applies centrifugal force under the Gravity Knife Statute to determine whether Common Folding Knives are illegal gravity knives.

Tsujimoto opines that the Wrist-Flick Test "is not a true test for centrifugal force" but rather involves "a misinterpretation of the term 'centrifugal force.'" (Tsujimoto Decl. ¶¶ 44, 50.) Tsujimoto does not deny that the Wrist-Flick test employs the use of centrifugal force; he concedes that centrifugal force is "imparted during the initial arm and wrist movement." (*Id.* ¶ 50.) Rather, Tsujimoto opines that "[i]t is th[e] sudden stopping of the blade and the inertia of the blade continuing to move, not centrifugal force, which opens the blade." (*Id.* ¶ 51) According to Tsujimoto, the statute covers only knives that open without "the sudden stopping of the arm and wrist" that Tsujimoto alleges is involved in the "second part of the [Wrist-Flick test]." (*Id.*)

Tsujimoto concludes that the statute covers only knives similar to German Paratrooper Knives. (Tsujimoto Decl. ¶ 26.) Tsujimoto states that this is "the understanding that knife companies have had since the 1950's." (*Id.* ¶¶ 11-26, 52.) Voyles reaches a similar conclusion.[13] (Voyles Decl. ¶¶ 8-10, 16.) Voyles bases his

[13] Voyles traces the history of gravity knives back to the 1800's and states that original gravity knives were similar to "German Paratrooper Knives" prevalent during WWII. (*See* Voyles Decl. ¶¶ 11-13.)

opinion on his "more than 35 years in the cutlery trade" and his review of historical references to gravity knives. (*Id.* ¶ 10, 15-24, 37-40.)

Tsujimoto explains that, by design, the German Paratrooper Knife easily slides out from the handle based on gravity alone – that is, holding it upside down causes the knife to slide out. (Tsujimoto Decl. ¶ 26; *see also* Voyles Decl. ¶ 16.) Tsujimoto further explains that a German Paratrooper Knife also easily slides out from the handle if one were to hold the knife handle pointing outward, away from their body, and rotate the arm around the shoulder, such as in a chair seat so that the individual spins around on the chair frame (what Tsujimoto describes as the "Swivel Chair Test"). (Tsujimoto Decl. ¶¶ 22, 51.) Tsujimoto opines that the type of centrifugal force intended by the Gravity Knife Statute must be only that which is necessary to open a German Paratrooper Knife via the Swivel Chair Test. (*Id.* ¶ 51.) Voyles also reaches a similar conclusion. (*See* Voyles Decl. ¶ 8-10.) The Court notes that despite this testimony from Tsujimoto and Voyles, plaintiffs did not argue that the Gravity Knife Statute is unconstitutionally vague because it does not involve the application of centrifugal force to open a knife. In fact, plaintiffs forfeited any such argument. (Plaintiffs' Reply/Rebuttal Trial Brief, Objections, and Opposition to Motion to Strike/Motion in Limine ("Reply Mem."), ECF No. 153, at 12.)[14] Furthermore, how a German

[14] Plaintiffs state: "Whether or not a folding knife actually opens by centrifugal force (as engineers and physicists understand the term) or opens by inertia or a combination of the two has no impact on the vagueness argument."

Paratrooper Knife functions is a point that defendants do not contest but assert is irrelevant. The Court agrees.

Relatedly, plaintiffs spent a fair amount of time on evidence regarding "bias" as it relates to the blade of a knife: "bias toward opening" and its opposite, "bias toward closure." Tsujimoto explains that switchblades and German Paratrooper Knives are examples of knives with a "bias toward opening." (Tsujimoto Decl. ¶ 28; *see also* Voyles Decl. ¶ 14; Ritter Decl. ¶ 15.) In contrast, according to Tsujimoto, "folding knives" (such as slip joints, lock backs, and liner locks) have a "bias toward closure." (Tsujimoto Decl. ¶ 29.) Different types of locking mechanisms – including liner locks and lock backs – correspond with differences in resistance to opening. (*Id.* ¶¶ 35, 46(1).)[15] Knives which have a bias toward closure feature blades that are held in the closed position by a spring or other mechanism, and the blade will remain in the closed position until the blade is manipulated to overcome the closing tension. (*Id.* ¶ 34.)

Plaintiffs have submitted evidence that differences in the manufacturing process can result in

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[15] In both types of knives, the same device that creates tension on the blade also locks it in place once open. (Tsujimoto Dep. at 85:7-86:1.) In a liner lock, that device is a metal cutout in the side of the handle, called the liner, which snaps across the back side of the blade as the blade opens to lock it in the open position. (Tsujimoto Dep. at 85:7-15; Tsujimoto Decl. ¶ 35; Ex. P-12.) In a lock back, that device is a spring-loaded bar that wedges itself into a notch on the blade to prevent it from closing. (Tsujimoto Dep. at 84:17-22, 102:21-103:10; Tsujimoto Decl. ¶ 35; Ex. P-11.)

differences between how knives of the same brand and model open. (Tsujimoto Decl. ¶ 46(2).) Defendants did not contest this evidence. (*See* Rather Decl. ¶ 23.) It is also clear that use of a knife over time may create differences in how the same knife opens at one point in time versus another. (Tsujimoto Decl. ¶ 46(3).) Loosening in joints and screws, resulting from, *inter alia*, use over time, may result in a knife opening by centrifugal force with a Wrist-Flick when it had not previously. By the same token, a knife that once opened with application of the Wrist-Flick test may not later. For example, if the knife has been stored continuously in a cold or arid location, or the knife has been exposed to moisture causing corrosion on the blade or in the handle. (Rather Decl. ¶ 24.)

Tsujimoto concludes that folding knives with a "bias toward closure" will not open with what he describes as "centrifugal force" (i.e., via the Swivel Chair Test), and therefore, in his opinion, should not meet the statutory definition of a gravity knife. (Id. ¶¶ 34, 49.) These opinions are here, again, largely irrelevant to the issues before the Court. Despite plaintiffs' vigorous arguments as to how they would like to *re*interpret the Gravity Knife Statute,[16] basic statutory interpretation is a legal, not factual, question. The application of centrifugal force through the Wrist-Flick test may result in the opening of a knife with bias toward opening or closure. While the knife design industry may

[16] Plaintiffs acknowledge, as they must, that "it is clear that under New York law, a Common Folding Knife can be considered a gravity knife." (Reply Mem. at 3.)

differentiate between knives just as Tsujimoto and Voyles state, those opinions do not mean that the legal definition of a gravity knife under the Gravity Knife Statute tracks those views.

3. Enforcement

While being trained at the Police Academy, officers of the New York Police Department ("NYPD") are instructed on the Penal Law definition of a gravity knife and the charges to be imposed for its possession. (Acosta Dep. at 28:06-30:09; Gutierrez Decl. ¶ 15; Kyrkos Decl. ¶ 14.) The law enforcement personnel involved in testing the knives possessed by plaintiffs here had such training. The evidence at trial made it clear that the same Wrist-Flick test has been used by the NYPD to identify gravity knives since the statute's effective date. The evidence supports consistent, continued application of this historical practice under the current New York District Attorney, Cyrus Vance, Jr. New police officers are trained to use the same test that officers were trained to use decades ago. Moreover, there is no evidence that the manner of conducting the Wrist-Flick test is, in fact, different from officer to officer.[17] Finally, there is no evidence in the record that

[17] In his trial declaration, Ritter claims that in his experience, "every individual who attempted a wrist flick maneuver executed it in their own individual manner. There was never any obvious consistency in execution between individuals nor often consistency even by the same individual when conducting multiple attempts at such maneuvers." (Ritter Decl. ¶ 20.) The Court does not credit this testimony, and finds that the record supports consistent application of the Wrist-Flick test.

two different police officers – each applying the Wrist-Flick test to a knife (either plaintiffs' or any other person's) on the same occasion – had different outcomes.[18] In other words, while plaintiffs have described hypothetical scenarios that are possible, they did not introduce sufficient evidence for the Court to find that any of the scenarios are probable as to plaintiffs or anyone else. There was no evidence, for instance, that a strong or well rested officer was once able to open a knife with the Wrist-Flick test while a weaker or tired officer was not; there was likewise no evidence that dexterity resulted in different outcomes.[19] In short, the evidence supports a known, consistent functional test for determining whether a knife fits the definition of a "gravity

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[18] There was evidence that when Assistant D.A. Rather and his staff were testing Native Leather's array of knives, there were some that had different outcomes under the Wrist-Flick test after multiple attempts by different individuals. However, in the sole specific example Rather gave, he discussed a knife that opened only once in ten attempts. (*See* Rather Dep. 43:12-44:6.) Rather specifically stated that such a knife was not one that the D.A's office was "going to determine to be a gravity knife." (*Id.* 44:07-45:2.) Plaintiffs did not pursue whether there were specific Native Leather knives tested fewer times with different outcomes that were nonetheless deemed gravity knives.

[19] Ritter also claims in his trial declaration that on many occasions he was able to open a Common Folding Knife by application of the Wrist-Flick test where someone else was not. (Ritter Decl. ¶ 16.) The Court finds that, even accepting this testimony, the record supports consistent application of the Wrist-Flick test. As a whole, the record does not suggest that the manner of conducting the Wrist-Flick test is, in fact, different from officer to officer.

knife" and does not support inconsistent outcomes under that test.

Prosecutions charging gravity knife possession constitute a very small fraction of the total number of misdemeanor prosecutions commenced in New York County each year. (Rather Decl. ¶¶ 33-34.) The record fully supports that arrests and prosecutions for possession of a gravity knife only occur once a knife has opened in response to the Wrist-Flick test. Prosecutions are not – and were not with regard to plaintiffs here – initiated based on a theoretical possibility that a knife could, might, or should open in response to a Wrist-Flick; they are commenced only if and when a knife does. (Rather Decl. ¶ 25.)

B. The Plaintiffs

1. Native Leather

Native Leather is a corporation organized under New York law that operates a retail store (with the same name) in Manhattan. (Walsh Decl. ¶ 2.) The retail store sells mostly men's accessories and leather goods, including, *inter alia*, folding pocket knives. (*Id.*) Carol Walsh is the owner and President of Native Leather. (Walsh Decl. ¶ 1.)

In 2010, during an investigation by the New York District Attorney's Office, investigators purchased knives from Native Leather and subjected them to the Wrist-Flick test. Upon application of the Wrist-Flick test, investigators determined that Native Leather

was, in fact, offering gravity knives for sale to the public. (Rather Decl. ¶ 42.) The D.A.'s Office then issued a subpoena to Native Leather, which required it to produce those knives in its inventory that met the statutory definition of a gravity knife under the New York Penal Law. (Ex. P-1; *see* Rather Dep. at 16:11-19, 37:8-23; Walsh Decl. ¶ 4.) After she received the subpoena, Walsh reviewed the Gravity Knife Statute and understood that she could not sell knives that met the description of what "the DA's Office was looking for," but that she could sell anything outside of that description. (Walsh Dep. at 9:14-22; *see also id.* at 57:4-12.) Even though she had been in business for a number of years, Walsh was not certain that she had ever read the definition of a gravity knife in the Penal Law before this time. (Walsh Dep. at 57:4-12.)[20] In response to the subpoena, Walsh collected and provided to the D.A.'s Office "almost every folding knife that [she] thought could be opened with one hand, with or without gravity or centrifugal force," for a total of over three hundred knives. (Walsh Dep. at 64:17-65:10.)

The D.A.'s Office subjected each knife to the Wrist-Flick test. Assistant D.A. Rather either personally tested each knife or observed other members of the District Attorney's staff personally test each knife. (Rather Decl. ¶ 45.) A number opened. It appears that one

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[20] Prior to receiving the subpoena, the only precaution Walsh took to ensure that she was not selling illegal gravity knives was a trip to the 6th precinct, in early 2000, to inquire about "Iceberg Army Navy," another retail store that had its knife inventory "confiscated" (or so she had heard). (Walsh Dep. at 57:13-59:1.)

or more of those knives opened only after multiple attempts of the Wrist-Flick test by different individuals. (Rather Dep. 43:15-44:06.) However, the record contains significant ambiguity on this point, and in particular, regarding the number of Wrist-Flick attempts applied to any particular knife, whether two different individuals had different outcomes, and whether in all events knives requiring multiple attempts were designated as gravity knives or were returned to Native Leather. In short, the Rather testimony on this issue was never clarified by plaintiffs and is therefore useless as proof of any particular point with respect to plaintiffs' specific knives. For instance, during questioning regarding Native Leather [sic] his deposition, plaintiffs asked D.A. Rather: "And did you ever have the circumstance arise where a knife passed the functional test with one person, but failed it with another?" (Rather Dep. 43:15-17.) D.A. Rather responded: "In a fashion. Gravity knives by law don't have to open each and every time. . . ." (Rather Dep. 43:18-20.) Plaintiffs continued to question D.A. Rather but framed their questions as hypotheticals instead of focusing specifically on the events that occurred with regard to Native Leather.

The D.A.'s Office retained those knives submitted by Native Leather that the D.A.'s office determined, by application of the Wrist-Flick test, to be illegal gravity knives. (Rather Dep. at 39:16-40:17, 41:24-43:11; Rather Decl. ¶¶ 45-46; Walsh Dep. at 65:11-23.) None of the knives that Native Leather provided to the D.A.'s Office were German Paratrooper Knives. (Rather Decl.

¶ 48.) Each of the knives that functioned as a gravity knife could also be described as a type of folding knife.[21] (Rather Decl. ¶ 47.)

On June 15, 2010, Walsh entered into a deferred prosecution agreement with the D.A.'s Office. (Ex. P-2; *see* Walsh Decl. ¶ 12.) She agreed, *inter alia*, not to sell gravity knives and to personally test Native Leather's inventory for gravity knives. (Walsh Decl. ¶¶ 13, 15.)

Walsh tests knives that she determines need testing based on her experience selling knives for "many, many years." (Walsh Dep. at 23:9-24:5; *see also id.* at 66:21-67:4.) For example, Walsh testified that a knife that does not lock in the open position – such as a Swiss Army knife – does not need to be tested because there is no way it will lock automatically upon opening. (Walsh Dep. at 23:14-24.) Similarly, she testified that a knife that locks in the closed position does not need to be tested because there is no way it could be opened with one hand. (Walsh Dep. at 23:14-21.) Walsh began testing Native Leather's knives herself in September 2010. (Walsh Dep. at 42:2-12.) After identifying which knives need to be tested, Walsh applies the Wrist-Flick test. (Walsh Dep. at 24:15-25:10.) If Walsh can't open a particular knife using the Wrist-Flick test but determines that a "stocky [man]" could open the knife with a Wrist-Flick, she rejects it and does not place it in her inventory for sale. (Walsh Dep. at 21:15-25:10.) Walsh

[21] Defendants submitted demonstrative videos of counsel opening certain of Native Leather's knives with application of the Wrist-Flick test. (Rather Decl. ¶¶ 53-55, 58-59, 63, 66; Exs. D-10, D-11, D-14, D-15, D-18, D-20, D-21.)

testified that she understands that certain knives, while not designed to open by the application of gravity or centrifugal force, may nonetheless function as gravity knives. (Walsh Dep. at 67:16-68:16.)

As part of the deferred prosecution agreement, Walsh also agreed to the appointment of an independent monitor to inspect the books, records, and inventory of Native Leather. (Walsh Decl. ¶ 13.) Kroll Inc. was selected by the D.A.'s Office to fulfill that role. (Walsh Decl. ¶ 17; Rather Dep. at 35:13-15.) In May 2011, Kroll employees tested certain of Native Leather's knives employing the Wrist-Flick test. (Walsh Decl. ¶ 20.) Walsh was present at the time. According to Walsh, "if the blade swung out of the knife, it was loose enough to be called a gravity knife"; conversely, "if the blade was snug into the handle [and] it wouldn't come out," the Kroll employees would not classify the knife as a gravity knife. (Walsh Dep. at 18:2-19:3.)

2. John Copeland

John Copeland is a resident of Manhattan. In October 2009, Copeland purchased a Benchmade brand knife at Paragon Sports in Manhattan. (Copeland Decl. ¶ 3.) In his trial declaration, Copeland states that shortly after purchasing the knife, he showed it to two different NYPD officers and that both officers applied the Wrist-Flick test to the knife. (Copeland Decl. ¶ 5.) Copeland testified that because both officers could not open the knife using the Wrist-Flick test, they told him that the knife was legal and returned it to him. (*Id.*)

Thereafter, Copeland regularly used the knife in connection with his work as a painter and sculptor. (Copeland Decl. ¶¶ 1, 4.) A year after his initial purchase of the knife, Copeland had the knife clipped to his pocket and was stopped in Manhattan by Sergeant Noel Gutierrez and Detective Ioannis Kyrkos of the NYPD. (Copeland Decl. ¶ 7; Gutierrez Decl. ¶¶ 4-5, Kyrkos Decl. ¶¶ 4-5.) According to Sergeant Gutierrez and Detective Kyrkos, Copeland told the officers that he used the knife in connection with his employment as a mechanic. (Gutierrez Decl. ¶ 7; Kyrkos Decl. ¶ 9.) In Copeland's presence, Detective Kyrkos applied the Wrist-Flick test to Copeland's knife by gripping the handle of the knife and flicking his wrist in a downward motion. (Gutierrez Decl. ¶¶ 8-9, Kyrkos Decl. ¶¶ 7-8.) The knife opened on the first attempt and the blade locked into place. (Gutierrez Decl. ¶ 8, Kyrkos Decl. ¶ 7.) The officers then placed Copeland under arrest for Criminal Possession of a Weapon in the Fourth Degree in violation of New York Penal Law § 265.01(1). (Gutierrez Decl. ¶ 11, Kyrkos Decl. ¶ 11.) Prior to the events giving rise to his arrest for gravity knife possession, Copeland knew that the New York Police Department employed the Wrist-Flick test to identify illegal gravity knives. (Copeland Decl. ¶ 5.) The Court finds that Copeland's knife met the definition of a gravity knife and the ability of Copeland's knife to open by application of the Wrist-Flick test immediately prior to his arrest, as compared to its inability to open a year earlier, was due to usage over time.

At the precinct, Copeland was given a Desk Appearance ticket and was then released. (Copeland Decl. ¶ 7, Gutierrez Decl. ¶¶ 11-12.) On November 3, 2010, Sergeant Gutierrez signed a criminal court complaint charging Copeland with possession of a gravity knife. (Gutierrez Decl. ¶¶ 13, 22-25; Ex. D-3.) On January 26, 2011, Copeland accepted an Adjournment in Contemplation of Dismissal. (Copeland Decl. ¶ 9.)

Both Sergeant Gutierrez and Detective Kyrkos submitted trial declarations stating that they apply the Wrist-Flick test to determine whether a knife is a gravity knife. (Gutierrez Decl. ¶¶ 13, 17; Kyrkos Decl. ¶¶ 13, 16-17.) Both officers testified that they hold the handle of a knife and flick their wrist to apply centrifugal force – if the blade exits the handle and locks into place, the knife is a gravity knife. (Gutierrez Decl. ¶ 17; Kyrkos Decl. ¶ 17.) Sergeant Gutierrez and Detective Kyrkos learned how to apply the Wrist-Flick test during their time as probationary officers by observing other officers use the test, as well as through their own first-hand experience during that time. (Gutierrez Decl. ¶ 16; Kyrkos Decl. ¶ 15.) Both Sergeant Gutierrez and Detective Kyrkos have consistently, and exclusively, used the Wrist-Flick test to identify gravity knives over the course of their careers. (Gutierrez Decl. ¶¶ 17-18, Kyrkos Decl. ¶¶ 16-18.)

In his trial declaration, Copeland states that he will not purchase a folding knife in New York similar to the Benchmade brand knife that he was previously arrested for because he fears future arrest and prosecution. (Copeland Dec. ¶ 11.)

3. Pedro Perez

Pedro Perez also resides in Manhattan. In approximately April 2008, he purchased a Gerber brand folding knife from a retailer in Manhattan. (Perez Decl. ¶ 4.) The knife had a stud mounted on the blade that enabled the user to open it with one hand by "swivel[ing]" the blade open with his thumb. (Perez Decl. ¶ 5.) Perez, who is a "purveyor of fine arts," regularly used the knife to cut canvas and open packaging. (Perez Decl. ¶¶ 1, 3, 5.) Two years after Perez purchased the knife, on April 15, 2010, Lieutenant Luke observed the knife clipped to the pocket of Perez's pants and stopped Perez inside a New York City subway station. (Perez Decl. ¶ 6; Luke Decl. ¶¶ 4-11.) Police Officers Julissa Sanchez and Ray DeJesus were present with Lieutenant Luke when he stopped Perez. (Luke Decl. ¶ 4-11.) All three officers were assigned to the Anti-Crime Unit. (Luke Decl. ¶ 4.)

In Perez's presence, Lieutenant Luke applied the Wrist-Flick test to Perez's knife by gripping the handle of the knife and flicking his wrist in a downward motion away from his body.[22] (Luke Decl. ¶ 12.) The knife

[22] Lieutenant Luke, who is now retired, served as an officer in the New York Police Department for twenty-two years and has been involved in approximately one hundred and fifty arrests for possession of a gravity knife. (Luke Decl. ¶¶ 1, 3, 21.) Lieutenant Luke consistently and exclusively used the Wrist-Flick test to identify gravity knives over the course of his career. (Luke Decl. ¶ 28.) Lieutenant Luke estimates that he has personally tested between forty and fifty gravity knives. (Luke Decl. ¶ 24.) Based on his training and experience, Lieutenant Luke understands a gravity knife to be a folding knife that possesses two

opened on the first application of the Wrist-Flick test and the blade locked in place automatically. (Luke Decl. ¶ 13.) Perez was then arrested. (Luke Decl. ¶ 15.) The arrest was assigned to Police Officer Angel Guerrero, who completed a Desk Appearance ticket charging Perez with possession of a gravity knife in violation of Penal Law § 265.01. (Luke Decl. ¶ 16; *see also* Perez Decl. ¶ 7.) The Court finds that Perez's knife met the definition of a gravity knife.

In his trial declaration, Perez states that the officers who arrested him could not open Perez's knife using the Wrist-Flick test but inexplicably charged him with possession of a gravity knife because it was "theoretically" possible to do so. (Perez Decl. ¶ 7.) The Court has no basis to credit this statement over the sworn statement of Lieutenant Luke, who was present on the scene at the time of the arrest. Perez did not contest the charge and accepted an Adjournment in Contemplation of Dismissal and agreed to perform seven days of community service. (Perez Decl. ¶ 8.)

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characteristics: the knife will open via gravity or the application of centrifugal force and, once open, the blade will lock into place automatically. (Luke Decl. ¶ 25.) Without exception, the gravity knives that Lieutenant Luke encountered during his career were folding knives. (Luke Decl. ¶ 24.) In Lieutenant Luke's experience, the resistance in a folding knife such as the one carried by Perez can change over time, either through regular use or intentional modification. (Luke Decl. ¶ 30.) Lieutenant Luke never charged someone with possession of a gravity knife if the knife in question did not open after the first or second application of the Wrist-Flick test, nor would he charge someone with possession of a gravity knife if Lieutenant Luke could open the knife via the Wrist-Flick test but another officer could not. (Luke Decl. ¶ 31.)

Indeed, the Court views this fact as some evidence that Perez understood his knife functioned as a gravity knife. But, in addition, the plaintiff carries the burden of proof in this matter and so when weighing statements of equal credibility, a tie goes to the defendants.

In his trial declaration, Perez states that he will not purchase a folding knife in New York similar to the Gerber brand knife that he was previously arrested for because he fears future arrest and prosecution. (Perez Dec. ¶ 10.)

III. CONCLUSIONS OF LAW

As the factual findings above detail, each of plaintiffs' knives met both of the statutory requirements under the Gravity Knife Law. The knives which plaintiffs possessed at the time of their arrests (or, in the case of Native Leather, those retained by the D.A.'s Office after compliance with the subpoena), opened with application of the Wrist-Flick test. Upon opening, the blades of such knives locked in place.

Plaintiffs now assert an as-applied constitutional challenge to the validity of the Gravity Knife Statute. The Gravity Knife Statute has been subject to a number of previous vagueness challenges, including as to the definitional provision. *See*, *e.g.*, *Herbin*, 86 A.D.3d at 446-447. Challenges to the constitutionality of a criminal statute on the basis of vagueness are brought pursuant to the guarantee in the Fourteenth Amendment that "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S.

Const. Amend. XIV, § 1. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *accord Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006).

A law that burdens constitutional rights or that imposes criminal penalties must meet a higher standard of specificity than a law that merely regulates economic concerns. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486, 195 [sic] (2016). This higher standard applies here because the Gravity Knife Law at issue imposes criminal penalties.

Based on these principles, the void-for-vagueness doctrine requires that "a penal statute define [sic] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 265 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Accordingly, "[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *VIP of Berlin, LLC v. Town of Berlin*,

593 F.3d 179, 186 (2d Cir. 2010) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

Throughout this litigation, plaintiffs have consistently characterized their claim as an "as-applied" challenge to the Gravity Knife Statute. (*See*, *e.g.*, Amended Complaint ¶ 60) ("The Due Process Clause of the Fourteenth Amendment invalidates Penal Law §§ 265.01(1) and 265.00(5) as void for vagueness, as applied to Common Folding Knives that are designed to resist opening from their folded and closed position."); Pltfs' PFOF, at 43 ("Plaintiffs' claim is straightforward. Plaintiffs assert that application of the Gravity Knife Law to Common Folding Knives is void for vagueness under the Fourteenth Amendment because no one can determine with any reasonable degree of certainty which Common Folding Knives are legal to possess and/or sell.") This characterization, however, "is in significant tension with [plaintiffs'] general failure to focus narrowly on the actual conduct in which they are engaged or would like to be engaged." *Expressions Hair Design v. Schneiderman*, 808 F.3d 118, 130 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 30 (2016).

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2449 (2015). Such challenges "are generally disfavored," *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010), and are "the most difficult . . . to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Outside of the First Amendment context, a facial challenge generally must show that "no set of circumstances exits under

which the [law] would be valid." *Dickerson*, 604 F.3d at 743 (alteration in original) (quoting *Salerno*, 481 U.S. at 745); *see Vill. of Hoffman Estates*, 455 U.S. at 497. In contrast, an as-applied challenge requires that a plaintiff show that the challenged statute is unconstitutional when applied to the particular facts of his or her case. *See Farrell*, 449 F.3d at 486; *see also Dickerson*, 604 F.3d at 745 ("To successfully make an as-applied vagueness challenge, the plaintiff must show that section 14-107 either failed to provide *them* with notice that the possession of their badges was prohibited or failed to limit sufficiently the discretion of the officers who arrested *them* under the statute.") (emphasis in original).

As noted above, plaintiffs frame their challenge to the Gravity Knife Statute as an applied challenge to all Common Folding Knives – defined by plaintiffs as knives that are "designed to resist opening from the closed position." Plaintiffs have not narrowed their challenge, however, to their specific conduct or specific Common Folding Knives (i.e. those that prompted the previous enforcement actions against plaintiffs).[23] (*See*, *e.g.*, Pltfs' PFOF at 1 ("[N]o-one can determine any longer whether a particular knife in their possession will be deemed illegal or prohibited"); Pltfs' PFOF at 53 ¶ 55 ("At its core, this entire case comes down to

[23] As explained by the Second Circuit, plaintiffs' standing to bring the instant challenge is predicated on their desire "to engage in the *very conduct* that prompted defendants' prior enforcement action[s]." *Knife Rights, Inc.*, 802 F.3d at 385, 387 (emphasis added).

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.")) In this way, plaintiffs' challenge resembles a pre-enforcement facial challenge. *See N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 265 ("Because plaintiffs pursue this 'pre-enforcement' appeal before they have been charged with any violation of law, it constitutes a 'facial,' rather than 'as-applied,' challenge.") This has caused some confusion in this case, which the Court sought to address during the closing-arguments.

In all events, for the reasons described below, plaintiffs' challenge fails whether it is considered an as-applied challenge or a facial challenge. On the record before it, the Court concludes that the Gravity Knife Statute was, and will continue to be, constitutionally applied to plaintiffs. This determination necessarily means that the Gravity Knife Statute is not unconstitutional in all of its applications (i.e. on its face).[24] The Court finds that none of the plaintiffs has [sic] demonstrated that the many hypotheticals the parties have so vigorously debated are in fact reasonably likely to occur to him or her.

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[24] Similarly, the Court finds that the statute is not "permeated with vagueness." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 265; *see City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality). This is not to say, however, that the statute could not be improved upon. Many statutes that pass constitutional muster may nonetheless benefit from close attention to possible improvements. That is so here.

A. Notice

"The first way that a law may be unconstitutionally vague as applied to the conduct of certain individuals is 'if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.'" *VIP of Berlin, LLC*, 593 F.3d at 187 (quoting *Hill*, 530 U.S. at 732). In determining whether a statute fails to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits, courts look to see whether individuals had fair notice or warning of such prohibitions. *Hill*, 530 U.S. at 732; *see VIP of Berlin, LLC*, 593 F.3d at 187. The Court asks whether "the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *VIP of Berlin, LLC*, 593 F.3d at 187; *see also Rubin v. Garvin*, 544 F.3d 461, 467 (2d Cir. 2008). To comply with the notice element requires that "[the] statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) (quotation marks omitted). The standard is objective and it is therefore irrelevant "whether a particular plaintiff actually received a warning that alerted him or her to the danger of being held to account for the behavior in question." *Dickerson*, 604 F.3d at 745.

"[T]he test does not demand meticulous specificity in the identification of the proscribed conduct." *United States v. Coppola*, 671 F.3d 220, 235 (2d Cir. 2012) (quotation omitted). Only an "unexpected and indefensible"

interpretation of a statute that gives a defendant "no reason to even suspect that his [or her] conduct might be within its scope" will violate the notice element. *United States v. Smith*, 985 F. Supp. 2d 547, 588 (S.D.N.Y. 2014) (quotations omitted); *see Mannix*, 619 F.3d at 199 (rejecting vagueness claim where New York courts had previously ruled that conduct similar to the defendants' satisfied the elements of the challenged statute); *see also Smith*, 985 F. Supp. 2d at 588 ("[I]t is not only the language of a statute that can provide the requisite fair notice; judicial decisions interpreting that statute can do so as well").

The Court finds that plaintiffs' had adequate notice that their conduct was prohibited under the Gravity Knife Statute. Each of plaintiff Copeland and Perez's knives opened on the first Wrist-Flick test applied. The knives confiscated from plaintiff Native Leather also opened by application of the Wrist-Flick test. As the Court has already explained, it is clear from the statutory text that the Wrist-Flick test involves the use of centrifugal force. Furthermore, the New York Court of Appeals, as well as lower New York courts and juries have all found the existence of centrifugal force based on the Wrist-Flick test. *See*, *e.g.*, *Sans*, 26 N.Y.3d at 17, 19 N.Y.S.3d 468, 41 N.E.3d 333; *Herbin*, 927 N.Y.S.2d 54; *Neal*, 913 N.Y.S.2d 192, 194 (1st Dep't 2010). Both the statutory text and these judicial decisions provided plaintiffs with the requisite notice that their conduct was prohibited.

In support of their position, plaintiffs have proffered numerous hypotheticals throughout this litigation.

For example, plaintiffs argue that "[a] person's ability to flick open a knife will vary based on degree of tiredness, injury, etc. . . . Suppose a person has a blister or cut on his strong hand, or has injured his hand or arm. That person will be entirely unable to perform the Wrist Flick [t]est, or his ability will be diminished." (Reply Mem. at 7-8.) Plaintiffs also imagine a situation where someone buys a knife, tests such knife inside the store and the knife fails the Wrist-Flick test, but then exits the store moments later where an officer is able to successfully perform the Wrist-Flick test to the same knife. (*See* June 16, 2016, Tr., ECF No. 191, at 25:07-21.) Plaintiffs claim that no one possessing a folding knife "can ever be sure he possesses a legal pocket knife versus an illegal gravity knife, because the test results are highly dependent on the strength, dexterity, skill, and training of the individual employing the test, the particular specimen of the knife, and other highly variable and uncertain characteristics." (*Id.*) Similarly, plaintiffs argue that "there is no number of people a person can consult to determine that his Common Folding Knife is not an illegal gravity knife, because no matter how many individuals fail to flick it open, the very next person might be able to do so, and the person in possession of that knife will be subject to arrest and prosecution." (Pltfs' PFOF, at 47 ¶ 19.) With regards to Copeland and Perez, plaintiffs claim that "no matter how many times [they] tr[y] and fail[ ] to flick a folding knife open, as long as any police officer, anywhere, at any time in the future can flick the knife open using the technique the police use to

test folding knives, [they] would be subject to arrest." (Pltfs' PFOF at 19 ¶ 55, 21 ¶ 64.)

Defendants assert, with effect, that the many interesting hypotheticals that plaintiffs have described are just that – hypotheticals. Ultimately, according to defendants, the particular plaintiffs before the Court bear the burden of proving that the statute is unconstitutional as to them, and this plaintiffs have not done. *See VIP of Berlin, LLC*, 593 F.3d at 189 (noting that the "pertinent issue [ ] is not whether a reasonable person . . . in general" would know what the statute prohibits, but rather whether a reasonable person in the plaintiffs specific circumstance would know that their conduct was prohibited). The Court agrees. Despite the various hypotheticals raised by plaintiffs, there is no evidence that any of the plaintiffs tried but were unable to open their knives by application of the Wrist-Flick test.[25] Nor is there evidence that the officers who arrested plaintiffs Copeland and Perez, as well as those individuals at the D.A.'s Office who tested the knives confiscated from plaintiff Native Leather, possessed any special strength, skill, or dexterity.

"What renders a statute vague is not the possibility that it will sometimes be difficult to determine

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[25] The Court noted in its Findings of Fact that two NYPD officers applying the Wrist-Flick test a year before plaintiff Copeland's arrest were unsuccessful in causing the blade of his knife to open. As the Court found above, however, the ability of Copeland's knife to open by application of the Wrist-Flick test by Detective Kyrkos immediately prior to his arrest, as compared to its inability to open a year earlier, was due to usage over time.

whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). The Gravity Knife Statute provides clear notice of the "incriminating fact" to be proven – namely, the blade of the knife must open and lock into place in response to gravity or centrifugal force – and the statute does not run afoul of the Fourteenth Amendment simply because the owner claims "difficult[y]" determining whether that fact has been proven.

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

the force of gravity or the application of centrifugal force" gives no less adequate notice – and, as discussed below, no less sufficient standards for enforcement – than a law that proscribes the mailing of a "concealable firearm."

Plaintiffs assert that the current District Attorney, Cyrus Vance, Jr., and the City have moved away from an interpretation of the Gravity Knife Statute that had been enforced with "clarity and predictability" for fifty years to one that treats "nearly any ordinary folding knife as an illegal 'gravity knife.' " (Pltfs' PFOF at 1.) According to plaintiffs, this alteration of a decades-old interpretation has led to unconstitutional unpredictability and "no-one can determine any longer whether a particular knife in their possession will be deemed illegal or prohibited." (*Id.*) The record contradicts these arguments, however. As noted, the evidence supports consistent, continued application of Wrist-Flick test. As defendants asserted, that same application was applied to plaintiffs, and there is no factual basis to believe that it will not be applied similarly to plaintiffs in the future.

B. Arbitrary and Discriminatory Enforcement

"The second way in which a statute can be found unconstitutionally vague is if the statute does not 'provide explicit standards for those who apply it' " in order to avoid arbitrary and discriminatory enforcement. *VIP of Berlin, LLC*, 593 F.3d at 191 (quoting *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007)). Having

concluded that the Gravity Knife Statute provided plaintiffs with sufficient notice, the Court asks: whether "(1) the 'statute as a general matter provides sufficiently clear standards to eliminate the risk of arbitrary enforcement;' or (2) 'even in the absence of such standards, the conduct at issue falls within the core of the statute's prohibition, so that enforcement before the court was not the result of the unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical applications of the statute.'" *Id.* (quoting *Farrell*, 449 F.3d at 494); *see also Dickerson*, 604 F.3d at 748.

For largely the same reasons that the statute gave plaintiffs sufficient notice, on the record before the Court, the Court concludes that the Gravity Knife Statute provides sufficiently clear standards. There is no evidence of any arbitrary and discriminatory enforcement of the Gravity Knife Law. To the contrary, the record contains ample evidence that NYPD officers are trained in an appropriate manner on the correct definition of a gravity knife under applicable law. The record fully supports that the NYPD generally, and with respect to plaintiffs here, apply that definition via the Wrist-Flick test in a consistent manner.

Again, plaintiffs assert that the Wrist-Flick test is "subjective, variable and indeterminate." (Pltfs' PFOF at 3.) According to plaintiffs, the Wrist-Flick test allows for the possibility that different units of the same model knife could have different legal statuses: one unit could pass the Wrist-Flick test (*e.g.* not open) and be deemed lawful; another unit could fail and be

deemed to be a gravity knife and therefore unlawful. Or, worse still, if two different people perform the test one after another, with the first Wrist-Flick test failing to open the blade and the second succeeding, the same knife, tested at relatively the same time, could be both a lawful folding knife and an unlawful gravity knife. (*Id.*) Similarly, plaintiffs argue: "If a person encounters an NYPD officer on a day the officer is rested and strong, he may be arrested for possession of a gravity knife, while another person may encounter the same officer at the end of his shift when he is tired. Both individuals could be in possession of identical knives, yet one could be arrested and the other not, merely due to the officer's physical state at the time." (*Id.* at 8.)

Again, the Court emphasizes that the various hypotheticals plaintiffs present are not supported by the record. Rather, the record establishes that NYPD officers are trained in an appropriate manner and apply the Wrist-Flick test in a consistent manner. If one of the many hypotheticals that plaintiffs describe does indeed arise, plaintiffs "could bring an 'as applied' vagueness challenge, grounded in the facts and context of [that] particular set of charges." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 266. The hypotheticals plaintiffs raise cannot, however, support their challenge here. *See id.*

Alternatively, even a statute that provides "what may be unconstitutionally broad discretion if subjected to a facial challenge" may still be upheld on an as-applied challenge "if the particular enforcement at issue [is] consistent with the core concerns underlying the

[statute] such that the enforcement did not represent an abuse of the discretion afforded under the statute." *Dickerson*, 604 F.3d at 748 (citations and internal quotation marks omitted). Here, plaintiffs' conduct plainly fell within the core of the Gravity Knife Statute.

As previously noted, plaintiff Copeland and Perez's knives opened on the first application of the Wrist-Flick test. And plaintiffs did not adduce evidence regarding how many applications of the Wrist-Flick test were necessary to open those knives confiscated from native leather that did not open on the first application of the Wrist-Flick test. Furthermore, the officers who arrested plaintiffs Copeland and Perez, as well as those individuals at the D.A.'s Office who tested the knives confiscated from plaintiff Native Leather, were nothing but average in all relevant respects and did not possess any special strength, skill, or dexterity. Prohibiting knives that open by the use of centrifugal force in the manner that plaintiffs' knives opened falls squarely within the core concerns underlying the Gravity Knife Statute. Even if the Gravity Knife Statute does not provide clear enforcement standards, its enforcement against plaintiffs "was not the result of 'unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical applications of the statute.'" *VIP of Berlin, LLC*, 593 F.3d at 193 (quoting *Farrell*, 449 F.3d at 494); *see Thibodeau*, 486 F.3d at 69. In short, this is not a case where one of the many implausible hypotheticals that plaintiffs present actually occurred.

IV. CONCLUSION

The Clerk of Court is directed to enter judgment for defendants and to terminate this action.

SO ORDERED.

Dated: New York, New York
January 27, 2017

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of August, two thousand eighteen,

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John Copeland, Pedro Perez, Native Leather Ltd,

Plaintiff - Appellants,

Knife Rights, Inc., Knife Rights Foundation, Inc.,

Plaintiffs,

v.

Cyrus R. Vance, Jr., in his Official Capacity as the New York County District Attorney, City of New York,

Defendants - Appellees,

Barbara Underwood, in her Official Capacity as Attorney General of the State of New York,

Defendant.

ORDER

Docket No: 17-474

Appellant, John Copeland, filed a petition for panel rehearing, or, in the alternative, for rehearing

en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe
[SEAL]