No. 18-918

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

BRIEF FOR THE NEW YORK COUNTY DISTRICT ATTORNEY

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COUNTERSTATEMENT OF QUESTION PRESENTED

A New York statute prohibits as a "gravity knife" any folding knife that can be opened and locked in place using centrifugal force or gravity. Petitioners, two individuals and one retailer previously charged or investigated for a violation of this statute, assert that the statute is void for vagueness because the "wrist-flick test" used by law enforcement to identify gravity knives produces inconsistent results.

The question presented is as follows:

Do Johnson v. United States, 135 S. Ct. 2551 (2015), and its progeny Sessions v. Dimaya, 138 S. Ct. 1204 (2018), permit petitioners to establish the facial invalidity of the statute notwithstanding the district court's undisturbed findings, after a bench trial, that the wrist-flick test produced consistent results as applied to petitioners' own knives and produces consistent results as a general matter?

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INTRODUCTION

Petitioners ask this Court to review a decision of the Second Circuit affirming the dismissal of their vagueness challenge to New York's gravity knife statute. Petitioners contend that the decision below raises the question of whether Johnson v. United States, 135 S.Ct. 2551 (2015) "materially changed" the standard for a facial challenge stated in United States v. Salerno, 481 U.S. 739 (1987). Pet. 2. For several reasons, the judgment of the court of appeals does not warrant review by this Court.

First, petitioners waived the alleged error. At trial, the district court asked the parties' view on the difference between facial and as-applied challenges. Petitioners answered that a facial challenge requires proof that no set of circumstances exists under which a law would be valid—i.e., the Salerno standard. Petitioners did not cite this Court's preexisting decision in Johnson before the district court or challenge the district court's application of Salerno in their brief on appeal. It was not until after briefing and argument in the Second Circuit that petitioners raised Johnson. Even then, petitioners did not raise the question they present here. In affirming the judgment, the Second Circuit relied on petitioners' concession that Salerno governs a facial challenge.

Second, Johnson does not apply to petitioners' claim. Petitioners seek to capitalize on language in Johnson that may be said to weaken Salerno, but

they do not account for the context in which that language appears. The law struck down in Johnson applied to a judicially-imagined version of a defendant's crime. The gravity knife statute applies to a defendant's real-world conduct. Johnson does not purport to excuse a challenger from proving a law vague in relation to his real-world conduct, which is the end petitioners seek. This principle has origins independent of Salerno and is the reason petitioners' claim fails.

Third, the decision of the Second Circuit does not create a split among the courts of appeals. Few circuit decisions address Johnson outside the context of laws that apply to a judicially-imagined version of a crime. Petitioners' theory of a "deep and intolerable" circuit split is supported by only two decisions. Pet. 34. Once those decisions are reviewed in their proper context, the asserted conflict is shown to be illusory. While there is some discussion in circuit dicta about whether and to what extent Johnson may eclipse the general rule of Salerno, there are no conflicting holdings. Both decisions raised by petitioners reject vagueness challenges for reasons unrelated to Salerno that apply with equal force to their claim.

Fourth, the question presented does not impact the outcome of this case. Petitioners' theory of relief is factual: they allege that the wrist-flick test is inherently vague. Petitioners did not prove at trial that application of the wrist-flick test was unclear in the context of their own arrests or prosecutions. Nor

did they prove that application of the wrist-flick test is unclear in the context of prospective conduct in which they would like to engage. On the contrary, the trial record shows that the wrist-flick test has been, and continues to be, applied in a consistent manner and with consistent results.

STATEMENT

A. The gravity knife statute

In New York, it is a misdemeanor to possess a gravity knife, which is defined as any knife with a blade that 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." Petitioners' Appendix (A) 40; N.Y. Penal Law §§265.00(5), 265.01(1).

The statute thus has two requirements: (1) the knife must open by the force of gravity or centrifugal force; and (2) the blade must lock in place. A45. New York courts have interpreted the second requirement to entail automatic locking of the blade upon release, without further action by the user. See, e.g., People v. Sans, 26 N.Y.3d 13, 16 (2015).

The statutory definition of a gravity knife is functional. A4-5, 46, 48-49. The intended use or design of a knife by its manufacturer is not an element of the offense and is irrelevant to the issue of whether the knife functions as a gravity knife. A5,

48. By contrast, other statutes incorporate design into a weapon's definition. A5, 48-49 (collecting N.Y. Penal Law provisions).

The statute is enforced primarily, if not exclusively, against folding knives. A8, 15, 21. Law enforcement uses the wrist-flick test to determine whether a folding knife functions in the manner prohibited by the statute. A5, 21, 46. The 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." A55.

The blade of a folding knife can loosen over time due to wear-and-tear or intentional modification. A54. Due to this variability, achieving the goal of the statute—to keep "particularly dangerous" knives off the streets, A46 fn.6—requires a definition that is based on present function, not design. "A number" of folding knives have a tension screw that the owner can tighten to correct looseness in the blade such that a knife that opens in response to the wrist-flick test will cease to do so. 2d Cir. Joint Appendix (J) 902, 1031-35; 2d Cir. Respondents' Appendix (R) 349-50; see also A54.

Enforcement of the statute with respect to folding knives that the industry elects to market as tools is not a new issue. Nor is such enforcement

unique to New York County.[1] In June 2006, the Wall Street Journal published an article describing how retailers built a $1 billion dollar business, nationwide, by selling deadly folding knives that "flick[ ] open" to "just about anyone in the market" for a pocketknife.[2]

B. The relief sought and the petitioners

Petitioners seek to enjoin enforcement of the gravity knife statute against "Common Folding Knives," which they define as "folding pocket-knives that are designed to resist opening from the closed position." A41. The phrase "Common Folding Knives" was invented by petitioners; it has no meaning under New York statute or caselaw. A8, A49 fn.9.[3] Petitioners admit that it includes all folding knives. Pet. 11; Pets. 2d Cir. Br. 61.

Each petitioner has previously been charged with, or investigated for, a violation of the statute for possessing folding knives that functioned as gravity knives when subjected to the wrist-flick test. A57-

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[1] Compare Pet. 6, 14 with Merring v. Town of Tuxedo, 2009 U.S. Dist. LEXIS 61444, *8, 35-38 (S.D.N.Y. Mar. 31, 2009) (a folding knife is a gravity knife if it opens in response to the wrist-flick test, regardless of whether it belongs to a brand that is "commonly sold in sporting goods stores in New York State").

[2] Mark Fritz, How New, Deadly Pocketknives Became a $1 Billion Business, Wall Street Journal, (July 25, 2006), https://www.wsj.com/articles/SB115379426517016179.

[3] The District Attorney did not, for example, assert that "Common Folding Knives [are] gravity knives." Pet. 18.

66. Copeland and Perez were arrested in October 2010 and April 2010, respectively. A61-66. Carol Walsh, the owner of Native Leather, signed a deferred prosecution agreement with the District Attorney's Office in June 2010. A57-60.

Petitioners' theory of relief is twofold. First, they allege that the wrist-flick test is inherently vague. Pet. 6-7. Second, they allege that the current District Attorney, who took office in January 2010, embarked on a "novel" expansion of the statute by applying it to folding knives via the wrist-flick test. Id. In petitioners' view, the statute applies only to German paratrooper knives. Id.[4]

C. The trial proceedings

Before the district court, the parties agreed to a trial on the papers. A43. To support their proposed findings of fact, the parties submitted deposition transcripts and witness declarations. Id. The government submitted demonstrative exhibits depicting the wrist-flick test. A60 fn.21. The parties then appeared for oral argument. At that time, the district court heard testimony from Doug Ritter, the chairman of former-plaintiff Knife Rights,[5] and

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[4] Petitioners make a confusing reference to switchblade knives, which are defined in a separate section of the Penal Law that petitioners no longer challenge. Pet. 9.

[5] Knife Rights is an advocacy organization; it was previously dismissed from this lawsuit for lack of standing. Copeland v. Vance, 802 F.3d 377, 387-89 (2d Cir. 2015).

Assistant D.A. Dan Rather, the District Attorney's institutional witness. A44.

After trial, the district court made factual findings adverse to petitioners' claim. The district court found that law enforcement has used the wrist-flick test to identify folding knives as gravity knives since the statute's effective date. A55. The Bill Jacket includes 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." A46 fn.6 (quotation omitted). Judges and juries in New York have long applied the statute to folding knives via the wrist-flick test. A21-22, 47-48 (collecting cases).

The district court found that police officers—including those involved in petitioners' arrests—are "trained to use the same wrist-flick test that officers were trained to use decades ago." A55. "Consistent" application of this "historical practice" has continued under the current District Attorney. Id. The district court rejected the allegation that enforcement of the statute with respect to folding knives that open via the wrist-flick test is a "novel" practice of recent origin. Compare A76 with Pet. 14.

The district court rejected petitioners' attempt to "reinterpret" the statute to apply only to paratrooper knives. A54-55. Paratrooper knives were issued to German soldiers during World War II to assist in cutting their parachutes. J161. They are not domestically manufactured. A8. Distinct from

folding knives, paratrooper knives have a blade that slides from the handle by the force of gravity alone—that is, by holding the knife upside-down. A49.

Police officers with decades of experience gave unchallenged testimony that the statute has always been enforced with respect to folding knives. A21. There is no evidence of its enforcement with respect to paratrooper knives. A8. Petitioners conceded at trial that it is "'clear'" that, under New York law, "'a Common Folding Knife can be considered a gravity knife.'" A54 fn.16 (quoting Pls. Reply Trial Br. at 3).[6]

The district court also rejected the allegation that the wrist-flick test, itself, is inherently vague. A55-57, 76-78. Because this allegation is at the heart of petitioners' claim, Pet. 6-7, 22, the relevant trial record is important.

The government's evidence included videos of the undersigned applying the wrist-flick test to folding

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[6] As a component of this theory, petitioners argued at trial that a folding knife subject to the wrist-flick test opens due to inertia created by the stopping of the wrist. A51. According to petitioners' expert, the "centrifugal force" language in the statute covers only knives that, like the paratrooper knife, open if one spins continuously—for example, by sitting in a swivel chair. A52. Petitioners resurrect this argument here. Pet. 11. The district court found that the wrist-flick test appropriately applies centrifugal force and that petitioners "forfeited" any argument to the contrary by conceding the point in response to the government's evidence. Id.

knives seized from Native Leather. A60 fn.21; J855-57, 901, 906.[7] After watching the videos, the district court issued an order asking petitioners to demonstrate "one or more Common Folding Knives that, according to [them], are of such a quality that a functional wrist-flick test by different witnesses could result in different outcomes." J924-25. In response, petitioners shipped a collection of paratrooper knives and folding knives from Arizona to the Southern District courthouse. J954-58.

Mr. Ritter appeared at the oral argument to demonstrate the Arizona knives. J993. First, he tested three paratrooper knives. J1002-12. Mr. Ritter's demonstration confirms that the blades of paratrooper knives do not automatically lock once open. J1037.

Next, Mr. Ritter moved on to the folding knives. J1012. The district court denied petitioners' request to have the undersigned serve as a foil to Mr. Ritter. J1014-15. Petitioners were unable to recruit a member of the audience "to try to show failure to open." J1016. By default, Mr. Ritter was matched with petitioners' counsel. J1017. The two men

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[7] Links are available to the following demonstrations of the wrist-flick test submitted as part of the government's case:

Ex. D-10: https://youtu.be/0QMgwKUJU08
Ex. D-14: https://youtu.be/qutCcqKwaeY
Ex. D-17: https://youtu.be/uoFgT-BNw-k
Ex. D-20: https://youtu.be/Rp1o7TQYjhk

applied their interpretation of the wrist-flick test to a series of folding knives. J1018-35.[8]

The district court found a "distinct difference" between the "maneuver" used by Mr. Ritter and petitioners' counsel and the wrist-flick test used by police officers and the District Attorney's Office. A47 fn.7. The district court credited testimony by Assistant D.A. Rather, a veteran prosecutor, that the motion utilized by Mr. Ritter and petitioners' counsel was "exaggerated" and did not represent the wrist-flick test. Id.

Not one knife used in petitioners' demonstration was purchased in New York County. A47 fn.7. There was no evidence that Copeland or Perez would purchase any of the knives if allowed to, or that any were the same brand and model as the knives possessed by either man at the time of his arrest. Id. Only one knife was identified as being of the same brand as a knife that may have belonged to Native Leather. Id. The knives that appear in the government's exhibits—which belonged to Native Leather—were present in the courtroom, but petitioners did not use them. J1001-02.

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[8] Petitioners misrepresent that the government declined to "participate" the demonstration. Pet. 20. In response to our exhibits, the district court asked petitioners to demonstrate folding knives that, according to them, showed inconsistency in the wrist-flick test. As the district court found, it was not our role to assist petitioners in presenting their case. J1014-15.

The district court found that petitioners did not present evidence that the manner of conducting the wrist-flick test is different from individual to individual, or that different individuals have different outcomes when applying the test to the same knife. Compare A55-56 with Pet. 19. On the contrary, the district court found that the record 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." A56-57.

The district court found that petitioners did not present evidence that the results of the wrist-flick test depend on the strength, dexterity, or skill of the tester. Compare A56, 73-74 with Pet. 7. On the contrary, the district court found that the police officers who arrested Copeland and Perez and the individuals at the District Attorney's Office who tested the knives seized from Native Leather "were nothing but average in all relevant respects." A79.

In presenting their case at trial, petitioners relied primarily on hypotheticals. A16, 72-73. Chief among them: a man selects a knife in a store, applies the wrist-flick test with negative results, exits the store, and instantly encounters a police officer who can open the knife. A16-17, 73; Pet. 21-22. The district court found no evidence that such events have occurred or are likely to occur. A70, 74, 77-78.

The district court found that petitioners had notice that their prior conduct was prohibited; that

the enforcement actions against them did not result from arbitrary or discriminatory police discretion; and that each enforcement action was consistent with the "core concern" of the statute. A72, 78-79.

Copeland and Perez were approached by police officers in public after the officers observed a knife clipped to their clothing. A61, 64. In each instance, the officers applied the wrist-flick test to the knife and the blade opened on the first attempt. A62, 64-66. Both men accepted an adjournment in contemplation of dismissal, which is a "non-merits" disposition. Copeland, 802 F.3d at 381. Perez agreed to perform seven days of community service. A65-66. The district court found no evidence that Copeland or Perez had tried, close to the time of his arrest, to open his knife by application of the wrist-flick test. A75.

The district court found that, in early 2010, investigators from the District Attorney's Office purchased folding knives at Native Leather that opened via the wrist-flick test. A57-58. In response to an ensuing subpoena requiring production of all gravity knives, Walsh produced the store's entire inventory of folding knives, approximately 300. A58. Before making the production, Walsh did not attempt to discern, by applying the wrist-flick test, which of her folding knives were illegal. A58.

Members of the District Attorney's Office tested the knives and returned the legal ones. A58-59. The district court found that the knives retained from

Native Leather opened in response to the wrist-flick test and met the statutory definition. A66. The district court found no evidence that any of the retained knives, which totaled over 200, J855 fn.1, responded inconsistently to the test. A58-59.

Pursuant to a deferred prosecution agreement, Walsh agreed to personally test her inventory and to the appointment of an independent monitor. A60-61. A year later, employees of the monitor visited Native Leather and tested its knives. A61. As Walsh recalls, "if the blade swung out of the knife, it was loose enough to be called a gravity knife; conversely, if the blade was snug in the handle and wouldn't come out, [the knife was] not…a gravity knife." Id. (quotation omitted). Only three knives tested by the monitors opened in response to the wrist-flick test. J67. There is no evidence Walsh tested these knives herself.[9]

D. The appellate proceedings

On appeal, petitioners did not directly challenge any of the factual findings by the district court, except the finding that Mr. Ritter's knife demonstration did not accurately portray the wrist-flick test. Pets. 2d Cir. Br. 6-7. As they do here, petitioners wrote their appellate brief as though the allegations in the complaint still govern.

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[9] The knives Walsh tested were listed in a separate logbook and were not among the knives tested by the monitors. R224-25; see also A74; R215-16.

Petitioners did not challenge the district court's finding that application of the statute was clear in the context of their past arrests and prosecutions. A18. Before the Second Circuit, petitioners disavowed any reliance on an as-applied theory relating to the past enforcement actions and argued that the district court erred in considering them. Pets. 2d Cir. Br. 6, 46, 51.

The Second Circuit agreed "in principle" that someone "previously convicted for carrying what is indisputably a gravity knife" could bring a "prospective" as-applied challenge to a different set of facts. A15. Assuming the existence of such a claim, the Second Circuit found that petitioners did not offer proof to support it:

> If this were a true prospective as-applied challenge, we would therefore expect petitioners to have offered proof that specific knives they wished to possess responded inconsistently, if at all, to the wrist-flick test. They did not.

A16. Instead, petitioners "sought to prove their claim chiefly with examples of hypothetical examples of unfair prosecutions that are divorced from their individual facts and circumstances." A4.

Because petitioners' proof was divorced from their own conduct—past *and* prospective—the court deemed their challenge to be facial. Id. Applying

the Salerno standard that petitioners "conceded" governs a facial challenge, the Second Circuit found that application of the wrist-flick test was clear in the context of the approximately 300 folding knives produced by Native Leather in response to the subpoena. A17, 27-28. Not only did Walsh fail to test the knives prior to their production, but petitioners offered "no evidence" that "*any*" of the approximately 200 knives retained by the District Attorney's Office responded inconsistently to the wrist-flick test. A27-28 (emphasis in original). Accordingly, petitioners did not prove the statute vague in all applications. A11, 28.

More generally, the court found that petitioners failed to show that the wrist-flick test could not be validly applied to a significant number of knives. The court noted that petitioners "acknowledge, for example, that some common folding knives may have a 'very light bias towards closure,' with a blade that fits only 'loose[ly]' in the handle." A34. Application of the wrist-flick test in this context would be clear, yet petitioners "made no effort to explain why an ordinary person would lack notice that such a knife was proscribed." Id. "Even if" the statute had been unfairly applied to all three petitioners, the court found that the existence of this class of knives precluded a finding that the wrist-flick test violates due process. Id.

REASONS FOR DENYING THE PETITION

A. Petitioners waived any error in the application of Salerno

The question presented was not properly raised in the lower courts. A party may "lose its right" to raise issues before this Court "when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." Steagald v. United States, 451 U.S. 204, 209 (1981). Petitioners have done all three.

The "Salerno rule"[10] that petitioners argue was applied in error is the same standard they supplied to the district court when asked to clarify the nature of their claim. Pet. 1. Petitioners have always insisted that their claim is "as-applied," yet they disavow any reliance on their actual conduct. A16-17, 41-42, 72-74; Pet. 23. Instead, they rely on hypothetical prosecutions that are "divorced" from their own facts. A4. In an as-applied challenge, however, hypothetical applications of a law are "beside the point." Holder v. Humanitarian Law Project, 561 U.S. 1, 3 (2010).

The district court sought to resolve the tension between the label petitioners gave their claim and the evidence they offered by asking their position on

[10] The origin of this rule is discussed in Part II, infra.

the difference between facial and as-applied challenges. A68; J961. In response, petitioners supplied three court decisions. J1075-76, 1081. The relevance of two of the decisions to this particular inquiry is not clear.[11] The third decision applies the "no set of circumstances" language of Salerno to reject a facial challenge.[12]

At trial, petitioners repeatedly noted that a facial challenge requires proof that no set of facts exists under which the statute would be valid.[13] Since the statute applies to German paratrooper knives, petitioners argued, the relief sought would not invalidate the statute in all applications. J1082-83.[14] By juxtaposing their claim with a facial challenge, petitioners sought to make it more palatable. Id. They did not raise Johnson before the district court.

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[11] Babbitt v. UFW Nat'l Union, 442 U.S. 289 (1979); MedImmune, Inc. v. Genentech Inc., 549 U.S. 118 (2007).

[12] Ward v. New York, 291 F. Supp. 2d 188, 196-198 (W.D.N.Y. 2003) ("Petitioners cannot sustain a facial challenge to the Statute because they have not established that 'no set of circumstances exist under which the [statute] would be valid'") (quoting Salerno, 481 U.S. at 745).

[13] R1080 ("[A]s we all know, a facial challenge is to the entire statute; that there is no scenario and no set of facts under which the statute could be constitutional"); R1081 ("It's facial if every application of the standard is unconstitutional").

[14] Petitioners' evidence shows that paratrooper knives do not lock automatically and therefore do not meet the second requirement of the statute. J1037.

The district court relied on Salerno to find that petitioners failed to meet their burden of proof. A68-69. Petitioners did not contest that aspect of the district court's decision or raise Johnson in their brief on appeal.[15]

During oral argument before the Second Circuit, petitioners again relied on the statute's application to paratrooper knives to make their claim appear less extreme than it is. The Chief Judge dismissed this premise, citing the evidence of exclusive enforcement against folding knives.[16] In response, petitioners made a series of concessions that guided the Second Circuit's decision.

Petitioners agreed that their claim encompasses "every knife that people carry"[17] and therefore can be viewed as a facial challenge. A15. Petitioners agreed that, if successful, their claim would disable the entire statute. A15-16. And petitioners argued that, nonetheless, they should prevail because the statute is unconstitutional "in every instance"[18] in which it applies to a folding knife. Petitioners thus invoked the Salerno rule at oral argument and claimed to have satisfied it.

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[15] Even if they had, the point had already been waived. See, e.g., United States v. Diaz, 176 F.3d 52, 80 fn.9 (2d Cir. 1999).

[16] 2:50-3:11 of the oral argument recording, available at http://www.ca2.uscourts.gov/oral_arguments.html. The circuit court does not produce argument transcripts.

[17] 3:35-4:10 of oral argument recording.

[18] 4:10-4:20 of oral argument recording.

It was not until after briefing and argument that petitioners sought to alter course—but, even then, they did not make the argument raised here. In a letter, petitioners offered Sessions v. Dimaya, 138 S.Ct. 1204 (2017), as supplemental authority requiring that a law be "clear in all applications to survive a vagueness challenge." 2d Cir. ECF No. 123 at 1. Petitioners argued that, under Dimaya, the gravity knife statute is vague because its application is not clear in the hypothetical scenario of the person who is arrested immediately after purchasing his knife. Id. at 1-2; p. 11, supra.

Dimaya did not create new law; the decision is a "straightforward application" of Johnson. Dimaya, 138 S.Ct. at 1213. While petitioners claim that Johnson "materially changed" the standard for a facial challenge, they make no such argument about Dimaya. Pet. 2, 29-30.[19]

Neither Johnson or Dimaya could be read as requiring, on pain of facial invalidation, that a democratically enacted statute be clear in *all* applications. In affirming the judgment, the Second Circuit rejected petitioners' misreading of Johnson and Dimaya and relied on their concession that Salerno governs a facial claim. A15-16, 18 fn.3. In a footnote, the Second Circuit expressed the view

[19] The language from Dimaya on which petitioners rely here appears in a footnote and is a quote from the preexisting Johnson. Pet. 2, citing Dimaya, 138 S.Ct. at 1222 fn.7.

that Johnson did not displace the general rule of Salerno. A11 fn.2.

In a petition for rehearing directed largely at other perceived errors, petitioners argued for the first time, in a footnote, that Johnson displaced Salerno. 2d Cir. ECF 135 at 14 fn.6.[20] Notably, within the last month, this Court dismissed a writ of certiorari in similar circumstances, where the petitioners sought to revive a previously conceded point of law in a motion for rehearing before the circuit court. Emulex Corp. v. Varjabedian, No. 18-459 (U.S. Apr. 23, 2019).

There is no justification for petitioners' failure to raise Johnson at trial or on appeal from the district court's application of Salerno—especially if, as petitioners now argue, Johnson requires judgment in their favor. Pet. 25-26. The only change in circumstances is that petitioners have since lost, twice. They should be bound, in this Court of final review, to the position taken below.

B. Johnson does not apply to petitioners' claim.

Petitioners isolate language in Johnson that may be said to weaken Salerno, but they do not address

[20] Petitioners did not acknowledge their concession before the district court that Salerno provides the general rule for a facial challenge. Id.

the analysis or holding of the decision. "[S]o much of the Court's analysis in Johnson deals with a [law] that was in key respects sui generis."[21] The gravity knife statute shares nothing in common with that law. Nor does Johnson purport to excuse a challenger from proving a law vague as applied to his own conduct, which is the end petitioners seek. This requirement has origins independent of Salerno and is undisturbed by Johnson.

Johnson is a narrow decision. It concerns a sentencing clause that applied an "imprecise" risk-based standard to a "judicially imagined ordinary case" of the defendant's crime. Johnson, 135 S.Ct. at 2557-58. The clause had proven "nearly impossible to apply consistently" in the circuit courts and had been before this Court four times. Id. at 2559-60. On this appearance, its fifth, the Court declined to uphold the clause merely because one could "envision" crimes to which its application would be clear. Id. at 2560-61.[22] The Court held that the combination of qualitative analysis and categorical application violated due process. Id.

Johnson avoids calling into question laws that do not share its problematic text. The decision may weaken the principle that a facial challenge requires that a law be vague in all applications, but it does so in the context of a sentencing clause that applied to

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[21] United States v. Cook, 914 F.3d 545, 553 (7th Cir. 2019).

[22] Even for those hypothetical crimes, the Court doubted that the clause's application would be non-speculative. Id.

"a judge-imagined abstraction." Johnson, 135 S.Ct. at 2558. "As a general matter," the Court wrote, "we do not doubt the constitutionality of laws that [apply] to real-world conduct." Id. at 2561.

Unlike the law at issue in Dimaya, which shared the problematic features of the sentencing clause, 138 S.Ct. at 1216, the gravity knife statute has neither textual flaw upon which Johnson's holding rests. It does not require the government to place petitioners' conduct on a subjective spectrum: a knife either opens to a locked position or it does not. A33. Nor does it operate under the categorical approach that created the lion's share of ambiguity in Johnson. The statute applies to "real-world" conduct. As this Court instructs, that distinction makes a difference. Johnson, 135 S.Ct. at 2561.

Johnson does not purport to excuse a challenger from proving a law vague as applied to his real-world conduct.[23] This principle is undisturbed by Johnson and has origins independent of Salerno.

In Salerno, this Court stated that a facial challenge requires proof that no set of circumstances exists under which a law would be valid. 481 U.S. at 745. As petitioners acknowledge, Pet. 1-2, this language is rooted in the Court's prior instruction in Hoffman Estates that a facial challenge requires

[23] In Johnson and Dimaya, each majority opinion suggested that application of the law to the defendant's crime was unclear. 135 S.Ct. at 2558, 2560; 138 S.Ct. at 1214 fn.3.

proof that a law is "vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).

As Hoffman Estates also instructs, a party raising a facial challenge outside the context of the First Amendment must, as a general matter, prove a law vague as applied to his own conduct:

> 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. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Id. This principle appears in a host of this Court's decisions that pre- and post-date Hoffman Estates.[24]

Since Johnson, the Court has continued to apply this principle. In Expressions Hair Design v. Schneiderman, a vagueness challenge gave the Court "little pause" where a law clearly proscribed

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[24] See, e.g., id. at 495 fn.7 (collecting cases); United States v. National Dairy Products, 372 U.S. 29, 33-34 (1963); Holder, 561 U.S. at 18-19; Posters 'N' Things v. United States, 511 U.S. 513, 525 (1994); Williams, 553 U.S. at 304.

the plaintiffs' conduct.[25] In Salman v. United States, the Court found "no need" to address situations where application of a law might be "difficult" because the defendant's conduct was "in the heartland" of the law and decisions interpreting it.[26] And in Beckles v. United States, members of the Johnson majority concurred in the Court's judgment where a guideline was clear as applied to the defendant such that he could not complain of its vagueness as applied to the conduct of others.[27]

The principle that a challenger must prove a law vague as applied to his own conduct harmonizes with Johnson. The analysis in Johnson "cast[s] no doubt on the many laws that require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." Welch v. United States, 136 S.Ct. 1257, 1262 (2016) (emphasis in original) (quotation omitted).

Under Johnson, a vagueness challenge cannot be defeated in reliance on a hypothetical application of a law. But that does not entitle a plaintiff to whose real-world conduct a law clearly applies to prevail in reliance on a fiction. Petitioners do exactly that: rely on theoretical applications of the statute that are "divorced from their own facts," as the circuit court found, and otherwise "implausible," as the district

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[25] 137 S.Ct. 1144, 1151-52 (2017).

[26] 137 S.Ct. 420, 428-29 (2016).

[27] 137 S.Ct. 886, 898 (Ginsberg, J., concurring); id. (Sotomayor, J. concurring).

court found. A4, 79. Johnson does not condone such a method of proof.

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All that can be said about whether and to what extent Johnson applies to laws that do not share its unique text draws attention back to petitioners' failure to present this issue for reasoned decision in the lower courts. Petitioners supplied Salerno to the district court and belatedly raised Johnson on appeal for a proposition that it does not support. The lower courts' treatment of Johnson is not a rejection of legal authority properly advanced by the now-complaining party. The missed opportunity for the lower courts to analyze at length the issue presented here makes this case a particularly inappropriate vehicle for review.

C. The result below does not implicate a circuit split

Out of the universe of circuit court decisions that cite to Johnson, a fraction do so outside the context of laws that apply to a judicially-imagined version of a defendant's crime. Petitioners cite two such decisions to suggest the existence of a split that, if resolved in their favor, would be dispositive of this case. Pet. 25-26. Both decisions reject vagueness challenges; petitioners merely seek to capitalize on citations to Johnson that are unnecessary to the courts' holdings.

In United States v. Bramer, the Eighth Circuit found that the language from Johnson on which petitioners rely does not excuse a challenger from showing that a law is vague "as applied to his particular conduct." 832 F.3d 908, 909-10 (8th Cir. 2016). While the court stated that it was "plausible" that the law at issue could be vague under "some circumstances," the court held the defendant's claim failed because he did not prove the law vague as applied to himself. Id.

In Kolbe v. Hogan, the Fourth Circuit rejected a pre-enforcement challenge to a law that, like the gravity knife statute, defined a weapon by its function. 849 F.3d 114, 148 (4th Cir. 2017). Agency opinions, like the judicial opinions here, explained how to determine whether a particular weapon met the functional definition. Id. at 149. The court held that the plaintiffs' alleged inability to make that determination themselves did not implicate vagueness doctrine. Id., citing Williams, 553 U.S. at 306. A brief discussion of Johnson and Salerno appears in a footnote. Id. at 148 fn. 19.

As with Johnson, petitioners' reliance on Bramer and Kolbe is superficial. In both decisions, the court assumed, without in-depth analysis, that Johnson eclipses the Salerno rule. In both decisions, the court resolved the case on different grounds that apply with equal force to petitioners' claim. Petitioners' supposed circuit split amounts to two decisions that, in passing, offer a view of Johnson that is different than the one offered by the Second

Circuit, also in passing. As the City of New York argues in its opposition brief, no court of appeals has fully examined the impact of Johnson on the Salerno rule in a vagueness challenge to a statute that applies to real-world conduct. City Opp. Point A.[28]

Significantly, nothing in Bramer or Kolbe can be read to excuse a challenger from proving a law vague as applied to his own conduct. In Bramer, the Eighth Circuit explicitly held otherwise. A collection of circuit decisions absent from petitioners' brief—including a decision by the Fourth Circuit—continue to require, post-Johnson, that a challenger do so.[29]

In Hosford, the Fourth Circuit rejected a vagueness challenge brought on facial and as-applied grounds to a law that prohibits someone without a license from "regularly" selling firearms. 838 F.3d at 170. The defendant argued that "his facial vagueness challenge could be heard even if the

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[28] The District Attorney joins the City's argument on this point, as well as its argument that the issues raised by petitioners' amici are beyond the scope of the question presented. City Opp. Point C.

[29] See, e.g., United States v. Lechner, 806 F.3d 869, 874-75 (6th Cir. 2015); United States v. Hosford, 843 F.3d 161, 170 (4th Cir. 2016); United States v. Westbrooks, 858 F.3d 317, 325-26 (5th Cir. 2017), judgment vacated on other grounds, 138 S.Ct. 1323 (2018); United States v. Miller, 868 F.3d 1182, 1189 (10th Cir. 2017), cert. denied, 138 S.Ct. 2622; United States v. Coscia, 886 F.3d 782, 794 (7th Cir. 2017); United States v. Bronstein, 849 F.3d 1101, 1110-11 (D.C. Cir. 2017); United States v. Palmer, 917 F.3d 1035, 1037-39 (8th Cir. 2019); Cook, 914 F.3d at 551-54.

[law] is not vague as applied to him." Id. at 170 fn.2. The Fourth Circuit recognized that, outside the First Amendment context, a challenger whose conduct is clearly proscribed cannot invoke theoretical applications of a law. Id. at 170. Because the law (and decisions applying it) gave notice that the defendant's conduct was prohibited, his vagueness challenge failed. Id. at 170-71.

In Coscia, by way of another example, the Seventh Circuit rejected a facial challenge to an "anti-spoofing" law that prohibited certain trading practices. 866 F.3d at 791. The defendant raised "broad" arguments based on the law's use of parentheticals and the lack of external guidance as to the meaning of "spoofing." Id. at 791-93. These arguments "did little to aid" him because "*his* prosecution" did not arise from a lack of notice or arbitrary enforcement. Id. at 792, 794 (emphasis in original). Id. at 792. Because the defendant's conduct "clearly [fell] within the confines of [the law]," he could not challenge any allegedly unfair application "that could hypothetically be suffered by a theoretical legitimate trader." Id. at 794.

Normally, this Court grants only petitions that raise an important question of law on which the lower courts are in conflict. Post-Johnson decisions of this Court and several circuit courts continue to apply the principle that a party to whose real-world conduct a law clearly applies cannot raise a vagueness challenge based on hypothetical events. This principle is fatal to petitioners' claim.

D. The question presented does not impact the outcome

Petitioners' true complaint is not their belief that the Second Circuit applied the incorrect standard for a facial challenge. They deny that their claim is a facial challenge, in the first place. Petitioners' true complaint is their belief that the lower courts failed to consider their challenge as applied to prospective events. By ignoring large swaths of the trial record and the decisions of the lower courts, petitioners obscure the fact that they did obtain a ruling on the merit of the prospective aspect of their claim. The lower courts found no evidence to suggest that the statute would be applied unfairly to petitioners on a prospective basis.

Petitioners do not challenge the district court's finding that application of the wrist-flick test was clear in the prior enforcement actions against them. A18. On appeal, petitioners disavowed any reliance on their own arrests and prosecutions. Pets. 2d Cir. Br. 6, 51. They do the same here:

> The [District 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. But those events are not the basis of the claim.

Pet. 23 (emphasis in original).

Instead, petitioners argue that past events are irrelevant because their claim is an as-applied prospective challenge. Pet. 23. Even if we consider petitioners' claim as they insist, the question remains: as applied to what, exactly, are we meant to consider it?

The imagination of their attorney is the closest petitioners come to proof of a scenario where the wrist-flick test was applied by different individuals to the same knife at the same time, a different result ensued, and the knife was deemed illegal. At several points in its opinion, the district court emphasized the lack of evidence to suggest that this hypothetical scenario or "the many [others] that the parties have so vigorously debated" are reasonably likely to occur to petitioners or anyone else. A42, 78, 79. The district court further found that petitioners' knife demonstration did not accurately portray the wrist-flick test and did not support their allegation of inconsistent outcomes under the test. A47 fn.7.[30]

The Second Circuit did not, as petitioners argue, use Salerno to "categorically bar" their as-applied "prospective" claims. Pet. at 3-4. Under Hoffman Estates, the unchallenged finding that the statute applied clearly to petitioners' past conduct should

[30] Petitioners do not seek review of this finding, they simply ignore it. See, e.g., Pet. 20-21, 22-23.

resolve this case—especially considering that a prior panel of the Second Circuit found that petitioners' standing to bring this lawsuit is predicated on their desire to "engage in the very same conduct" that led to the prior arrests and prosecutions. Knife Rights, 802 F.3d at 387. This panel of the Second Circuit, however, gave petitioners an even wider berth.

The Second Circuit agreed with petitioners that the statute's clear application to their past conduct could, in theory, be excused in the context of a "prospective, as-applied vagueness challenge." A14-15. It was only after finding that petitioners failed to present evidence to support a prospective as-applied challenge that the Second Circuit analyzed their claim as a facial one. A16-17.[31]

To this end, the panel cited the lack of evidence that knives petitioners wish to possess in the future respond "inconsistently, if at all," to the wrist-flick test. A16. The panel affirmed the finding of the district court that petitioners' knife demonstration did not accurately portray the wrist-flick test. A29. And the panel noted that the demonstration did not include knives that petitioners wish to carry or sell and therefore "tells us nothing" about whether

[31] In reliance on the "prospective as-applied" language in the Second Circuit's decision, a district judge recently entered summary judgment against the District Attorney in another civil suit challenging the gravity knife statute. Cracco v. Vance, 2019 U.S. Dist. LEXIS 52292 (S.D.N.Y. Mar. 27, 2019). The District Attorney has filed a notice of appeal. No. 19-1129 (2d Cir. Apr. 24, 2019).

application of the wrist-flick test to those knives would be unconstitutional. Id.

As the Second Circuit further found, petitioners use the term "as applied" in an idiosyncratic way. A17. They do not mean that the wrist-flick test cannot lawfully be applied to "certain knives they wish to personally carry," but that the wrist-flick test cannot lawfully be applied "to *anyone* carrying *any* knife" in the all-consuming "common folding knife" category. A15. Petitioners thus implicate the exclusive way in which police officers, prosecutors, courts, and juries have enforced the statute for the last sixty years. A21. The trial record does not show inherent vagueness in the wrist-flick test; it shows the opposite. As the district court found, "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." A56-57.

After years of discovery and a trial, petitioners' central allegation—the asserted indeterminacy of the wrist-flick test—remains just that: an allegation. There is no evidence to support petitioners' theory of vagueness, regardless of whether we view that theory as being grounded in past events or in prospective applications of the statute. As a result, there is no principled way to rule in petitioners' favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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