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

RESPONDENTS' JOINT SUPPLEMENTAL BRIEF

ZACHARY W. CARTER
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for City Respondent

RICHARD DEARING*
CLAUDE S. PLATTON
NWAMAKA EJEBE

CYRUS R. VANCE, JR.
District Attorney of New York County
One Hogan Place
New York, NY 10013
(212) 335-9000
krasnowe@dany.nyc.gov
Counsel for the District Attorney Respondent

ELIZABETH N. KRASNOW*
PATRICIA J. BAILEY

**Counsel of Record*

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INTRODUCTION

Respondents the City of New York and New York County District Attorney (DA) Cyrus Vance, Jr., submit this joint supplemental brief under Supreme Court Rule 15(8) in response to petitioners' supplemental brief. As explained in respondents' joint letter of June 4, 2019, this case is now moot because the central criminal statute that petitioners challenged as unconstitutionally vague has been repealed. Because petitioners sought solely prospective relief against enforcement of this statute, there is no remedy that the Court could now grant.

Petitioners try to avoid the mootness of their case by changing it. They now seek to challenge regulations of the Metropolitan Transportation Authority (MTA) that make it a violation—the lowest level of offense—to possess "weapons" and "dangerous instruments" in the New York City public-transit system, including items that are otherwise lawful like box cutters and now gravity knives. But those regulations, which are broader than the criminal statute challenged in the complaint, were never a part of this case and cannot be brought into it now. Their newly framed vagueness challenge would also be premature, as the state courts have rarely addressed the MTA regulations and have had no opportunity to construe them following the repeal of the state criminal prohibition of gravity knives.

Pointing to a statement of a New York City Police Department (NYPD) spokesperson, petitioners incorrectly suggest that the NYPD will continue to use the "wrist-flick test" and the definition of a "gravity knife" under N.Y. Penal Law § 265.00(5) to specifically target possession of gravity knives in the subways. But neither point is true. Following the repeal, the NYPD has renounced reliance on the "wrist-flick test" on which petitioners' constitutional challenge has hinged. The quoted statement was simply expressing the NYPD's view that although the possession of a gravity knife is now de-criminalized under the state law, commuters remain prohibited from bringing them, like any other "weapon" or "dangerous instrument," into the transit system.

Petitioners also cannot avoid mootness by speculating that they could face prosecution in the future for pre-repeal possession of a gravity knife. It is doubtful that New York law would even allow such a prosecution and entirely speculative for petitioners to suggest that one might occur.

Because the case is moot, the Court would lack jurisdiction to address the question proposed in the petition. But the petition also raises no cert-worthy question for a number of reasons unrelated to the recent repeal, as explained in respondents' briefs in opposition. Petitioners' labored efforts to avoid mootness, even if they had any merit, certainly cannot and do not cure those pre-existing defects.

ARGUMENT

A. The administrative transportation regulations were never a part of this litigation and cannot save the case from mootness.

When petitioners commenced this suit in 2011, they asserted a void-for-vagueness challenge only to two sections of the New York Penal Law: § 265.00(5), which defines a "gravity knife," and § 265.01(1), which defines misdemeanor possession of a weapon. These two provisions, when read together, criminalized the possession of a gravity knife. The complaint sought a declaration that the provisions were unconstitutional and an injunction against their continued enforcement (Second Circuit Joint Appendix (JA) 51–52). The prohibition of possession of a gravity knife in § 265.01(1) has now been repealed.

In an attempt to save the case from becoming moot, petitioners now point for the first time to administrative regulations promulgated by the MTA governing the possession of various "weapons" and "dangerous instruments" on New York City subways, buses, and trains. Those regulations make it a violation (a form of offense less serious than a misdemeanor) to possess, in the various components of the transit system, weapons and dangerous instruments including, but not limited to, "a firearm, switchblade knife, boxcutter, straight razor or razor blades that are not wrapped or

enclosed in a protective covering, gravity knife, sword, shotgun or rifle." 21 N.Y.C.R.R. § 1050.8; *see* 21 N.Y.C.R.R. §§ 1040.9, 1044.11 (similar).* In eight years of litigation, petitioners have never mentioned these MTA regulations as the source of any alleged injury sought to be remedied by this lawsuit. Nor have they ever argued that the MTA regulations are impermissibly vague or otherwise violate their constitutional rights.

Petitioners cannot bring these regulations into the case via a last-minute filing in the Court of last review. *See, e.g.*, *United States v. United Foods*, 533 U.S. 405, 417 (2001) (rejecting petitioner's attempt "to assert new substantive arguments" that were not presented below); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to entertain arguments about a new statute that petitioner had failed to address before the court of appeals, explaining that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"). To properly challenge these regulations, and to even have standing to make the claim, petitioners needed to have included them in their complaint

* Contrary to petitioners' assertions (Pets. Supp. Br. 4), a violation of the MTA regulations that cover New York City subways can result in a maximum of ten days, not 30 days, of imprisonment. 21 N.Y.C.R.R. § 1050.10.

and alleged that they had fear of future prosecution under the regulations. They never did so.

While petitioner Pedro Perez happened to be arrested inside a subway station, he was charged with a violation of the criminal statute, not the MTA regulations. Petitioners have consistently maintained that the basis of their challenge was their fear of future prosecution for engaging the same conduct that led to their arrests. *See Knife Rights, Inc. v. Vance*, 802 F.3d 377, 387 (2d Cir. 2015); JA44, 46, 55, 60; Pet. 8–9. Yet Perez did not challenge the MTA regulation, which he now claims would have prohibited possession of the knife that he possessed at the time of his arrest. Indeed, no petitioner alleged in the complaint or asserted in any other filing, in the lower courts or before this Court, that he feared prosecution under the MTA regulations for carrying a knife on public transportation in the future, gravity knife or otherwise.

The MTA regulations thus are simply not in this case. The petitioners have always sought to bar future enforcement of the state criminal prohibition of the possession of gravity knives. Because the Court can grant no prospective relief regarding that now-repealed statute, this case is moot.

B. Petitioners' mootness argument based on the administrative regulations rests on unfounded assumptions.

In addition to falling outside of the scope of this case, petitioners' suggestion that a challenge to the MTA regulations would raise a similar vagueness question as was raised by their challenge to the now-repealed Penal Law provisions rests on a number of unwarranted assumptions. At a minimum, before petitioners' arguments about the MTA regulations could even be appropriately presented to this Court, petitioners' assumptions would need to be tested in the lower courts.

The core assumption underlying petitioners' supplemental brief is that the MTA regulations prohibiting the possession of weapons or other dangerous instruments in the transit system are now and will be enforced in the same way as the former gravity-knife statute that forms the basis of petitioners' suit. But the transit rules are broadly worded, barring the possession of any "weapon" or "dangerous instrument" in the transit system, and they cite gravity knives only as one of a nonexclusive list of examples of such weapons or instruments. On the face of the regulations, the "common folding knives" that petitioners seek to possess may be unlawful weapons or dangerous instruments even if they are not gravity knives as defined in the Penal Law.

The state courts have had little opportunity to construe the MTA regulations. Indeed, a federal district court recently observed that "New York courts have not squarely interpreted [21 N.Y.C.R.R. § 1050.8] and its use of the terms 'weapon' and 'dangerous instrument' in particular," describing a "dearth of authority" on this point. *Corso v. City of New York*, No. 17 Civ. 6096 (NRB), 2018 U.S. Dist. LEXIS 161113, at *19–20 (S.D.N.Y. Sept. 20, 2018). The illustrative list of weapons or dangerous instruments under the regulations is not coextensive with definitions from the state penal law. For example, state law does not criminalize the possession of box cutters or define the term, but the MTA rules include box cutters in the illustrative list of weapons and dangerous instruments that cannot be possessed on subways, buses, or trains. 21 NYCRR §§ 1040.9, 1044.11, 1050.8. Thus, the application of the MTA regulations to a folding knife may not turn on whether it would qualify as a "gravity knife" under the Penal Law definition. Until such interpretive questions are addressed, it is far from clear that petitioners' vagueness arguments are even relevant to the MTA regulations.

And indeed, the NYPD does not intend to use the wrist-flick test in enforcing the MTA regulations. Counsel for respondents have been informed by the NYPD, and have been authorized to inform the Court, that the NYPD determined after repeal of the gravity-knife statute that New York City police officers will no longer be trained

on, or authorized to use, the wrist-flick test to identify an illegal gravity knife. The NYPD will thus enforce the prohibition of weapons or other dangerous instruments on public transit under the MTA regulations without reference to whether the weapon constitutes a "gravity knife" as defined under N.Y. Penal Law § 265.00(5) and without reference to the wrist-flick test. That test has been the basis of petitioners' case since its inception (JA37, 42; Pet. 3, 6–8). The NYPD's abandonment of the test confirms that petitioners' core vagueness argument no longer applies.

C. Petitioners' argument based on the possibility of future prosecution for past conduct has no basis in the record.

Pointing to a general savings clause in the New York statutes, N.Y. Gen. Constr. Law § 93, petitioners also resist mootness on the ground that retailers like Native Leather will continue to fear prosecution under the now-repealed Penal Law § 265.01(1) until the two-year limitations period for that former statute has elapsed. But the purpose of the savings clause is to address a scenario where an existing criminal penalty is *increased* after the defendant commits the offense. New York decisions generally do not apply the savings clause to an "ameliorative amendment," such as Assembly Bill 5944, that eliminates conduct from the scope of an existing criminal statute. *See, e.g., People v. Walker*, 81 N.Y.2d 661, 666 (1993)*; People v. Behlog*, 74 N.Y.2d 237, 240–41 (1989); *People v.*

Oliver, 1 N.Y.2d 152, 158–59 (1956); *People v. Roper*, 259 N.Y. 170, 178–179 (1932).

Even if prosecution under the statute could be legally permissible, there is absolutely no evidence in the record that criminal charges against Native Leather or any other retailer are pending or contemplated. There is not even a suggestion in the record that the police or DA investigators have inspected Native Leather's inventory of knives in the past two years, let alone identified a knife that would have constituted a prohibited gravity knife. Mere speculation cannot save petitioners' case from becoming moot. *See, e.g., Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (opinion of Stevens, J. respecting the denial of certiorari) ("[S]peculation cannot 'shield [a] case from a mootness determination.'" (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 (2001))).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel of the
City of New York

Counsel for City Respondent

RICHARD DEARING*
CLAUDE S. PLATTON
NWAMAKA EJEBE
New York City Law
Department
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

CYRUS R. VANCE, JR.
District Attorney
of New York County

Counsel for the District Attorney Respondent

Elizabeth N. Krasnow*
Patricia J. Bailey
New York County District
Attorney's Office

One Hogan Place
New York, New York 10013
(212) 355-9000
krasnowe@law.nyc.gov

* *Counsel of Record*