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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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In their briefs in opposition, Respondents take the same approach they have taken through this lawsuit. They ignore the substance of the case and instead attempt to direct attention away from review of the actual issues. None of it contradicts the fact that the ruling below directly conflicts with multiple other circuits (now four) and misapplies this Court's controlling precedent in order to prevent review of a law that puts millions of New Yorkers at risk of arrest and prosecution for carrying an ordinary pocket tool.

They claim the circuit split is not real when it plainly is. They claim the issue presented in the Petition was not preserved when it was plainly *passed on* by the court of appeals. And they disregard the actual record below -- all of this in an effort to get this Court to focus on irrelevancies.

And the split has become deeper. There are now four circuits that directly conflict with the Second Circuit. The Seventh and Ninth Circuits also explicitly recognize this Court's rejection of the rule from *United States v. Salerno*, 481 U.S. 739 (1987) in the context of vagueness cases.

The Court should see through Respondents' erroneous arguments.

I. Notwithstanding Respondents' Erroneous Assertions, the Circuit Split is Real, Substantial, and Expanding

Respondents suggest that the circuit split identified in the Petition is either nonexistent or insubstantial, arguing that the treatment of *Johnson v. United States*, 135 S. Ct. 2551 (2015) by the Fourth and Eighth Circuits is dicta and therefore does not form a true split. They are incorrect. The binding aspect of a court's decision arises from the reasoning and path it takes to arrive at its decision. That it might have reached the same result another way is irrelevant. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996).

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 [emphasis added].

This statement reflects a direct reliance on the difference between the rules in *Johnson* and *Salerno*. By indicating that *Johnson* "precludes the State's contention that [the court] should uphold" the statute under *Salerno*, that court necessarily concluded that it must go beyond the requirements of *Salerno* and evaluate the statute under the more favorable (to the plaintiff) standard under *Johnson*.

The state was urging the court to dispose of the vagueness claim by finding merely a single instance of non-vagueness, as the *Salerno* standard allows. But the court rejected that urging, indicating that it needed to make a stronger finding on vagueness because the *Salerno* rule had been supplanted in vagueness cases by *Johnson*. Nothing about that is dicta.

Directly to the contrary, the Second Circuit disposed of *this case* based on a single alleged instance of non-vagueness, exactly as the state requested and the court refused to do in *Kolbe*. The

Second Circuit concluded that on at least *one* occasion, the Gravity Knife Law was validly applied to Petitioner Native Leather, and therefore under *Salerno*, that was sufficient to defeat the claims of all three Petitioners.

The ruling of the Second Circuit in this case and the ruling of the Fourth Circuit in *Kolbe* are irreconcilable. The Second Circuit did exactly what the Fourth Circuit said it *could not do* in *Kolbe*.

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 held that the Plaintiff was required to meet a *different* standard to prevail on the merit of its vagueness claim after 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.

The court continued:

> Though Bramer need not prove that § 922(g)(3) is vague in all its applications, our case law still requires him to show that the statute is vague as applied to his particular conduct.

Id.

Thus, the Eight Circuit applied a different standard in evaluating the plaintiff's proofs. Although, the case was decided on another ground, that is irrelevant, as the court established the *Johnson* standard as the required measure of proof the plaintiff had to meet. He was not required to meet the *Salerno* standard. It is difficult to imagine that any district judge sitting within the Eighth Circuit would not understand that she is required to apply *Johnson* rather than *Salerno* to vagueness cases arising after *Bramer*.

Respondents' superficial focus on labels misses this point. *Bramer* creates a Circuit split because courts within the Eighth Circuit will now certainly apply *Johnson* in vagueness cases, while courts

within the Second Circuit will continue to apply *Salerno*.

And the circuit split is expanding. The Seventh Circuit has now also explicitly recognized that this Court has abrogated the *Salerno* rule in the context of vagueness cases. In *United States v. Cook*, 914 F.3d 545 (7th Cir. 2019), the court explained:

> It is true that *Johnson* puts to rest the notion—found in any number of pre-*Johnson* cases [citing *Salerno*]—that a litigant must show that the statute in question is vague in all of its applications in order to successfully mount a facial challenge. 135 S. Ct. at 2561. And, as we have mentioned, *Johnson* likewise rejects the notion that simply because one can point to some conduct that the statute undoubtedly would reach is alone sufficient to save it from a vagueness challenge. *Id*.

Id. at 553.

The Ninth Circuit is also directly at odds with the Second Circuit. In *Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018), the court held that it was required to depart from a prior circuit precedent in light of *Johnson* and *Dimaya*. The court explained:

> Applying the teachings of *Johnson* and *Dimaya* here, we conclude that we applied the wrong legal standard in *Alphonsus*. There, we

> held that the petitioner "must establish that no set of circumstances exists under which the statute would be valid." *Alphonsus*, 705 F.3d at 1042 (brackets omitted) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). In a footnote, we observed that the "no set of circumstances" standard was subject to some doubt but that we would continue to apply that standard "until a majority of the Supreme Court directs otherwise." *Id*. at 1042 n.11 (internal quotation marks and brackets omitted). That day has come. *Johnson* and *Dimaya* expressly rejected the notion that a statutory provision survives a facial vagueness challenge merely because some conduct clearly falls within the statute's scope. *Johnson*, 135 S.Ct. at 2561; *Dimaya*, 138 S.Ct. at 1214 n.3. .

Id. at 544.

Thus, the split created by the Second Circuit in this case on the one hand and *Kolbe, Bramer, Cook, and Guerrero,* on the other is unmistakable. This split is especially important because this issue will regularly arise in the context of criminal law and specifically implicates due process concerns in criminal prosecutions. For that reason this circuit split should be addressed by the Court.

II. The Issue Presented in the Petition was Passed On by the Court of Appeals and was Therefore Properly Preserved

Respondents argue that: (1) Petitioners failed to preserve the issues in the Petition by not raising them below and (2) Petitioners waived the issues in the Petition by invoking the *Salerno* rule below. This is incorrect.

For preservation, this Court requires that an issue be "pressed or passed on" below. *U.S. v. Williams*, 504 U.S. 36, 41-43 (1992). The rule operates disjunctively. The issue need only be either (1) pressed or (2) passed on. "Passed on" means that the court decided the issue below. *Id*.

There is no serious question that the issue was both pressed *and* passed on below. In footnote 3, the court below explicitly addressed Petitioners' contention as to the conflict between the *Salerno* rule and the rule in *Johnson* and *Dimaya*:

> 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.

The court went on to explicitly apply the *Salerno* rule:

> 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.

Under *Williams*, this is easily sufficient for preservation.

Respondents also claim that Petitioners affirmatively invoked *Salerno* in support of their position. This is also incorrect.

As a supposed example of this, the DA references Petitioners' citation of *Ward v. New York*, 291 F. Supp. 188 (W.D.N.Y. 2003) during oral argument before the district court. What they ignore is that the citation of *Ward* was in response to a question from the court about prospective *as-applied* challenges:

> THE COURT: Do you have a case where the challenge for an as-applied challenge is

> prospective in major part or exclusively? Either one. Either in major part or exclusively.
>
> . . .
>
> MR. SCHMUTTER: I'll offer as well *Ward v. New York*. Western District of New York. 291 F. Supp. 2d 188. Although, your Honor, because this issue just came up I would ask for the opportunity to submit a post trial brief to provide additional cases.
>
> THE COURT: I'm not going to take anymore briefing on this.

C.A.App.1075-76.

Ward is both a facial case *and* an as-applied case. Petitioner cited *Ward* at oral argument in answer to a question about cases involving *as-applied* claims. *Ward* also happens to discuss *Salerno* in a separate section about facial claims. So, the DA is trying to suggest that Petitioners cited *Ward* for its recitation of the *Salerno* rule, which is plainly incorrect.

Importantly, Petitioners have *always* litigated this case below as an as-applied case. The only time any court ruled that the claim was actually a facial claim was in the decision of the court of appeals. Accordingly until the court of appeals ruled that the claim was actually facial and ruled that a *single past*

instance in which the court found that the Wrist Flick Test was validly applied to one of the Petitioners, *Salerno* and its conflict with *Johnson* was not a material factor in the case.

Thus, it is the combination of two improper rulings by the court of appeals that give rise to the issues in the Petition: (1) The court of appeals ruled that Petitioners' claims are facial and not as-applied. The court of appeals was the only court to so rule. (2) The court of appeals ruled that, notwithstanding that the claims in the case are *entirely prospective*, finding that in a single past instance the Wrist Flick Test was validly applied to one of the Petitioners was enough to invalidate *all of the prospective claims of all of the Petitioners*.

Importantly, the district court made no such finding, instead deciding that Petitioners claims fail regardless of whether they are deemed facial or as applied: "In all events, for the reasons described below, plaintiffs' challenge fails whether it is considered an as-applied challenge or a facial challenge." App.70.

Thus, the unique combination of holdings of the court of appeals is what put the conflict between *Salerno* on the one hand and *Johnson* and *Dimaya* on the other squarely into play, and therefore Petitioners cannot be deemed to have waived the issues in this case.

Significantly, this Court has repeatedly warned against ascribing substantive significance to the difference between facial and as-applied. As recently as April of this year, in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Court explained that the distinction is largely one of breadth or remedy and further noted that the line between the two can sometimes prove amorphous. *Id*. at 1127-28. *See also Citizens United v. Federal Election Commission*, 558 U.S 310, 331 (2010); *Doe v. Reed*, 561 U.S. 186, 194 (2010).

Thus, Respondents' assertion of waiver is misplaced.

III. Petitioners' Own Past Conduct is Irrelevant

Like the court below, Respondents incorrectly apply the rule that in a vagueness challenge, a plaintiff cannot complaint about a vague statute if the statute is not vague when applied to his own conduct, *citing United States v. Cook*, 914 F.3d 545, 554 (7th Cir. 2019) and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

But like the court below, Respondents fail to recognize that this rule has no applicability in prospective vagueness cases like the within case. This "own conduct" rule derives from this Court's decision in *Parker v. Levy*, 417 U.S. 733 (1974), in which the Court laid out the non-controversial rule

that to maintain a vagueness claim, a plaintiff must show at least that the statute is vague as to himself. That is different than what Respondents and the court of appeals think the rule means, and that error is what led the court below to apply *Salerno* incorrectly and in a manner in conflict with *Johnson*.

The court below concluded that some of the knives previously sold by Native Leather operated as so-called "gravity knives" under the statute when the Wrist Flick Test was applied by the DA. The court then made the leap, without any analysis, that *that* fact precluded a prospective claim about *future* knives Native Leather wished to sell. But that is a *non sequitur* and misapplies *Parker*.

The operation of specific knives in the past has nothing to do with whether the Wrist Flick Test can identify *legal* knives in the future. The claim in this case has nothing to do with past knives. It has everything to do with the fact that there is no way to use the Wrist Flick Test to identify, going forward, what is a legal knife.

Petitioners want to possess/sell legal knives. It does them no good to identify knives that *can* flick open. To behave lawfully, they must identify knives that *cannot* flick open -- an impossible task.

As explained in the Petition, the test is not whether the *knife owner* can flick the knife open. The test is whether *anyone, anywhere, at any time*

can flick the knife open. Because the Wrist Flick Test varies from person to person when applied to Common Folding Knives, there is no way a person can ever make this determination. Petitioners are not interested in which knives they *can* flick open. They are interested in which knives *no one, anywhere can ever* flick open. No one can ever know that. No one can ever know that no person anywhere will ever be able to flick a given knife open. But that is what the Gravity Knife Law requires. For that reason no one can conform his conduct to the requirements of the law, and the Wrist Flick Test is void for vagueness.

Past conduct has no bearing on this. Because the court below misapplied *Salerno*, it became fixated on the one past instance in which it concluded that the statute was validly applied to Native Leather. But misapplying *Salerno* caused the court below to misapply the record to the merits of the claim. If the court of appeals had properly recognized that *Salerno* no longer supplies the rule in vagueness cases, it would have realized that Native Leather's past conduct has no bearing at all on its *prospective* vagueness claim.

For this reason, Respondents' argument that the record below precludes relief is meaningless. The court's error as to *Salerno* compelled its further error as to the factual record because it looked to past conduct rather than future conduct. There was ample factual support for prospective indeterminacy

of the Wrist Flick Test, but once the court below got the *Johnson*/*Salerno* conflict wrong, it was mistakenly drawn to past facts and ignored the forward looking facts.

Further, none of Native Leather's past facts have anything to do with the other Petitioners, Copeland and Perez. Thus, even if the court of appeals properly looked to the past conduct of Native Leather to deprive it of a prospective claim, none of that could be used to deprive Copeland and Perez of *their* prospective claims. Native Leather's conduct has no bearing under *Parker* on Copeland's and Perez's claims.

For this reason, granting the Petition *would* provide relief to the Petitioners if they prevail on the merits.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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