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

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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,

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