13-4840

United States Court of Appeals
For the Second Circuit

KNIFE RIGHTS, INC., JOHN COPELAND, PEDRO PEREZ,
NATIVE LEATHER, LTD., KNIFE RIGHTS FOUNDATION, INC.,
Plaintiffs-Appellants,

– v –

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

ERIC T. SCHNEIDERMAN, in his Official Capacity as Attorney General of the State of New York
Defendant

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE CYRUS R.VANCE, JR.

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Jurisdictional Statement

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the complaint in this action asserted claims arising under 42 U.S.C. § 1983.

On September 24, 2013, the District Court entered an order dismissing the Amended Complaint, and on November 20, 2013, it filed an order denying Plaintiffs' motion for reconsideration and leave to file a second amended complaint. The notice of appeal from both orders was timely filed on December 18, 2013.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 1294.

Statement Of Issues Presented For Review

This case arises out of Plaintiffs' challenge to New York State Penal Law §§ 265.00(4), 265.00(5) and 265.01(1), which prohibit the possession of "switchblade knives" and "gravity knives." The Amended Complaint alleges that the statutes are "void-for-vagueness" as applied to Plaintiffs and asserts two causes of action arising under 42 U.S.C. § 1983, seeking declaratory and injunctive relief against the City of New York and the District Attorney of New York. The issues presented for review are as follows:

1. Did the District Court correctly conclude that three Plaintiffs against whom the statutes might be enforced (John Copeland, Pedro Perez and

Native Leather, Ltd.) lacked standing where none identified or described the knives that they wanted to possess but for fear of prosecution with the specificity needed to show a concrete and particularized injury fairly traceable to the alleged vagueness in the statutes and the challenged enforcement of those laws?

2. Did the District Court correctly conclude that interest group Plaintiffs Knife Rights Inc. ("Knife Rights") and Knife Rights Foundation ("Foundation") lacked standing where (a) this Court has clearly stated that interest group plaintiffs do not have standing to bring associational standing claims under 42 U.S.C. § 1983, and (b) the interest group plaintiffs' argument for direct standing rested entirely on the claims of the three other Plaintiffs, who are not alleged to be members of Knife Rights or Foundation, and who themselves lack standing?

3. Did the District Court abuse its discretion when it denied Plaintiffs the opportunity to file a second amended complaint, 28 months after the case had been commenced and 13 months after Plaintiffs had filed their Amended Complaint, and where discovery relating to the Amended Complaint had already been nearly completed and Plaintiffs' proposed second amended complaint would have changed the focus of Plaintiffs' case and required additional discovery to address the changed focus?

4. Are the New York Penal Law statutes at issue in this case, which have been repeatedly upheld by the New York courts against void-for-vagueness challenges, unconstitutionally vague?

Statement Of The Case

A. Statutory Definitions of Gravity Knives and Switchblades

Plaintiffs challenge the Defendants' enforcement of New York Penal Law § 265.01(1), entitled Criminal Possession of a Weapon in the Fourth Degree, which makes it a class A misdemeanor to possess a "switchblade knife" or a "gravity knife."

[1] *Switchblade knife* is defined in Penal Law § 265.00(4) as any knife that "has a blade which opens automatically by hand pressure applied to a button, spring or other device on the handle of the knife."[1]

[2] *Gravity knife* is defined in Penal Law § 265.00(5) as any knife that

> 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.[2]

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[1] Although Penal Law §265.00(4) defines "[s]witchblade knife" this brief shall use the more colloquial term "switchblade."

[2] The legislature provided an exemption: If a person has a valid New York State Department of Environmental Conservation hunting, fishing or trapping license, he or she is exempt from gravity knife prosecution. *See* N.Y. Penal Law

New York courts have upheld section 265.00(5) against challenges that it was unconstitutionally vague,[3] and the Court of Appeals has stated, in *dictum*, that section 265.00(5) "distinguishes gravity knives from certain folding knives that cannot readily be opened by gravity or centrifugal force. It further requires that the blade lock in place automatically upon its release and without further action by the user, distinguishing a gravity knife from, for example, a 'butterfly knife,' which requires manual locking." *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010) (citations and internal quotations omitted).

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§ 265.20(6). Thus, regardless of the make, model or source of the knife, outright dismissal is required if a defendant has a valid DEC sportsman's license.

[3] *See, e.g.*, *People v. Giles*, 99 AD3d 610 (1st Dep't 2012) (rejecting void-for-vagueness challenge to gravity knife statute); *People v. Herbin*, 86 A.D.3d 446, 446-447 (1st Dep't 2011)("The statutory prohibition of possession of a gravity knife is not unconstitutionally vague. The statute defines a gravity knife as 'any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.' This language provides notice to the public and clear guidelines to law enforcement as to the precise characteristics that bring a knife under the statutory proscription")(internal citations omitted), *lv. denied*, 17 N.Y.3d 859 (2012); *People v Kong Wang*, 17 Misc.3d 133(A) (N.Y. Co. Crim. Ct. 2007) (statutory provisions defining gravity knife "are not impermissibly vague as applied to defendant"); *People v. Voltaire*, 18 Misc.3d 408, 413 (N.Y. City Crim. Ct. 2007) ("[S]tatute provides clear notice as to the specific characteristics which define an illegal gravity knife."); *People v. Fana*, 23 Misc.3d 1114(A), 886 (Crim. Ct. N.Y. Cty. 2009) ("[T]he statute provides police with clear standards for enforcement and is a valid use of the state's police power. . . . Penal Law § 265.01(1) authorizes police to arrest a person where they have probable cause to believe that he knowingly and voluntarily possesses a knife which meets the specific statutory definition of a gravity knife.") (citation omitted).

B. The Amended Complaint

Plaintiffs Knife Rights, John Copeland and Pedro Perez filed the original complaint in this case on June 9, 2011, against Defendants Cyrus Vance, Jr., in his official capacity as the New York District Attorney, the City of New York, and Eric Schneiderman, in his official capacity as Attorney General of the State of New York. DA Vance moved to dismiss the complaint on the grounds that Plaintiffs did not have standing and the Complaint failed to state a claim upon which relief could be granted. The City joined the motion. After motion practice, including Plaintiffs' submissions of numerous declarations in opposition to the motion, and in the midst of discovery, Plaintiffs moved pursuant to Federal Rule of Civil Procedure 15(a) for leave to file an amended complaint. The District Court granted Plaintiffs' motion, and dismissed Defendants' motions as moot.

The Amended Complaint was filed on September 24, 2012. *See* A227 – A243. (Attorney General Schneiderman was not named as a defendant in the Amended Complaint; Native Leather and the Foundation were added as plaintiffs.) It alleges that New York's statutes prohibiting switchblades and gravity knives are void-for-vagueness as applied to "Common Folding Knives,"

which Plaintiffs define as knives "that are designed to resist opening from their folded and closed position." A227.[4]

The Amended Complaint alleges that "it is impossible" for individuals who wish to possess Common Folding Knives and retailers who would sell them "to know whether the NYPD or the District Attorney will contend that any particular Common Folding Knife is a 'switchblade' or a 'gravity' knife." As a consequence, the Amended Complaint alleges individuals who would otherwise possess Common Folding Knives are afraid to do so, and retailers either refuse to sell any Common Folding Knives, or "severely limit the Common Folding Knives they offer for sale in New York City in an attempt to avoid prosecution by only selling Common Folding Knives that are very difficult to open." *Id.* ¶ 6.

1. The Amended Complaint's Allegations About Plaintiffs Copeland And Perez

The Amended Complaint alleges that Plaintiffs Copeland and Perez, respectively an artist and a "purveyor of fine arts," used knives in the regular course of their business. *See* Amended Complaint ¶¶ 11-12 [A230]. They were stopped, on separate occasions, by the New York City Police for possession of knives that NYPD contended were gravity knives. *See* Amended Complaint ¶¶ 25-30 (Copeland), 33-37 (Perez).

[4] Because the Amended Complaint defines "Common Folding Knives" in this fashion, the same definition will be used here. The term is not, however, statutorily defined.

The Amended Complaint alleges that when the police stopped Copeland (October 10, 2010), he was carrying a knife, and the police "stated that they could open the . . . knife's blade by grasping the knife's handle and forcefully 'flicking' the knife body downward, and they alleged that it was therefore a prohibited gravity knife." *Id.* ¶ 30. Copeland was given a Desk Appearance Ticket, and charged with violating Penal Law § 265.01(1).

The Amended Complaint makes the following allegations about Perez's police stop, which took place on April 15, 2010: "Although the officers could not themselves open the knife using a 'flicking' motion, the officers asserted that it would (theoretically) be possible to do so, and that the possibility to open the knife using any type of a 'flicking' motion made the knife a prohibited gravity knife." *Id.* ¶ 37. Like Copeland, Perez was given a Desk Appearance Ticket, and charged with a violation of Penal Law § 265.01(1). The complaint commencing the prosecution of Perez (which was file on May 17, 2010) stated that an NYPD lieutenant opened the knife by flicking his wrist and the blade then locked in the open position. *See* Entry 66, Exhibit A, Docket Sheet for 11 Civ. 3918.

Perez's case was resolved in November 2010, when he agreed to an Adjournment in Contemplation of Dismissal ("ACD") pursuant to New York

Criminal Procedural Law § 170.55.[5] Copeland's case was resolved in January 2011, when he too agreed to ACD. *Id.* ¶ 38.

The knife that Copeland possessed when stopped by police was a "Benchmade brand Common Folding Knife" with a blade that locked in place when in a "fully open position." The blade had a thumb stud mounted on it that allowed a user to hold the knife and "swivel the blade open" with a single hand. *Id.* ¶ 26-27. The Amended Complaint alleges that on two separate and unspecified occasions before the police stop, Copeland had shown his knife to police officers who had tried unsuccessfully to open the knife; the Amended Complaint does not allege, however, whether the knife's condition changed following those occasions and before the police stop. *Id.* ¶ 29.

The Amended Complaint alleges that Copeland "would purchase another similar" knife, but "refrains from doing" because he fears arrest and prosecution and also "is unable to find any such knives for sale in the City." *Id.* ¶ 32. The Amended Complaint further alleges that Copeland no longer carries any Common Folding Knife in the City "because he fears that he will again be charged with Criminal Possession of a Weapon, and he is unable to determine

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[5] An ACD is "…an adjournment of the action without a date ordered with a view to ultimate dismissal in the furtherance of justice." N.Y. CPL §170.55(2). An ACD is not a meritorious dismissal as "…the question of guilt or innocence remains unanswered." McKinney's §§ 170.55, subd 2, comment. *See also Hollender v. Trump Village Co-op, Inc.,* 58 N.Y.2d 420, 426 (1983) (an adjournment in contemplation of dismissal is "neither a conviction nor an acquittal.").

whether any particular Common Folding Knife might be deemed a prohibited switchblade or gravity knife by the District Attorney or NYPD." *Id.* ¶ 32. The Amended Complaint makes virtually identical allegations about Perez and the knife he possessed when stopped by police, except Perez's knife was made by "Gerber." *See id* ¶¶ 35-36, 39.

2. The Amended Complaint's Allegations About Plaintiff Native Leather

Plaintiff Native Leather is a New York corporation with its principal place of business in Manhattan where it operates a retail store that sells knives. *See id.* ¶ 14. The Amended Complaint alleges that in or about June 2010, Native Leather entered into a deferred prosecution agreement in which it "turned over many of its folding knives to DA Vance, paid monetary penalties, adopted a compliance policy that DA Vance approved, and pledged to cease from selling switchblade and gravity knives as defined in N.Y. Penal Law § 265.00(4)-(5)." *Id.* ¶ 44.

The Amended Complaint further avers that Native Leather sells only folding knives that have passed the following "wrist-flick" test: "knives that [a] designated employee is not able to 'wrist-flick' open even one time." Native Leather "would currently sell a significantly wider variety" of folding knives but for the threat that New York Penal Laws §§265.01(1), 265.00(4), 265.00(5) would be enforced against it. *Id.* ¶ 46 (A238-A239).

The Amended Complaint does not describe with any particularity the folding knives that Native Leather sells or, but for its alleged fear of prosecution, would sell.

3. The Amended Complaint's Allegations About Plaintiffs Knife Rights and Foundation

Knife Rights is a "membership organization" with members "throughout the United States" including members in New York City. *Id.* ¶ 47. It "promotes legislative and legal action, as well as research, publishing and advocacy, in support of people's ability to carry and use knives and tools." *Id.* ¶ 10. One of the "core purposes of Knife Rights is to vindicate the legal rights of individuals and businesses who are unable to act on their own behalf," and it allegedly brought the lawsuit "on behalf of both itself and its members." *Id.* ¶ 47.

Foundation is a not-for-profit corporation organized under the laws of Arizona with its principal place of business in that state. *Id.* ¶ 13. It is "organized to promote education and research regarding knives and edged tools." *Id.* Foundation "has paid or contributed towards, and continues to pay and contribute towards," some of Knife Rights' "monetary expenses" in connection with "Defendants' threatened enforcement of the State laws prohibiting switchblade and gravity knives against Common Folding Knives." *Id.* ¶ 52.

4. The Amended Complaint's Causes Of Action

The Amended Complaint asserts two causes of action. The first alleges that Penal Laws §§ 265.01(1) and 265.00(4) – the provisions that, respectively, prohibit a person from possessing a switchblade and define "switchblade knife" – are void for vagueness "as applied to Common Folding Knives that are designed to resist opening from their folded and closed positions" in violation of the Plaintiffs' due process rights and 42 U.S.C. § 1983. *See* Amended Complaint ¶¶ 57-58. The second count makes the same allegations with respect to Penal Laws §§ 265.01(1) and 265.00(5) – the provisions that, respectively, prohibit a person from possessing a gravity knife and define "gravity knife." *See* Amended Complaint ¶¶ 59-60. The Amended Complaint seeks declaratory and injunctive relief.

C. Motion To Dismiss And Order Dismissing The Amended Complaint

Defendants moved to dismiss the Amended Complaint in October 2012 pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that each of the Plaintiffs lacked standing because none was faced with the risk of imminent injury, and Federal Rule of Civil Procedure 12(b)(6), on the ground that the Penal Laws at issue were not unconstitutionally void. *See* Memorandum of Law in Support of District Attorney Cyrus R. Vance Jr.'s Motion to Dismiss, filed

October 18, 2012 (Entry 67, Docket Sheet for 11 Civ. 3918). Plaintiffs opposed the motion, and requested that if the District Court agreed that the Amended Complaint should be dismissed then the Plaintiffs should be given an opportunity to file a second amended complaint. *See* Plaintiffs' Memorandum of Law In Opposition to Defendant District Attorney's Motion to Dismiss, filed November 23, 2012 (Entry 73, Docket Sheet for 11 Civ. 3918).

The District Court held that the Plaintiffs did not have standing, and granted the Defendants' motion on September 25, 2013. *See* SPA1-SPA11. It did not reach the issue of whether the state penal laws were unconstitutionally vague.

As to Perez, Copeland and Native Leather, the District Court found that each lacked standing because each "fail[s] to present a 'concrete and particularized' and 'actual or imminent' injury in fact that arises from the definitions of 'switchblade' and 'gravity' knives being unconstitutionally vague." SPA7 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The District Court noted that Perez and Copeland may have faced a risk of injury when they were arrested, and Native Leather might have faced such an injury had it been prosecuted, but Copeland and Perez agreed to dispose of the charges against them through ACDs, and Native Leather avoided prosecution by entering into a deferred prosecution agreement, all without pressing a challenge to the vagueness of the statute. SPA7 "Thus," the District Court reasoned, "no

Plaintiff currently faces 'certainly impending' harm as a result of the statute, *Lujan*, 504 U.S. at 565 n.2, that would be 'redressable by a favorable ruling,' *Horne* [*v. Flores*,] 557 U.S. [433,] 445 [(2009)]." SPA7-8.

The District Court found that Copeland's, Perez's and Native Leather's allegations were "completely hypothetical and 'highly speculative.'" SPA8 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). The key to the District Court's analysis was that while each of these three Plaintiffs alleged fear of prosecution if it possessed or sold knives because they could not be confident of which knives fell within the definition of (prohibited) switchblades or gravity knives, none of the Plaintiffs alleged the make and model of the knives that he wanted to possess, or even a specific description of the knives. *See* SPA8-SPA9. Because the Amended Complaint was so speculative, the District Court held, it "is a prototypical request for an advisory opinion." SPA9. The District Court found (*id.*):

> Plaintiffs ask this Court to determine that the statute is unconstitutionally vague without showing any actual or imminent and redressable harm deriving from the statute. The advisory nature of this request is particularly clear because Plaintiffs fail to describe with specificity the nature of the knives they wish to own or the injury caused by their inability to do so. Under such circumstances, the Court's standing inquiry must be "especially rigorous." *Clapper*, 133 S. Ct. at 1147 (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). The Court refuses to entertain a request for an advisory opinion[.]

As to the two interest group Plaintiffs, Knife Rights and the Foundation, the District Court found that their claim for standing was "even more attenuated." SPA9. The District Court observed that, under binding Second Circuit case law, neither could bring a § 1983 suit under a theory of associational standing,[6] and that the only way that they might have standing would be if "they themselves 'independently satisfy the requirements of Article III,'" by suffering an actual or imminent injury traceable to the conduct of Defendants. SPA10 (quoting *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011)). Although Knife Rights and the Foundation had indeed "expended resources" to oppose the statutes, that expenditure of money could not satisfy the Article III standing requirement because "to sue based on litigation expenses, a plaintiff organization must be challenging a practice by defendants that actually affects its members. Otherwise the organization itself has suffered no actual or imminent harm." SPA10 (emphasis in the original; citations omitted.)

The District Court concluded: "At most, Knife Rights and the Foundation have expended litigation resources in order to avoid an entirely hypothetical possibility that the government's policies will injure their members. Plaintiffs 'cannot manufacture standing merely by inflicting harm on themselves

[6] Only Knife Rights asserted associational standing. Foundation did not. The arguments that apply to Knife Rights would apply as well to Foundation if it were to assert an associational standing claim.

based on their fears of hypothetical future harm that is not certainly impending." SPA10-SPA11 (quoting *Clapper*, *supra*, 133 S. Ct. at 1151). The District Court therefore ordered that the Amended Complaint be dismissed, and the case terminated. *Id.*

In a footnote near the conclusion of its opinion, the District Court noted that "[w]hile the Court does not reach the issue, the Court notes that several courts have already held that the definitions of knives are not vague." SPA11 at n.3 (citing authority).

D. Plaintiffs' Motion To File A Second Amended Complaint

Plaintiffs moved for reconsideration of the District Court's decision dismissing the Amended Complaint, arguing that Plaintiffs should be permitted to file a second amended complaint. *See* A312-A313. The District Court ruled that for it to "consider this motion fully, plaintiffs should provide a proposed [second] amended complaint." A313. The Plaintiffs filed the Proposed Second Amended Complaint on October 28, 2013.

1. The Proposed Second Amended Complaint

The Proposed Second Amended Complaint (A316 – A344) dropped any reference to switchblades, and focused entirely on the allegedly unclear distinction between gravity knives and "locking blade folding knives," which the Proposed Second Amended Complaint defined as "folding pocket knives that

feature mechanisms that lock their blades in the open position." Proposed Second Amended Complaint ¶ 1 (A316).

The only cause of action was that New York Penal Laws §§ 265.01(1) and 265.00(5) were void for vagueness as applied to Plaintiffs' "locking-blade folding knives." *See* Proposed Second Amended Complaint ¶ 90 (A343). In support of the claim, the Proposed Second Amended Complaint identified the model numbers of the knives that Mr. Copeland and Mr. Perez had been carrying when they were stopped by the police, *see* Proposed Second Amended Complaint ¶¶ 27 (A323), 34 (A324), as well as knives that had been purchased by the District Attorney's Office from Native Leather, *see id.* ¶ 39 (A326). But, it did not allege whether the knives carried by Copeland and Perez when stopped by police, or the knives purchased from Native Leather could be opened with a flick of the wrist or by the application of centrifugal force. The Proposed Second Amended Complaint also described the compliance agreement that Native Leather had entered into with the District Attorney's Office, pursuant to which the owner of Native Leather would test any knife that she proposed to sell by attempting to open the knives with a "flick" of her wrist – if they opened then they were prohibited gravity knives – and recording the results. *See id.* ¶ 47 (A328).

The Proposed Second Amended Complaint alleged that, but for their fear of prosecution, Plaintiffs Copeland and Perez "would purchase, use, possess and carry" the models of the knives that they had been carrying when they were

stopped by the police, *see id.* ¶¶ 54 (Copeland) (A329), 60 (Perez) (A331). The Proposed Second Amended Complaint also alleged, for the first time, that Copeland and Perez could find no other tools that served the purpose of the knives they had when they were each arrested in 2010, and that to carry another knife or tool would simply be "too burdensome." *Id.* ¶¶ 56 (Copeland) (A330), 61 (Perez) (A332). It further alleged that Copeland and Perez were frightened that even if they believe that their knives could not be opened readily with the flick of the wrist, others may disagree. *Id.* ¶¶ 57, 62 (A330, A332).

As to Native Leather, the Proposed Second Amended Complaint alleged that Native Leather sold only a limited inventory of locking-blade folding knives because it feared that other knives "would not pass the 'wrist-flick' test." *Id.* ¶ 65 (A333). The Proposed Second Amended Complaint alleged that "there is no assurance that the NYPD will not charge a person who purchases a locking-blade folding knife from Native Leather with a gravity knife offense" because there can be no assurance that the NYPD would agree with the assessment that any particular knife is not readily opened by the flick of a wrist. *See id.* ¶ 68 (A334-A335).

The Proposed Second Amended Complaint's allegations about Knife Rights and Foundation are the same, for all relevant purposes, as the analogous allegations in the Amended Complaint. *Compare* Proposed Second Amended

Complaint ¶¶ 69 - 76 (A335-A338) *with* Amended Complaint ¶¶ 47 - 52 (A239-A240).

2. The Need for Additional Discovery

Upon receiving the Proposed Second Amended Complaint, the District Court ordered the parties "to indicate . . . whether the [proposed] second amended complaint contains new factual material as to which no discovery was taken (cite ¶¶'s), and if so, what additional discovery would be necessary." A351.

Plaintiffs responded that no new discovery was required (A352-A353), but Defendants submitted a letter showing the opposite. Defendants' letter showed that:

- The Proposed Second Amended Complaint's change of focus from Common Folding Knives to locking-blade folding knives would require additional discovery because such blades were only "peripherally addressed" in the deposition of the Plaintiffs' expert witness. *See* A355.
- The new allegations about the harm that Plaintiffs Copeland and Perez suffered by virtue of their inability to possess the knives with which they were arrested were important to establish injury-in fact, and thus required additional discovery. *See* A356-A357.
- The Proposed Second Amended Complaint sought a declaration that the "wrist flick test" used to determine whether a knife was a

> gravity knife be declared void-for-vagueness. *See* A356; *see also* A343-A344 (Remedy section of Proposed Second Amended Complaint). That relief was entirely new, and "[n]o discovery has been conducted on the issue of how, or whether, the wrist-flick maneuver is unconstitutionally vague or violative of the Fourteenth Amendment." A356.

As the letter explained, to defend against the new allegations in the Proposed Second Amended Complaint "the Defendants would need, at the very least, to serve additional interrogatories and requests to admit upon each of the Plaintiffs, and to reopen the deposition of Plaintiffs' knife expert[.]" In addition, Defendants would need to depose Copeland and Perez, and re-open the depositions of Native Leather's owner and of the president of Knife Rights and the Foundation. *See* A355.

3. The Ruling Of The District Court

In an opinion and order dated November 20, 2013, the District Court denied Plaintiffs' motion for reconsideration and leave to file the Proposed Second Amended Complaint. *See* SPA13-SPA19. The District Court ruled that Plaintiffs' motion was simply an attempt to "plug the gaps of their lost motion by inserting new allegations related to standing – exactly the type of situation for which reconsideration is not designed." SPA15 (internal quotations and citations omitted; emphasis in the original).

Furthermore, the District Court stated, discovery was closed and the Proposed Second Amended Complaint "alters the case sufficiently to cause prejudice to defendants." SPA16. The District Court referred to the allegations in the Proposed Second Amended Complaint concerning Copeland's and Perez's needs for specific types of knives and noted that in light of those allegations "defendants would need to serve additional interrogatories and requests to admit upon the plaintiffs as well as to depose Copeland and Perez." SPA17. The District Court further referred to the change in emphasis from Common Folding Knives in the Amended Complaint to locking-blade folding knives in the Proposed Second Amended Complaint, and said "[w]hile the element of a locking blade mechanism was peripherally addressed in the deposition of Plaintiffs' knife expert, it was not examined as it would have been had the 'core allegation' been against locking blade folding knives, as it is in the Proposed [Second Amended] Complaint. That is sufficient to show prejudice." SPA18 (internal quotations omitted; quotation was of Defendants' Letter to the Court (A352-A357)).

The District Court concluded by stating that discovery had been closed, and that the court had granted Defendants' "summary judgment motion." *Id.*

E. This Appeal

Plaintiffs filed a notice of appeal from both the District Court's order dismissing the Amended Complaint and the Court's order denying Plaintiffs' motion for reconsideration and leave to amend. Plaintiffs' appeal raises three issues.

First, Plaintiffs argue that the District Court erred in finding that Plaintiffs Copeland, Perez and Native Leather lacked standing. According to Plaintiffs, the allegations in the Amended Complaint that "actual enforcement has already been taken against them" establish that "it is not speculative that Defendants actually enforced the law in the manner alleged." Appellants' Brief at 44. They further contend that the District Court "misunderst[ood] the nature of the injury. This is a vagueness challenge. Inherent in such a challenge is the inability to know what conduct will result in liability." *Id.* Plaintiffs argue that the alleged vagueness of the penal statutes creates a chilling effect because Copeland, Perez and Native "must avoid all Common Folding Knives in order to ensure that no enforcement action will be taken against them." *Id.* at 45 (footnote omitted).

Second, Plaintiffs argue that the District Court's holding that Knife Rights and the Foundation "cannot bring a § 1983 suit on behalf of their members" (SPA10) was wrong as a matter of law because it is based on *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), which, Plaintiffs contend, has been undermined by

subsequent Supreme Court authority. *See* Appellants' Brief at 54-61. Plaintiffs further allege that for the same reasons that the District Court's holding with respect to Copeland, Perez and Native Leather was wrong, so too was its holding with respect to Knife Rights and the Foundation. *See* Appellants' Brief at 46-47.

Third, Plaintiffs argue that the District Court erred in denying them the right to file their Proposed Second Amended Complaint. *See* Appellants' Brief at 48-54. In support of their argument, Plaintiffs fasten on the District Court's statement that discovery was closed, pointing out that it was (slightly) in error, as "[e]xpert discovery was ongoing, and the deposition of Plaintiff's expert . . . still remains to be taken." *Id.* at 52. Plaintiffs also dispute that additional discovery would be needed in any event, *id.,* and point out that the District Court's reference to the Defendants' "summary judgment" motion was incorrect because Defendants had filed motions to dismiss (Fed. R. 12(b)(6)) and for judgment on the pleadings (Fed. R. Civ. P. 12(c)), rather than summary judgment motions. *Id.* 53-54.

Summary of Argument

The District Court's orders from which Plaintiffs have appealed should be affirmed in all respects.

First, the District Court's finding that Copeland, Perez and Native Leather lacked standing because they did not adequately identify the knives they would possess but for fear that the New York Penal Laws would be enforced against

them was absolutely correct. Plaintiffs' descriptions of the knives they wanted to possess were insufficient to show that their fear of enforcement was traceable to the statute's alleged vagueness, or that they would suffer actual harm from the enforcement of New York Penal Law §§ 265.01(1), 265.00(4), 265.00(5). *See infra* Point I.

Second, the District Court's order finding that Knife Rights did not have associational standing to assert a claim under 42 U.S.C. § 1983 was correct and compelled by this Court's precedent. *See Nnebe*, 644 F.3d at 156 (2d Cir. 2011) (citing authority). *See infra* Point II.A. Its order that Knife Rights and Foundation lacked standing to sue directly was also correct because, like Plaintiffs Copeland, Perez and Native Leather, neither Knife Rights nor Foundation could show that they had suffered actual harm from any threatened application of the New York Penal Laws. To be sure, they expended funds to pursue this lawsuit, but that is not a cognizable injury given the absence of any underlying threatened application of the laws. *See infra* Point II.B.

Third, the District Court did not abuse its discretion in refusing to permit Plaintiffs to file a second amended complaint. The case was already more than two years old when Plaintiffs moved for reconsideration of the Court's decision and sought to amend for a second time, and the Proposed Second Amended Complaint would have required additional discovery and motion practice. *See infra* Point III.

Fourth, although the District Court did not reach the question whether the New York Penal Laws were unconstitutionally vague, the issue was fully briefed below and this Court can decide the question. Although Plaintiffs claim that the laws are vague "as applied" to "Common Folding Knives," Plaintiffs do not identify any instance in which the laws leave Plaintiffs, or any person of ordinary intelligence, unable to understand which Common Folding Knives he may possess and which ones not. Although there may be close cases that is true with any law, and issues posed by close cases are addressed not by the doctrine of vagueness but by the requirement of proof beyond a reasonable doubt. New York's statutes prohibiting switchblades and gravity knives have been upheld against constitutional vagueness challenges and are not less precise than other statutes that have been upheld against void-for vagueness challenges; the Penal Laws do not give too much discretion to law enforcement officers. Plaintiffs do not allege facts showing that the enforcement of New York Penal laws against them for possession of gravity knives was arbitrary or discriminatory as applied. *See infra* Point IV.

POINT I

Copeland's, Perez's and Native Leather's Claims Were Speculative and Hypothetical Because the Amended Complaint Did Not Identify Or Otherwise Specifically Describe The Knives Plaintiffs Wished To Possess But Allegedly Can Not

Whether a plaintiff has standing to sue is a question of law, which this Court reviews *de novo*. *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 156 (2d Cir. 2012) (citing *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010)).

The Supreme Court has recently emphasized that "no principal is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper* 133 S. Ct. at 1146 (2013). To establish Article III standing, plaintiffs must establish an injury that is "'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Id.* at 1147 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). *See also Lujan*, 504 U.S. at 560-61 (1992) (setting forth the three requirements for Article III standing: (1) an injury in fact that is "concrete and particularized," and "actual or imminent, not conjectural or hypothetical," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood, rather than merely a speculative possibility, that "the injury will be redressed by a favorable decision") (internal quotations and citations omitted).

See also Lexmark Int'l Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) ("The plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.") (citing *Lujan*); *Pricewaterhouse Coopers, L.L.P. v. Bhatia, et al.*, 2014 U.S. App. LEXIS 12225 (June 26, 2014, 2d Cir.) at *9 (citing *Lexmark* and *Lujan*, and noting, quoting *Lujan*, that the injury-in-fact must be the "invasion of a 'legally protected interest' in a manner that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'").

The Supreme Court's most recent ruling on Article III standing is *Clapper*, which involved a challenge to the constitutionality of 50 U.S.C. § 1881a. That statute authorized the United States government to conduct surveillance on individuals who were not "United States persons" and were outside of the United States. *See* 133 S. Ct. at 1142. The plaintiffs were United States persons whose work "required them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under § 1881a," and they sought a declaration that § 1881a was unconstitutional. *Id.* The plaintiffs had two arguments in support of their claim that they had standing to assert their claims: First, that they could establish injury in fact "because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under § 1881a at some point in the future," *id.* at

1147, and second that they were injured because the risk of surveillance "requires them to take costly and burdensome measures to protect the confidentiality of their communications," *id.* at 1150-51.

The Supreme Court found both arguments wanting, and held that the plaintiffs lacked Article III standing. As to the first argument, the Court noted that the plaintiffs assumed that their communications would be monitored, but that assumptions alone could not bear the plaintiffs' burden of proof to establish standing, and that the plaintiffs were required to set forth "specific facts demonstrating that the communications of their foreign contacts will be targeted." *See id.* at 1149. The Court further noted that because § 1881a "at most *authorizes* – but does not *mandate* or *direct* – the surveillance that [plaintiffs] fear, [plaintiffs'] allegations are necessarily conjectural." *Id.* (citations omitted) (emphasis in original).

As to the second argument, plaintiffs contended that "the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to talk in generalities rather than specifics, or to travel so that they can have in-person conversations." *Id.* at 1151 (internal quotations omitted). The Court held, however, that the costs that plaintiffs incurred on account of their fear of surveillance were insufficient to confer standing upon them, because "the harm [plaintiffs] seem to avoid is not certainly impending." *Id.* at 1151. The Court stated: "[Plaintiffs] cannot manufacture standing merely by inflicting harm

on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* (citations omitted).

The Court concluded: "[B]ecause they cannot demonstrate that the future injury they purportedly fear is certainly impending and because they cannot manufacture standing by incurring costs in anticipation of non-imminent harm," the plaintiffs lacked Article III standing. *Id.* at 1155.

Clapper's analysis – which was applied by the District Court, *see supra* at __ – applies with full force here and demonstrates that Copeland, Perez and Native Leather have no standing. In *Clapper,* the plaintiffs' claims were insufficiently concrete, and too speculative, because the plaintiffs could only assume that their communications might be monitored, and the Court found that standing could not be predicated on such an assumption. *Id.* at 1149. Similarly, Copeland, Perez and Native Leather, other than asserting that they wished to possess knives similar to those they previously possess (Amended Complaint ¶¶ 32 (Copeland), 39 (Perez) (A235, A237)) failed adequately to identify or describe the knives they want to possess, and so they could not establish that there was any "concrete, particularized, and actual or imminent" injury. *Id.* at 1147 (internal quotation omitted).

Most notably, Copeland, Perez and Native Leather never alleged whether – when Copeland and Perez were stopped by police and when Native Leather entered into the deferred prosecution agreement – the knives they previously

possessed and still wished to possess could be opened with the application of centrifugal force or by the "flick of the wrist."[7] That omission is striking given that the ability to open a knife by centrifugal force or gravity is the principal defining feature a gravity knife under New York law and the part of New York's gravity knife definition that Plaintiffs claim makes the statute unconstitutionally vague. Because Plaintiffs failed adequately to identify or describe the knives they wanted to possess, they could not show that their alleged injury – whatever it was – was concrete, traceable to the alleged vagueness in the statute and "redressable by a favorable ruling." *Id.* In sum, as the District Court found, "[t]he advisory nature of this request is particularly clear because Plaintiffs fail to describe with specificity the nature of the knives they wish to own or the injury caused by their inability to do so." SPA9.

Plaintiffs argue that because theirs is a vagueness challenge, they should be relieved of the requirement of establishing a concrete injury in fact. They argue that "[i]nherent in [a vagueness] a challenge is the inability to know what conduct will result in liability." *See* Appellants' Brief at 44. *See also id.* at 45 ("Copeland, Perez and Native Leather must avoid all Common Folding Knives

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[7] Although the Amended Complaint alleged that two unnamed police officers at separate times could not open Copeland's knife with a wrist flick (*see* Amended Complaint ¶ 29), the Amended Complaint does not allege when those attempts occurred or whether Copeland's knife underwent a change between the times of those attempts and the time of his police stop.

in order to ensure that no enforcement action will be taken against them.") ((footnote omitted) (quoted *supra*)). But this argument, too, was considered and rejected by *Clapper*, which held that the plaintiffs' argument that they were effectively suffering from a "chilling effect" on account of their fear of surveillance was insufficient to confer standing. *Id.* at 1152. "'[A]llegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). It is precisely such allegations of subjective chill that Copeland, Perez and Native Leather assert, and their assertions are therefore inadequate for Article III standing.[8]

Plaintiffs' argument is also undermined by the Amended Complaint, itself, which avers that Native Leather uses the wrist-flick test to determine which knives it can sell, and it sells some "lock-blade Common folding Knives" despite the claimed vagueness of the statute (Amended Complaint ¶¶ 45-46, A238). The Amended Complaint thus acknowledges that at least one of the Plaintiffs (Native

[8] Notably, plaintiffs fail to discuss or even to cite the *Clapper* decision. The cases they do cite are inapposite. For example, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 14 (2010), plaintiffs gave a detailed recitation of the conduct they wished to undertake, but refrained from doing so out of fear of prosecution. Here, as discussed in the text here, Plaintiffs have failed to adequately identify what knives they want to possess and whether those knives can be opened by the application of centrifugal force. Thus, the concrete injury alleged by the Holder plaintiffs bears no resemblance to the conjectural nature of Plaintiffs' alleged injury here.

Leather) understands that possession of some folding knives will not result in liability. And, the Amended Complaint noticeably lacks any allegations indicating why the other Plaintiffs would have any different understanding, or how they would be harmed by using folding knives that are plainly not switchblades or gravity knives.

That Copeland and Perez were previously prosecuted, and that Native Leather entered into a deferred prosecution agreement, does not change the standing calculus. As the District Court pointed out, the Plaintiffs resolved their cases without seeking a decision on the constitutionality of the statute, and the cases are now closed. *See* SPA7. And, as noted above, because Plaintiffs have not specifically identified or described the knives they possessed and wish to possess, they have not alleged that any concrete injury that they might suffer would be traceable to the vagueness of the statutes.

POINT II

Knife Rights' And The Foundation's Arguments For Standing Were Foreclosed By Binding Precedent And By The Defective Standing Claims Of Copeland, Perez and Native Leather

A. Knife Rights Cannot Establish Associational Standing

"It is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983." *Nnebe v. Daus*, 644 F.3d at 156 (2d Cir. 2011). Panels of this Court are "bound

by the decisions of prior panels until such time as they are overruled either by an en banc panel of [this] Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *accord Adams v. Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). This Court is bound by the holding in *Nnebe*, as there have been no en banc or Supreme Court decisions establishing associational standing in section 1983 claims since *Nnebe*. All of the cases cited and discussed at length by Plaintiffs in their brief to support associational standing (*see* Appellants' Brief at 54-61) pre-date *Nnebe* and are thus irrelevant.

Even if this Court were to consider Knife Rights' arguments for associational standing, those arguments would fail on their own terms. For an organization to bring suit on behalf of its members, its members must have standing to sue in their own right. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 344 (1977). The Amended Complaint, however, does not establish that any of Knife Rights' members have standing. In the first place, the Amended Complaint does not identify Copeland, Perez or Native Leather as members of Knife Rights. *See* Amended Complaint, *passim*. And, as demonstrated Point I, even if Copeland, Perez or Native Leather were members of Knife Rights, none of those Plaintiffs has standing in his or its own right.

Nor does the Amended Complaint identify any other members of the organization, or otherwise allege facts indicating that any of its members have standing. *Id.* Plaintiffs contend only that Knife Rights' members would have

standing because they have "refrained from engaging in legal activity – carrying Common Folding Knives – because of the ongoing threat of arrest and prosecution based on defendants' impermissibly vague application of the gravity knife prohibition." *See* Appellants' Brief at 60. But this supposed injury is speculative and hypothetical because the Amended Complaint does not specifically identify Knife Rights' members, sufficiently describe the knives those members wish to possess but cannot, and does not specify the harm those members suffer on account of not being able to possess their preferred knives. The Amended Complaint have not identified a single member whose activities have been limited by the supposed vagueness of the "application of the gravity knife prohibition."

B. Knife Rights And The Foundation Cannot Bring Claims Directly

For an organization to bring a § 1983 suit on its own behalf, it must "independently satisfy the requirements of Article III standing as enumerated in [*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991)]." *Nnebe*, 644 F.3d at 156 (2d Cir. 2011). In other words, the organization must establish that: (1) it suffered an "injury in fact" that is "actual or imminent, not conjectural or hypothetical," (2) there is a "causal connection between the injury and the conduct complained of," and (3) it would be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (internal

quotations marks and citations omitted). Knife Rights and the Foundation fail each of these requirements.

1. Neither Knife Rights Nor The Foundation Has Suffered An Injury In Fact

To establish injury in fact based on the expenditure of litigation resources, an organization must show that it has responded to the defendant's actions by expending resources that could have been spent on other activities, and that this opportunity cost "constitutes far more than simply a setback to [the organization's] abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). *See also, Nnebe*, 644 F3d at 157-58 (organization must show a "perceptible impairment" of its activities).

An organization cannot "manufacture" standing by expending resources to contest a defendant's activities when those activities do not in fact affect the organization's members. *Id.* "An organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

In *Nnebe*, this Court held that the New York Taxi Workers Alliance had established perceptible impairment where the Alliance had counseled drivers whose licenses were suspended by the City without hearings. 644 F.3d at 157-

58. This Court made it clear that the case was not an instance of "manufactured" litigation because "[t]he Alliance, far from trolling for grounds to litigate, has allocated resources to assist drivers only when another party – the City – *has initiated proceedings* against one of its members." *Id.* (emphasis added).

Plaintiffs claim that Knife Rights and the Foundation have suffered perceptible impairment of their activities because they have expended resources as a result of the City's actions. Plaintiffs claim that "the record is replete" with discovery on this issue, including "receipts, expense reports, travel documentation [for travel to knife shows and depositions], attorneys' invoices, etc., and the deposition of the President of Knife Rights and Foundation, Douglas Ritter." *See* Appellants' Brief at 46; A180-A181; A186-A206. Plaintiffs further claim that Knife Rights has expended "time, energy, and money" to "publish materials that warn the public of the City's expansive (and unanticipated) interpretation of 'gravity knife,'" as well as to "provide general counseling and guidance to concerned individuals." *See* Appellants' Brief at 47.

These activities simply do not establish perceptible impairment of Knife Rights' and the Foundation's activities. Knife Rights and the Foundation were founded to advocate for and counsel knife owners. *See* Appellants' Brief at 17 ("Knife Rights promotes legislative and legal action, as well as research, publishing and advocacy, in support of people's ability to carry and use knives and tools"); Appellants' Brief at 18 ("Foundation is organized to promote

education and researching regarding knives and edged tools . . . ."). It is nonsensical to claim that Knife Rights' and the Foundation's execution of those very activities in this case constitutes an "impairment" to them as organizations.

But even more importantly, the Amended Complaint did not allege that Knife Rights or the Foundation had spent their "time, energy, and money" in response to activities by Defendants that in fact affected their members. In contrast to the Taxi Workers Alliance in *Nnebe*, which had counseled taxi drivers whose licenses had been suspended and who were subjects of proceedings by the City, the Amended Complaint does not allege that Knife Rights and the Foundation counseled members who were in fact targets of any action by prosecutors.[9]

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[9] Appellants' Brief argues that Knife Rights has expended "time, energy, and money" to "counsel and assist many individuals charged with violating the Gravity Knife Law with Common Folding Knives." *See* Appellants' Brief at 47. That claim is not, however, set forth in the Amended Complaint, and in their substantial discovery Plaintiffs provided absolutely no details about these individuals, , or the specifics of the knives they supposedly possess.

Plaintiffs' Proposed Second Amended Complaint alleges that Knife Rights assists individuals charged for possessing "folding pocket knives with locking blades." *See* A336 (¶¶ 72-73). The allegations, however, are either plainly deficient (e.g. the allegation that Knife Rights provides "general counsel to charged individuals," (¶ 72(a)); that it provides "background information" to their attorneys (¶ 72(b)); and that it has "referred several charged individuals to defense counsel (¶ 72(c))), or so general (e.g., "Knife Rights has sometimes contributed financially towards charged individuals' legal defense costs" (¶ 72(d))), as to be inadequate. In three years of litigation, Plaintiffs have failed to supply any details, either in their discovery or even in their Proposed Second Amended Complaint, about the individual members supposedly being

2. There Is No Causal Connection Between Knife Rights' And The Foundation's Supposed Injury And The Conduct Complained Of

An entity cannot inflict harm upon itself and claim standing arising from the injury. *See Clapper,* 133 S. Ct. at 1151, 1155; *Lujan*, 504 U.S. at 560. The supposed injuries to Knife Rights and the Foundation are entirely self-inflicted. Knife Rights and the Foundation have chosen to travel to knife shows to discuss the gravity knife ban, produce materials warning people about the ban, counsel concerned individuals and start this litigation. All of these initiatives obviously require the expenditure of resources. But the initiatives are not in response to any action by the Defendants, rather, Knife Rights and Foundation have engaged in the initiatives out of an alleged fear of action by the Defendants. Knife Rights and Foundation cannot establish standing based on the fear of anticipated action by prosecutors. As *Clapper* explained, if plaintiffs were allowed to establish standing merely on the basis of a reaction to a risk of harm, "an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Clapper*, 133 S. Ct. at 1151. *Clapper* controls here, and demonstrates that Knife Rights and Foundation

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prosecuted by the City. Plaintiffs cannot successfully allege injury in fact on the basis of such unsupported allegations.

cannot show that there is the requisite connection between their alleged harm and the Defendants' activity.

3. Knife Rights' and the Foundation's Supposed Injury Would Not Be Redressed By a Favorable Decision

Absent a plaintiff's showing that its alleged injury is "likely to be redressed by a favorable decision," "exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. at 38 (1976). *See also Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 241 (1937) (Article III allows for the adjudication of a controversy only when it is "real and substantial . . . admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.").

Plaintiffs here asked the District Court to declare Penal Law sections 265.01(1), 265.00(4) and 265.00(5) void for vagueness "as applied to Common Folding Knives that are designed to resist opening from their folded and closed positions." *See* Amended Complaint ¶¶ 57-58 (A242). In making this as-applied challenge, Plaintiffs have failed to sufficiently describe which knives "designed to resist opening from their folded and closed positions" they wish to possess and cannot. Thus, plaintiffs have set forth – at best – a hypothetical state of facts; as the District Court observed, they are seeking nothing more than an

impermissible advisory opinion. *See* Opinion at 9 (SPA9). Because it would be impossible for a court to provide specific relief for this imaginary situation, Plaintiffs have failed to show that Knife Rights and the Foundation have suffered injury that would be redressed by a favorable decision.

POINT III

The District Court Did Not Abuse Its Discretion In Refusing To Permit Plaintiffs To File and 11th Hour Second Amended Complaint Where Plaintiffs Had Sufficient Time To Correct The Defects In The Amended Complaint And The Filing Of A Second Amended Complaint Would Have Required Additional Discovery

A district court's denial of leave to amend is reviewed for abuse of discretion. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend its pleadings more than once "only with the opposing party's written consent or the court's leave." Although the Rule states that a district court should freely give leave when justice so requires," this Court has recognized that a district court has discretion to deny an amendment request where justice would not be served by allowing a party to alter its papers for a second time.

This Court has held that "it is within the sound discretion of the district court to grant or deny leave to amend" for *any* "good reason," including "futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy*, 482 F.3d at 200; *cf. Min Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002)

(outright refusal to grant leave without any reason for the denial is an abuse of discretion). It is well-established that "one of the most important considerations in determining whether amendment would be prejudicial is the degree to which it would delay the final disposition of the action." *H.L. Hayden Co. v. Siemens Med. Sys.*, 112 F.R.D. 417, 419 (S.D.N.Y. 1986); *accord Krumme v. Westpoint Stevens Inc.*, 143 F.3d 71, 88 (2d Cir. 1998) (affirming denial of leave to amend where request would require a "new wave" of discovery and the proposed amendments were based on facts long known by the moving party); *Zahra v. Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995) (affirming denial of leave to amend where request was filed more than two years after the commencement of the action).

In this case, the District Court's denial of Plaintiffs' attempt to amend their pleadings a second time was a valid exercise of its discretion. The court gave *many* reasons for denying Plaintiffs' motion. It correctly noted that Plaintiffs had filed their original complaint more than two years earlier (SPA13), and that new discovery would be required due to Plaintiffs' sudden shift in focus from their "Common Folding Knives" to "locking-blade folding knives." (SPA17-SPA18).

Furthermore, the new allegations in the Proposed Second Amended Complaint were not based on information that Plaintiffs had only learned recently or through the course of discovery. The new allegations were based on information that had always been in Plaintiffs' possession. There was, therefore,

no excuse for making the allegations so late in the process. *See Krumme v. Westpoint Stevens Inc.*, *supra.*

The District Court mistakenly referred to Defendants' motions to dismiss as summary judgment motions, and stated that discovery was closed when, in fact, the final deposition had not yet been completed. These mistakes are understandable in light of how drawn-out the proceedings had been, the number of declarations Plaintiffs filed in support of their opposition to the 12(b)(6) motions and the near completion of discovery (*See* A45-A144; A180-A219; A262-A268; A297-A306).

The misstatement about discovery was entirely irrelevant because it was clear that, whether discovery had been completed or not, more discovery would be required if Plaintiffs were permitted to file the Proposed Second Amended Complaint than if they were not permitted to file it. Furthermore, because the Court gave many other valid reasons for denying the request, these misstatements simply do not matter.

POINT IV

Penal Laws §§ 265.00(4), 265.00(5) And 265.01(1) Are Not Void-For-Vagueness

The District Court did not rule on the question whether Penal Laws 265.00(4), 265.00(5) and 265.01(1) were "void-for-vagueness, as applied to Common Folding Knives that are designed to resist opening from their folded

and closed position," because it found that Plaintiffs had no standing. If this Court determines that one or more of the Plaintiffs has standing, then it can reach the question whether the Penal Laws at issue are unconstitutionally vague.

An issue is reviewable on appeal if it was "pressed or passed upon below." *United States v. Harrell*, 268 F.3d 141, 146 (2d Cir. 2001) (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)). "A claim is 'pressed or passed upon' when it fairly appears in the record as having been raised or decided." *Id.* (citing 19 James William Moore et al., *Federal Practice* § 205.05(1) (3d ed. 2000)). Although the issue whether the Penal Laws were unconstitutional was not decided, it was certainly raised, and fully briefed. *See* Entries 62-67, 70-73, 75-76, Docket Sheet for 11 Civ. 3918.

An "appellee may seek to sustain a judgment on any grounds with support in the record." *Int'l Ore & Fertilizer Corp. v. SGS Control Servs.*, 38 F.3d 1279 (2d Cir. 1994); *see Kennecott Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1206 (2d Cir. 1978) (noting that a grant of injunctive relief may be affirmed on a claim dismissed by the district court). The record here is sufficient to sustain the judgment of the District Court on the ground that the Penal Laws at issue are not, as Plaintiffs contend, unconstitutionally void "as applied to Common Folding Knives."[10]

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[10] The Plaintiffs' void-for-vagueness challenge to the New York Penal Laws was expressly an *as applied* challenge rather than a *facial* challenge. *See* Amended

Because the question is a purely legal one, it is especially appropriate for this Court to exercise its discretion to consider it. *See, e.g.*, *Pichardo v. Ashcroft*, 374 F.3d 46, 54 (2d Cir. 2004); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002) ("We have chosen to exercise such discretion in cases where the issues not addressed below involved purely legal questions.") (citing authority).

To make a successful as-applied void-for-vagueness challenge to Penal Laws §§ 265.00(4), 265.00(5) and 265.01(1), Plaintiffs must show that the statutes either [1] failed to provide them with notice that the knives Plaintiffs possessed or would possess were prohibited switchblades or gravity knives, or [2] failed to limit the discretion of the law enforcement officers who arrested them or would arrest them for violation of the statutes. *See Dickerson v. Napolitano*, 604 F.3d 732, 745 (2d Cir. 2010).

A. The Penal Laws Put Plaintiffs On Notice That They Cannot Possess Switchblade Knives Or Gravity Knives, And Provide Adequate Definitions Of Those Kinds Of Knives

"The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand

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Complaint Prayer For Relief at ii (A243). It is doubtful whether Plaintiffs could have brought a facial challenge to the statutes because (a) the prohibitions against switchblades and gravity knives do not impinge on the First Amendment, (b) it is unclear whether facial challenges can be maintained on any other ground, and (c) even if facial challenges could be maintained on any other ground, there is no allegation in the Amended Complaint that Plaintiffs' constitutional rights are at issue. *See Dickerson v. Napolitano*, 604 F.3d at 743-44 (2d Cir. 2010).

what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Rosen*, 716 F.3d 691, 699 (2d Cir. 2013) (internal quotations and citations omitted).

Penal Law § 265.01(1) makes it a class A misdemeanor to possess a "switchblade knife" or a "gravity knife" as those terms are defined in Penal Law §§ 265.00(4) and 265.00(5), respectively (quoted *supra*). The terms used are straightforward and common. Plaintiffs do not point to a single term in the statutes that is difficult to interpret, or unreasonably vague, or so open-ended that it would leave an ordinary person unaware of "what conduct is prohibited."

To be sure, as reflected in the Amended Complaint, the test applied in New York for determining whether a knife is a gravity knife[11] is a functional one involving whether the subject knife can be opened by the flick of a wrist, and whether it locks into place. But that test is called for by the plain language of the gravity knife statute. According to that language, a knife whose blade opens in response to the force of gravity or the application of centrifugal force and whose blade locks into place constitutes a gravity knife, regardless whether it was originally designed to open in that manner. *See, e.g., People v. Dreyden*, 15 N.Y.3d

[11] The Amended Complaint refers to both switchblades and gravity knives, but both Copeland and Perez allegedly possessed gravity knives, and allegations about alleged vagueness almost all refer to gravity knives, as opposed to switchblades. Thus, the analysis here focuses on gravity knives rather than switchblades.

100, 101 (2010) (while "[a] conclusory statement that an object recovered from a defendant is a gravity knife does not alone meet the reasonable cause requirement," an officer's description of the basis of his belief, such as the performance of a functional test, would be sufficient); I*n re Michael Grudge M.*, 80 A.D.3d 614 (2nd Dept. 2010) (supporting deposition sufficient when it contains a description of the gravity knife and its operation, based upon officer's observations and handling of the knife); *see generally People v. Dolson*, 142 Misc.2d 779, 781 (Onondaga Cty. 1989)("[T]he Legislature took pains to describe and outlaw certain weapons whose potential for quick deployment make them per se too dangerous to possess").[12]

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[12] The Amended Complaint alleges that *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010), "ruled" that the definition of a gravity knife in Penal Law § 265.01(5) "distinguishes gravity knives from certain folding knives that cannot *readily* be opened by gravity or centrifugal force" (Amended Complaint ¶ 22) (emphasis added), and further alleges that the term "readily" is "intrinsically vague." *Id.* at ¶ 23. But the term "readily" has an ordinary definition that is of common usage, and even if read into the statute, would not render it vague. Courts have given the term "readily" its ordinary meaning. *See, e.g.*, *Bell Atlantic Corp. v. United States*, 224 F.3d 220, 224 (3d Cir. 2000) ("readily" in the phrase "readily identifiable" in the Tax Reform Act of 1986, 26 U.S.C. § 204(a)(3), means "'promptly,' 'quickly,' or 'easily'"); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 422-25 (6th Cir. 2006) (interpreting the phrase "readily restored to shoot automatically" in the National Firearms Act, 26 U.S.C. § 5845(b), and noting (at 422) that the phrase must not be construed in the abstract, but rather "its contours should be determined in the context of what it means to be able to 'readily restore[]' a machine-gun as opposed to some other object"); *Moore v. Maryland*, 189 Md.App. 90, 102 (2009), *cert. granted* 412 Md. 689 (2010), *aff'd* 424 Md. 118 (2011) (construing state statute that defines a firearm as a weapon that "may readily be converted to expel a projectile by the action of an explosive," and finding that the statute's meaning is clear and unambiguous: "'Readily' means

Thus, courts have held that a demonstration that a knife's blade opened and locked in place by application of centrifugal force established that the knife was a gravity knife. For example, in *Carter v. McKoy*, 2010 U.S. Dist. LEXIS 83246 (S.D.N.Y. 2010), the Court found that the officer's testimony and "demonstration of the knife's operation … was sufficient to permit a rational fact finder to conclude that the knife at issue was a gravity knife." *Id.* at *14. *See also People v. Jouvert*, 50 A.D.3d 504, 506 (1st Dept. 2008) (officer's description and demonstration of knife is sufficient to support conclusion that it is a gravity knife); *People v. Neal*, 79 A.D.3d 523 (1st Dept. 2010)(evidence that an officer could open the knife by centrifugal force, created by flicking his wrist, was sufficient to confirm knife met statutory definition of a gravity knife); *People v. Smith*, 309 A.D.2d 608, 609 (1st Dep't 2003) (same) (parallel citations omitted).

Moreover, in keeping with the language of the statute, courts have held that a knife is a gravity knife if it can be opened in the manner described in the statute even if some efforts at demonstrating that function fail. *Smith*, 309 A.D.2d at 609 ("[The fact that the knife malfunctioned on some of the detective's attempts to operate it did not defeat the proof of operability."); *see People v. Birth*,

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'in a ready manner . . .a: with prompt willingness . . . b: with fairly quick efficiency: without needless loss of time: reasonably fast . . . c: with a fair degree of ease: without much difficulty: with facility: easily . . .' Webster's, at 889, as well as '[p]romptly, in respect of the time of the action; quickly, without delay; also, without difficulty, with ease or facility.' 13 O.E.D., at 264.").

49 A.D.3d 290, 290 (1st Dep't 2008) (NYPD officer's description and demonstration of knife is sufficient to support conclusion that it is a gravity knife. There was no obligation for the officer to attempt the demonstration in a seated position or with his weaker hand).

Plaintiffs' reference in their brief, *see* Appellants' Brief at 17, to the Federal Switchblade Act and related case law also demonstrates that New York's penal laws are not void-for-vagueness. Under federal law, it is illegal to manufacture or possess any knife that "opens automatically . . . by inertia, gravity, or both." 15 U.S.C. § 1241(b)(2); see 15 U.S.C. §§ 1242, 1243. At least until recently, that law "indisputably" covered folding knives that "require[] some human manipulation in order to create or unleash the force of 'gravity,'" such as a "flick," to open the knife. *Taylor v. United States*, 848 F.2d 715, 720 (6th Cir. 1988); *see Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1016-17 (2d Cir. 1967) (holding that a folding knife that, after modification involving "weakening the restraining spring slightly," could be "opened with a flick of the wrist," fell under the federal statute). At least one federal circuit court upheld the Switchblade Act against a void-for-vagueness challenge on the ground that the statutory text was sufficient "to put a man of ordinary caution on notice as to what its boundaries are." *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).[13]

[13] Plaintiffs assert that a 2009 amendment to the federal Switchblade Act exempts "Common Folding Knives," as Plaintiffs have defined the term, by

Comparison of Penal Laws §§ 265.00(4), 265.00(5) and 265.01(1) with the statute upheld against a charge of void-for-vagueness in *Dickerson v. Napolitano*, *supra*, is instructive. *Dickerson* involved a challenge to the constitutionality of New York City Administrative Code § 14-107, which made it a crime to possess "any uniform, shield, buttons, wreaths, numbers or other insignia or emblem *in any way resembling* that worn by members of the police force." (Emphasis added.) This Court rejected plaintiffs' void-for-vagueness as-applied challenge to the statute because plaintiffs did not show that the statute "provided insufficient notice to the plaintiffs as to the specific items that they were arrested for possessing." 604 F.3d at 747. According to this Court: "Even if there is ambiguity as to the margins of what conduct is prohibited under the statute, we are of the view that an ordinary person would understand the statute to prohibit

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specifying that 15 U.S.C §§ 1242-1243 "shall not apply to . . . a knife that contains a spring, detent, or other mechanism designed to create a bias toward closure of the blade and that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure to assist in opening the knife." 15 U.S.C. § 1244(5); *see* Appellants' Brief at 17. Thus, Plaintiffs assert, "unlike New York law, federal law explicitly eliminates the risk" that a so-called "Common Folding Knife" could be "construed as a gravity knife." Appellants' Brief at 17. That the federal statute exempts certain knives from its coverage does not indicate that such an exemption is constitutionally required. *Nelson* establishes that such an exemption is not constitutionally required, regardless whether a legislature could find it desirable. *See also People v. Trowells*, N.Y.L.J. August 4, 2014 Vol. 252; No. 23 (Sup Ct, Bronx County 2014) (dismissing in "furtherance of justice," and not on the law, indictment charging Criminal Possession of a Weapon in the Third Degree, Penal Law § 265.02(1), and noting that New York legislature has recently considered amendments to the statute).

the possession of items that could be used by an adult to impersonate a police officer." *Id.*

The statute at issue in *Dickerson* is much broader than the statutes at issue here. In fact, it is hard to imagine a broader statute than the one in *Dickerson* (prohibiting possession of an emblem or insignia "in any way resembling . . ."). If that statute was not unconstitutionally vague, then neither are these statutes.

Even if Plaintiffs had alleged facts indicating that the knives they want to possess presented "close cases" under the New York statute, such allegations would not make out a valid claim of as-applied vagueness. As the Supreme Court stated in *United States v. Williams*, 535 U.S. 285, 305-06 (2008), it is wrong to believe "that the mere fact that close cases can be envisioned renders a statute vague." Rather, the "problem that [close cases] pose[] is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 535 U.S. at 305-06. Indeed, 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.'" *United States* v. *Powell*, 423 U.S. 87, 93 (1975) (quoting *Nash v. United States*, 229 U.S. 373, 377 [1913]). *See also, e.g.*, *McAllister v. Rabsatt*, 2010 U.S. Dist. LEXIS 79657 at * 13 (E.D.N.Y. 2010) (denying petitioner's § 2254 petition, finding that "[t]he jurors were instructed on the weapon charge and the definition of a gravity knife, and they watched as [Police Officer] Raymond used one hand to apply centrifugal force

and release the blade. Therefore, the Court concludes that a rational jury could have found McAllister guilty beyond a reasonable doubt of criminal possession of a weapon in the third degree.").

A law "need not achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth." *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) *cert. den. Archer v. Heath* 131 S.Ct. 611 (2010) (quotation marks omitted). And where a statute draws a fine line between what is legal and what is not, "it is [not unfair] to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

For instance, in *United States v. Powell*, Powell challenged a federal law that criminalized the mailing of firearms "capable of being concealed on the person" as unconstitutionally vague. *Powell*, 423 U.S. at 88. Although a given firearm might be more or less concealable on different people depending on their height, weight, and type of clothing they were wearing, the Court rejected a vagueness challenge on that ground and insisted upon "the commonsense meaning that such a person would be an average person garbed in a manner to aid, rather than hinder, concealment of weapons." *Id.* at 93. The Court admonished that "straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void-for-vagueness' doctrine."

Id. Thus, Powell was properly convicted on "evidence that the weapon could be concealed on an average person." *Id.* at 89.

New York's law criminalizing knives that have "a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force," NYPL §265.00(5), gives no less adequate notice and no less sufficient standards for enforcement than a law that proscribes the mailing of a "concealable firearm." Given the clarity of the statutory language it is not surprising New York courts have unanimously determined that "the statutory prohibition of possession of a gravity knife is not unconstitutionally vague." *People v Herbin*, 86 A.D.3d 446 (1st Dept. 2011) *lv. denied* 17 N.Y.3d 859 (2011) (internal citations omitted) (quoted *supra* at n. 3). *See also supra* n.3 (citing additional authority).[14]

B. The Penal Laws Sufficiently Limit The Discretion Of The Law Enforcement Officers Called Upon To Enforce Them

A statute may be unconstitutionally vague if it "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S.

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[14] The case on which Plaintiffs rely, *United States v. Irizarry*, 509 F. Supp.2d 198 (E.D.N.Y. 2007) (cited in Appellants' Brief passim), is not to the contrary. That case did not question the constitutionality of the statute's definition of a "gravity knife," but simply held that the particular knife possessed by the defendant (a Husky Sure-Grip Folding Knife) was not a gravity knife and thus defendant's possession of the knife did not give the police officer grounds for either reasonable suspicion or probable cause that a crime was being committed. *See id.* at 209-10.

703, 732 (2000). To defeat a challenge that a statute gives insufficient direction to those who would enforce it, defendants must establish that the statute contains "minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation marks omitted). Even a statute that allows unconstitutionally broad discretion to law enforcement officers would be upheld on an as-applied challenge if "the particular enforcement at issue is consistent with the 'core concerns' underlying the statute such that the enforcement did not represent an abuse of the discretion afforded under the statute." *Dickerson v. Napolitano*, 604 F.3d at 748 (internal quotations and citations omitted).

The Amended Complaint alleges that the police use a "wrist flick" test to determine whether a knife is a gravity knife, according to which the police officer attempts to open the knife with a flick of his or her wrist. *See* Amended Complaint ¶ 3 (A228); Appellants' Brief at 3-4. Plaintiffs complain that the wrist flick test is "subjective, variable, and indeterminate," and that "the test results are highly dependent on the individual employing the test, the particular specimen of knife, and other highly variable and uncertain characteristics." Appellants' Brief at 4. *See also id.* at 25 ("[T]here is no way for the purchaser of such a knife to know whether or not an NYPD officer able to flick open such a knife would arrest the purchaser of such a knife, . . ."); 45 n.8 ("any wrist flick test is entirely subjective and indeterminate") (quoted *supra*).

Once again, Plaintiffs are seeking precision where none is possible or required. Criminal statutes regularly use terms of limitation or degree, like "reckless," "material," or similar terms the application of which requires judgment and degree,[15] and law enforcement officers decide whether the conduct at issue meets the standards imposed by those terms. So too here: Law enforcement officers can and do decide whether there is probable cause to believe that the knife at issue can be opened by the use of centrifugal force. *See People v. Herbin*, *supra*, 86 A.D. 3d at 446 (language of Penal Law § 265.01(1) "provides notice to the public and clear guidelines to law enforcement as to the precise characteristics that bring a knife under the statutory proscription") (citation omitted); *People v. Fana*, *supra*, 23 Misc.3d 1114(A), 886(Crim. Ct. N.Y. Cty. 2009) ("[T]he statute provides police with clear standards for enforcement and is a valid use of the state's police power. . . . Penal Law § 265.01(1) authorizes police to arrest a person where they have probable cause to believe that he

[15] *See, e.g.*, New York Penal Law §§ 120.01 (reckless assault of a child by a day care provider); 120.02 (reckless assault of a child); 18 U.S.C. § 1621(1) (defining perjury as a false statement under oath on a "material matter which [the speaker] does not believe to be true"). *See also, e.g.*, *United States v. Soler*, ___ F.3d ___, 2014 US App. LEXIS 13995 (2d Cir.) (July 22, 2014) (upholding conviction for violation of 18 U.S.C. § 2119, which makes it a crime forcibly to take an automobile "from the person *or presence*" of the victim, and concluding that the term "presence" includes, by implication, "a degree of physical proximity between the victim and the vehicle." Slip op. at 24.)

knowingly and voluntarily possesses a knife which meets the specific statutory definition of a gravity knife.") (citation omitted).

The wrist flick test about which Plaintiffs complain is well-established in New York law. "Centrifugal force is not defined in the Penal Law, however, it is well-settled law that releasing the blade from the handle of the knife by flicking the wrist constitutes centrifugal force." *People v. Trowells*, N.Y.L.J. August 4, 2014 Vol. 252; No. 23 (Sup Ct, Bronx County 2014) (citing *People v. Birth*, 49 A.D.3d 290, 853 N.Y.S.2d 317 (1st Dep't 2008))[16]; *People v. Smith*, 309 A.D.2d 608, 765 N.Y.S.2d 777 (1st Dep't 2003); *People v. Kong Wang*, 17 Misc.3d 133(A) (App. Term 1st Dep't 2007). Thus, the statutes provide guidelines for law enforcement and limit the discretion of officers called upon to enforce the laws.

That Copeland and Perez were prosecuted even though some officers allegedly could not open their knives with a wrist flick (Amended Complaint ¶¶ 29, 37) does not mean that the statutes are unconstitutionally vague. The Amended Complaint alleges that, at the time of Copeland's police stop, two police officers said they could open Copeland's knife with a wrist-flick, *see* Amended Complaint ¶ 30, and the criminal complaint commencing the prosecution against Perez alleged that a police officer opened Perez's knife with

[16] *People v. Trowells*, cited above, was published in the New York Law Journal on August 4, 2014. To the extent the Court or Plaintiffs do not have access to this decision the Defendants will supply copies upon request.

a wrist-flick, s*ee* Entry 66, Exhibit A, Docket Sheet for 11 Civ. 3918. Perez's and Copeland's cases presented, at most, "close cases," which are properly "addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 305-06.

Conclusion

For the foregoing reasons, the judgment below should be affirmed.

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Respectfully submitted

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