13-4840-cv

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, 1:11-CV-3918, HONORABLE KATHERINE BOLAN FORREST, U.S.D.J.

BRIEF AND SPECIAL APPENDIX OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants Knife Rights, Inc., Knife Rights Foundation, Inc., and Native Leather, Ltd. each hereby certify that they have no parent corporation and that there is no publicly held corporation that owns 10% or more of their stock.

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JURISDICTIONAL STATEMENT

This case was originally filed in the U.S. District Court, Southern District of New York on June 9, 2011. A19.[1] The court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 as it involves claims arising under 42 U.S.C. § 1983 and the Constitution. On November 20, 2013, the court entered final judgment disposing of all claims. SPA13. Plaintiffs-Appellants filed a timely notice of appeal on December 18, 2013. SPA20. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 & 1294.

STATEMENT OF ISSUES PRESENTED

This appeal arises as a result of dismissal below for claimed lack of standing. Plaintiffs-Appellants brought this action as an as-applied Constitutional vagueness challenge to the novel and unprecedented expansion of the manner in which Defendants-Appellees 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, Defendants now choose to treat nearly any ordinary folding knife as an illegal "gravity knife." Regular, law-abiding, tradesmen (among others) must now wonder and guess if the tools of their trade, used freely

[1] Citations to the Joint Appendix are designated "A__," and citations to the Special Appendix are designated "SPA__."

throughout the state, will result in their arrest and prosecution as "criminals" in New York City. As a result, in New York City, no one can determine any longer whether a particular knife in their possession will be deemed legal or prohibited. This application of the law is therefore unconstitutionally void for vagueness. To add insult to injury, the District Court dismissed this action because Plaintiffs did not identify in their Complaint specifically which models of knives are at issue. But the inability to identify which knives are prohibited or permitted is precisely the problem complained of in the action. Defendants' enforcement of the law is void for vagueness precisely *because* no one can identify which knives are problematic and which are not. Requiring Plaintiffs to name specific knives in order to have standing, in a case about the inability to know what is prohibited or permitted, turns the very idea of this lawsuit on its head and is an impossible demand to satisfy.

Fundamentally, the District Court dismissed the Amended Complaint employing a pleading standard which is not in accordance with law and impossible to satisfy. The judgment below should be reversed.

Under New York law there are three basic categories of knives:

A "switchblade knife," which opens automatically upon the pressing of a button or other device. N.Y. Penal L. § 265.00(4). It is unlawful to possess a

switchblade knife. N.Y. Penal L. § 265.01(1). Switchblade knives are not at issue here.

A "gravity knife," which opens *readily* by the force of gravity or the application of centrifugal force. N.Y. Penal L. § 265.00(5); *People v. Dreyden*, 15 N.Y.3d 100, 104 (2010); *United States v. Irizarry*, 509 F. Supp. 2d 198, 210 (E.D.N.Y. 2007). It is unlawful to possess a gravity knife. N.Y. Penal L. § 265.01(1)

A "pocket knife," which is a folding knife that "cannot readily be opened by gravity or centrifugal force." *Dreyden*, 15 N.Y.3d at 104 (2010); *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.

Under the recently adopted practices of Defendants New York City (the "City") and the Manhattan District Attorney (the "DA"), the latter two distinct categories gravity knife and pocket knife seem to have, in practice, collapsed into a single category. As a result, Defendants arrest and prosecute individuals and retailers for possessing and/or selling what should be deemed legal pocket knives, unilaterally alleging them to be illegal gravity knives based on a subjective and variable standard. According to Defendants, any pocket knife with a locking blade can be deemed an illegal gravity knife. There is no way for someone to know with

any degree of certainty which locking blade pocket knives are legal and which are not under Defendants' unconstitutional approach.

Defendants now apply the gravity knife law to knives which have never previously been considered gravity knives (in New York or elsewhere). These knives, which (unlike traditional gravity knives) are designed to *resist* opening, are referred to throughout the record as "Common Folding Knives."

To be sure, the relevant statute contains language *defining* the term "gravity knife." But the *operational test* employed by Defendants, sharply flicking the knife downward with the wrist (the "Wrist Flick Test"), is subjective, variable, and indeterminate. Using that test, no one possessing a Common Folding Knife can ever be sure he possesses a legal pocket knife versus an illegal gravity knife, because the test results are highly dependent on the individual employing the test, the particular specimen of knife, and other highly variable and uncertain characteristics. Under the Wrist Flick Test, different units of the same model knife could be found to be both permitted and prohibited. Even more problematic, one individual knife, itself, could be classified as both permitted and prohibited, *simultaneously*, depending on who performs the test. This application of the law is, therefore, void for vagueness under the Fourteenth Amendment Due Process Clause. Plaintiffs seek such a ruling in their Amended Complaint.

Yet, the District Court insisted that to demonstrate standing, Plaintiffs must identify *specifically* which knives are implicated by the challenged enforcement practices. Absent that, the court describes Plaintiffs' claims as "hypothetical." This, of course, is an impossible (and paradoxical) standard to meet, and incorrect under the law, since Plaintiffs' central allegation is that they cannot know which knives fall into which category, and therefore they face jeopardy of arrest and prosecution. Fundamentally, attempting to apply the gravity knife law to *any* Common Folding Knife creates inherent and inescapable uncertainty – a key test for vagueness.

Plaintiffs John Copeland and Pedro Perez wish to possess Common Folding Knives to use in their professions, and Plaintiff Native Leather, Ltd. ("Native Leather") wishes to sell Common Folding Knives, but they cannot determine which Common Folding Knives will not result in arrest and prosecution.

Plaintiffs Knife Rights, Inc. ("Knife Rights") and Knife Rights Foundation, Inc. ("Foundation") have incurred injury-in-fact by expending time, energy, and money as a result of Defendants' unlawful enforcement practices, yet the court similarly insists that such organizations can only claim injury from expenditures that relate to specifically identifiable knives – again an impossible and incorrect standard for standing. Yet, because it is literally impossible for Plaintiffs to

identify the specific knives implicated by Defendants' illegal enforcement practices, the court dismissed the Amended Complaint and denied leave to replead.

Accordingly, this case requires the Court to decide:

1. Whether the District Court erred by holding that the Plaintiffs did not have standing to challenge Defendants' arbitrary enforcement of New York's gravity knife law because they did not allege which specific knives give rise to arrest and prosecution, even though the inability to determine which knives are lawful is the very essence of their claim.

2. Whether the District Court erred by refusing to allow Plaintiffs to replead in light of the Court's dismissal based on lack of specificity.

3. Whether the District Court erred in failing to follow *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) and *Warth v Seldin*, 422 U.S. 490 (1975) in denying associational standing to Knife Rights.

STATEMENT OF THE CASE

On October 10, 2010 and April 15, 2010, respectively, Plaintiffs 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 Defendants claim were illegal gravity knives under N.Y. Penal L. §265.00(5) and N.Y. Penal L. §265.01(1) (the "Gravity Knife Law"). Copeland

and Perez were arrested and charged because Defendants allegedly managed to open the subject knives using the Wrist Flick Test. The charges were ultimately resolved by when both men executed Adjournments in Contemplation of Dismissal ("ACD"). A234-37; A258; A259.

On June 17, 2010 the DA publicly announced his successful scheme to coerce Plaintiff Native Leather by threatening criminal charges on the ground that it was allegedly selling prohibited switchblade knives and gravity knives. The DA threatened to prosecute Native Leather because Defendants allegedly managed to open certain Common Folding Knives using the Wrist Flick Test. Rather than face prosecution, Native Leather agreed to pay the City a monetary sanction and turn over its Common Folding Knives held in inventory in exchange for the City's agreement not to prosecute. A237-39; A266; A247.

Because Copeland, Perez, and Knife Rights members wish to lawfully possess and use Common Folding Knives within the City, but fear arrest and prosecution by Defendants if they do so, the within action was commenced on or about June 9, 2011 pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief. A19. The Complaint alleges that Defendants' application of the Gravity Knife Law, employing the Wrist Flick Test on Common Folding Knives to determine whether they are prohibited 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 know with any certainty, *ex ante*, whether Defendants will consider a given Common Folding Knife a gravity knife. *See, generally*, Complaint, A19.

Because Native Leather wishes to lawfully sell Common Folding Knives within the City, but fears prosecution by Defendants if it does so, and because Foundation has expended time, energy, and money as a result of Defendants' actions, on September 24, 2012, an Amended Complaint was filed adding Native Leather and Foundation as Plaintiffs. *See, generally*, Amended Complaint, A227.

Defendants moved to dismiss the Amended Complaint (A224, A261), and the Honorable Katherine B. Forrest, U.S. District Judge for the Southern District of New York, granted the motions, holding that none of the Plaintiffs have standing to assert the within claims. The court held that Copeland, Perez, and Native Leather do not have standing because they did not allege which specific knives they wish to possess and/or sell, and thus their claims are "hypothetical" and "speculative." SPA1-9. This is notwithstanding that the very essence of Plaintiffs' Amended Complaint is that, under Defendants' application of the law, they cannot determine what knives are lawful to possess and/or sell.

The court drew a similar conclusion as to the standing of Knife Rights and Foundation holding that, although they could normally assert claims based on injury-in-fact resulting from the expenditure of time, energy, and money on behalf

of their members and others because of Defendants' improper enforcement of the Gravity Knife Law, they could only do so based on practices that actually affect their members.[2] The court held that impacts to their members for which they must expend resources are "speculative" -- for the same reason that the court ruled that Copeland's, Perez's, and Native Leather's claims are speculative. SPA9-11. This is notwithstanding that members of Knife Rights and Foundation face *precisely* the same impossible conundrum as Copeland, Perez, and Native Leather. They cannot possibly know what a lawful knife is under Defendants' subjective and variable application of the law.

In an attempt to address the court's concerns, however difficult that may have been given the circular logic justifying the dismissal, Plaintiffs sought leave to file a Second Amended Complaint, which motion was denied. A311; A316; SPA13.

Plaintiffs now appeal the District Court's orders and judgment.

[2] In fact, as set forth in greater detail below, substantial discovery was undertaken on precisely the issue of the significant time, energy, and money that was spent by Knife Rights and Foundation, including depositions, answers to interrogatories, and the production of documents.

A. Switchblade Knives, Gravity Knives, and Common Folding Knives

As noted above, knives that one can carry in one's pocket can generally be divided into three categories based on design and function.

A switchblade knife is traditionally defined as a knife with a blade that springs out of the handle and locks in place when a button is depressed releasing the blade. A switchblade knife is generally described as having a "bias toward opening." That is, the blade must be held closed by a mechanism that keeps it in place in the handle. Otherwise, its natural tendency is to *open*. A228; A231-32; A274.

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, allowing the blade to fall out of the front of the handle. World War II German military engineers designed the gravity knife for paratroopers who might need to cut themselves free of their parachutes if stuck in a tree or otherwise had limited use of their hands. The original gravity knife was not a folding knife at all. Rather, the blade simply *fell* downward from the knife's body when activated, through the force of gravity alone. *See id.* Traditionally, a gravity knife's blade moves freely in and out of the handle without resistance, which is why it is released merely by the force of gravity. If a gravity knife is held horizontally, it

may also be opened by the application of centrifugal (rotational) force, as one would experience on a carousel or spinning in a swivel chair. Although legal in many states, gravity knives are not currently produced by any domestic manufacturer, notwithstanding Defendants' erroneous allegations. A228; A231-32; A273.

A traditional gravity knife has no bias either toward opening or closure. As such, just as gravity and centrifugal force will "pull" the blade from out the front of the handle, so too will a very gentle flick of the wrist[3] that imparts some small amount of centrifugal force. As soon as centrifugal force is applied by the start of the wrist movement, the blade "readily" starts moving out of the front of handle. It does not require great effort or force; it does not require multiple attempts; it does not require energetic thrusts or bodily movement; and it is "readily" accomplished by virtually any person regardless of experience, strength, stature, or experience. Any true gravity knife will open completely if pointed with the blade towards the ground. That is the very essence of what a gravity knife is. A gentle wrist flick simply enables that "ready" freedom of movement, the blade having no bias toward opening or closure. Most importantly, a true gravity knife will operate in the same manner for anyone. *Id.*

[3] This gentle "flick of the wrist" is materially different than the aggressive, sharp flick of the wrist employed in the Wrist Flick Test.

In addition to traditional switchblade knives and gravity knives, there are folding knives explicitly designed to *resist* opening. That is, they have a "bias toward closure." They are designed to open by deliberate exertion of effort on the blade itself to rotate the blade out of the handle to overcome the built-in resistance. By design, their natural tendency is to remain *closed*. This category of knives represents the vast majority of pocket knives legally sold in the U.S. today and carried by millions of Americans and New Yorkers daily. Plaintiffs refer to such knives in the record as Common Folding Knives. A227-28; A231-33; A274-277.

B. The Statutory Framework

Under New York law, possession of knives, including pocket knives, is generally lawful, unless one has criminal intent. *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 per se prohibitions on "switchblade knives" and "gravity knives." *See* N.Y. Penal L. § 265.01(1).

New York law defines a switchblade knife as "any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife." N.Y. Penal L. § 265.00(4). New York first prohibited switchblade knives in 1954, and the definition remains substantively the same. *See* 1954 N.Y. Laws ch. 268., sec. 1.

New York law defines a gravity knife as "any 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." 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.

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.

The 1958 Sponsor's Memorandum to the gravity knife bill explained that gravity knives had "come into being as a circumvention" of the prohibition on switchblade knives and were "the successor of the switchblade knife." 1958 N.Y. "Bill Jacket," A. 913-1796, at 3 (N.Y. 1958). A278-296. A memorandum from Attorney General Louis J. Lefkowitz described gravity knives as "knives containing blades automatically opened by the force of gravity." A292.

The first time New York courts meaningfully discussed the definitional requirements of a "gravity knife" was in the late 1980s, when two upstate County Courts ruled that the gravity knife law did not cover Balisong (or "butterfly") knives. *See People v. Dolson*, 142 Misc. 2d 779, 780, 538 N.Y.S.2d 393, 394 (Onondaga Cty. Ct. 1989); *People v. Mott*, 137 Misc. 2d 757, 522 N.Y.S.2d 429, *amended at* 1987 N.Y. Misc. LEXIS 2528, *2 (Jefferson Cty. Ct. 1987).

A Balisong is a type of folding knife that has a two-piece, split handle that folds back to reveal the knife blade and does *not* resist opening. *See id.* *Mott* was the first case to address the issue, and it found that a Balisong did not meet *either* of the definitional elements of a gravity knife. First, "[a]lthough a person with the requisite skill can *rapidly* open a Balisong knife with one hand, the knives do not have blades which open *automatically* by operation of inertia, gravity or both." *Mott*, 1987 N.Y. Misc. LEXIS 2528 at *2-3 (emphasis added). Second, "the blade of a Balisong does not lock into place at the moment it is released," but instead needs physical manipulation. *Id.*

The court in *Mott* also observed that "the legislature was extremely careful and specific in naming which devices would be unlawful as "per se weapons," and had named specific weapons like "plum ballistic knives" and "chuka sticks." *Id.* at *3-4. If the legislature had "desired to outlaw [Balisongs] it would have done so by name." *Id.* at *4. Two years later, an Onondaga County Court followed *Mott's*

reasoning to reach the same conclusion. *See Dolson*, 142 Misc. 2d at 780-81, 538 N.Y.S.2d at 394-95.

The first time the Appellate Division addressed the definition of "gravity knife" was 2003, when the Second Department likewise concluded it did not cover a Balisong. *See People v. Zuniga*, 303 A.D.2d 773, 774, 759 N.Y.S.2d 86, 87 (2d Dept. 2003).

Beginning with *United States v. Irizarry*, 509 F. Supp. 2d 198 (E.D.N.Y. 2007), courts construing New York law began to address the contention that a knife can be deemed a gravity knife if it can be opened by a "flick of the wrist." Judge Weinstein concluded that the "Husky" brand folding utility knife at issue there did not fall within the Penal Law's definition of gravity knife and suppressed evidence found in the man's detention and search. *Id.* at 209-10.

Irizarry is significant because the arresting NYPD officer was able to open the knife with a "wrist-flick" motion in court, and the court specifically found the knife was "capable of being opened by an adept person with the use of sufficient centrifugal force." *Id.* at 204. However, the court also found that the 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. (In other words, the knife was a Common Folding Knife.) The ease with which it could be opened (in any manner) depended on the degree of mechanical resistance present in the blade, and

while increasing that resistance would make it more difficult to "wrist-flick" the blade open, it would also make the knife less practical as a tool. *Id.*

Other issues aside, it is unavoidable that the court in *Irizarry* found that the basic *ability* to open a folding knife with a "wrist-flick" was not enough. Something more was needed.

Beginning in 2010, several Appellate Division cases were reported in which the defendants were arrested and successfully prosecuted by the Manhattan District Attorney for possessing gravity knives because the police could open the knife with a flick of the wrist. *See People v Neal*, 79 A.D.3d. 523, 524, 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*, 86 A.d.3d 446, 927 N.Y.S2d 54 (1st Dep't 2011) (". . . the officers release[d] the blade simply by flicking the knife with their wrists . . ."); a*ccord Carter v. McKoy*, 2010 U.S. Dist. LEXIS 83246 (S.D.N.Y. 2010) (officer opened knife with flick of wrist).

Thus, within approximately the last five years or so, New York's 50 year old Gravity Knife Law has taken on a novel and unique (to New York City) application.

Significantly, Congress managed to avoid this mutation of the law; that is, applying gravity knife prohibitions to Common Folding Knives.

Under federal law, the term "switchblade" is broadly defined and includes a knife which opens "by operation of inertia, gravity, or both." 15 U.S.C. §1241. Thus, the federal definition of "switchblade" includes gravity knives.

However, the federal prohibition does not extend to Common Folding Knives. 15 U.S.C. §1244(5) contains an exception to the gravity knife prohibition for:

> 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. [Emphasis added.]

This "bias toward closure" is precisely the feature that differentiates a Common Folding Knife from a traditional gravity knife. Thus, unlike New York law, federal law explicitly eliminates the risk that a Common Folding Knife could be construed as a gravity knife.

C. The Parties

Plaintiff Knife Rights is a non-profit member organization incorporated in Arizona with its principal place of business in Gilbert, Arizona. 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. A230.

Plaintiff Copeland is a citizen and resident of New York residing in Manhattan. He is a 34 year-old painter whose work is recognized worldwide.

Galleries in New York, Copenhagen, and Amsterdam currently feature his work, and galleries throughout the U.S. and the world have featured Copeland's work. *Id.*

Plaintiff Perez is a citizen and resident of New York State residing in Manhattan. Perez is 44 years old and has been employed as a purveyor of fine arts and paintings for the past 18 years. He possesses two associates degrees and Series 7 and 63 securities licenses. In the course of his art business, he often transports artwork and tools throughout the City. One of the tools he finds especially useful is a knife, as he often needs to cut canvas and open packaging. *Id.*

Plaintiff Foundation is a non-profit corporation organized under Arizona laws with its principal place of business in Gilbert, Arizona. Foundation is organized to promote education and research regarding knives and edged tools and is recognized under § 501(c)(3) of the Internal Revenue Code. A230-31.

Plaintiff Native Leather is a corporation organized under New York law with its principal place of business in Manhattan. Native Leather operates a retail store and sells leather goods and other items, including folding knives. A231.

Defendant District Attorney Cyrus R. Vance (the "DA") is sued in his official capacity as District Attorney for New York County, responsible for executing and administering the laws of New York State, including §§ 265.00 and 265.01 of the Penal Law. The DA has enforced the laws at issue against Plaintiffs,

he continues to enforce the laws at issue against Plaintiffs, and he threatens to enforce the laws at issue against Plaintiffs in the future. *Id.*

Defendant City is a municipal corporation incorporated under the laws of the State of New York. The City is authorized by law to maintain the NYPD, which acts for it in the area of law enforcement, and the City is ultimately responsible for the NYPD and assumes the risks incidental to the maintenance of it and its employees. The NYPD is an agency of the City. Officers of the NYPD have enforced the laws at issue against Plaintiffs, they continue to enforce the laws at issue against Plaintiffs, and they threaten to enforce the laws at issue against Plaintiffs in the future. *Id.*

D. Defendants' Recent Enforcement of the Gravity Knife Law

On October 10, 2010, NYPD police officers stopped Copeland near his home on Manhattan's lower east side after observing a metal clip in Copeland's pocket. A234.

Copeland was carrying a Benchmade brand Common Folding Knife with a blade of approximately 3 inches and a locking mechanism that locks the blade in place once it is in its fully open position. This Benchmade knife is designed so that its blade resists opening from the closed position. *Id.*

Copeland purchased his Benchmade knife at Paragon Sports in Manhattan in approximately October 2009. The knife features a stud mounted on the blade that

allows a user to overcome the knife's resistance against opening and swivel the blade open with his or her thumb. Copeland selected this knife because he wanted a knife that he could open with one hand. Copeland found this feature especially useful because, among other reasons, he often needs to use his knife at the same time that he is using his other hand to paint or to hold canvas. Copeland could remove this knife from his pocket and manipulate the blade open by using only one hand. Copeland also selected this knife because the blade locked in place once open, and this prevented the blade from accidentally closing on his fingers. *Id*.

Prior to his October 2010 charge, Copeland showed his Benchmade knife to NYPD officers on two separate occasions, and had asked them whether or not his knife was illegal. Both officers had tried to open the knife from its closed position using a "flicking" motion, but they could not, so they told him that the knife was legal and returned it to him. A234-35.

The NYPD officers who charged Copeland in October 2010 stated that they could open the Benchmade knife's blade by grasping the knife's handle and forcefully "flicking" the knife body downwards, and they alleged that it was therefore a prohibited gravity knife. The NYPD police officers charged Copeland with Criminal Possession of a Weapon in the Fourth Degree by issuing him a Desk Appearance Ticket. A235.

Copeland denied that his knife was a gravity knife, retained private counsel, and defended the charge on its merits. The City offered to resolve the charge against Copeland by entering into an ACD, and they consummated this arrangement on January 26, 2011. Copeland was not incarcerated and did not have to pay any fine or fee or perform any community service. *Id*.

Copeland no longer carries a Common Folding Knife in the City. Copeland would carry a Common Folding Knife, but he does not do so because he fears that he will again be charged with Criminal Possession of a Weapon, and he is unable to determine whether any particular Common Folding Knife might be deemed a prohibited switchblade or gravity knife by the District Attorney or NYPD. In addition, Copeland has been unable to purchase a Common Folding Knife similar to the Benchmade knife in the City. Copeland would purchase another similar Common Folding Knife, but he refrains from doing so because he fears arrest and prosecution, and also because he is unable to find any such knives for sale in the City. *Id*.

On April 15, 2010 NYPD officers stopped Perez in a Manhattan subway station after observing a metal clip in Perez's pocket. A236.

Perez was carrying a Gerber brand Common Folding Knife with a blade of approximately 3.75 inches and a "linerlock" locking mechanism that locks the

blade in place once it is in its fully open position. This Gerber knife is designed so that its blade resists opening from the closed position. *Id*.

Perez purchased the Gerber knife at Tent & Trail, an outdoor supply store in lower Manhattan, in approximately April 2008. The knife features a stud mounted on the blade that allows a user to overcome the knife's resistance against opening and swivel the blade open with his or her thumb. Perez selected the knife because he wanted a knife that he could open with one hand. Perez found this feature especially useful because, among other reasons, in his work as an art dealer he often needs to carefully cut artwork away from frames. A one-handed opening knife is useful because it allows him to use his other hand to hold the canvas while preparing for and making a cut. Perez also selected this knife because the blade locks in place once open, and this prevented the blade from accidentally closing on his fingers. *Id*.

The NYPD officers alleged that that the Gerber knife was a prohibited gravity knife. Although the officers could not themselves open the knife using a "flicking" motion, they 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. The NYPD officers charged Perez with Criminal Possession of a Weapon in the Fourth Degree by issuing him a Desk Appearance Ticket. *Id*.

Perez denied that his knife was a gravity knife, retained private counsel, and defended the charge on its merits. The City offered to resolve the charge against Perez by entering into an ACD, and they consummated this arrangement on November 17, 2010. Perez was not incarcerated, but he agreed to perform 7 days' community service. A237.

Perez no longer carries a Common Folding Knife in the City. Perez would carry a Common Folding Knife, but he does not do so because he fears that he will again be charged with Criminal Possession of a Weapon, and he is unable to determine whether any particular Common Folding Knife might be deemed a prohibited switchblade or gravity knife by the District Attorney or NYPD. In addition, Perez has been unable to purchase a Common Folding Knife similar to the Gerber knife in the City. Perez would purchase another similar Common Folding Knife, but he refrains from doing so because he fears arrest and prosecution, and also because he is unable to find any such knives for sale in the City. *Id*.

On June 17, 2010 the DA announced he had initiated enforcement actions against various knife retailers in New York City (the "NYC Retailers"). He asserted that many of the NYC Retailers' Common Folding Knives were switchblade or gravity knives and threatened to impose criminal charges. He targeted reputable and established businesses such as Paragon, Orvis, Eastern

Mountain Sports, and Home Depot, even deeming common utility knives found in hardware stores to be prohibited.[4] One such NYC Retailer was Native Leather. *Id*.

The alleged switchblade and gravity knives sold by the NYC Retailers were similar to the Benchmade and Gerber knives described above in that they were Common Folding Knives designed to resist opening from the closed position. *Id*.

Rather than face prosecution, the NYC Retailers agreed to pay the City approximately $1.8 million and to generally turn over Common Folding Knives held in inventory, in exchange for the City's agreement not to pursue charges. *Id*.

Although the NYC Retailers and the City agreed that the NYC Retailers would remove some Common Folding Knives from their New York City stores, the City agreed to permit certain of the NYC Retailers, such as Paragon, to continue selling certain "custom" Common Folding Knife models. Aside from their significant value, these "custom" knives were and are functionally identical to the other Common Folding Knives that the District Attorney had alleged were *per se* illegal and that the NYC Retailers had agreed not to (otherwise) sell in the City. A238.

[4] Such knives are functionally identical to the knife found *not* to be a gravity knife in *Irizarry*.

Significantly, even though the DA apparently agreed to allow certain NYC Retailers to sell such expensive "custom" Common Folding Knives, there 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, just as Copeland and Perez were arrested.

Many of the NYC Retailers continue to sell a variety of Common Folding Knives at their New York State locations outside of New York City, including those that they no longer sell in the City. Although the Penal Law's prohibition on switchblade and gravity knives applies equally throughout all of New York State, see N.Y. Penal L. § 265.01(1), other localities have not attempted to apply the definitions to cover Common Folding Knives. A229.

Because it is impossible for retailers to know whether the NYPD or the DA will contend that any particular Common Folding Knife is a "gravity" knife, many retailers avoid the risk by refusing to carry any Common Folding Knives in their New York City locations. *Id*.

However, the NYPD and the DA apply the State laws prohibiting gravity knives to include Common Folding Knives that – in their view – can be "readily" opened with a "wrist-flicking" motion, even if it involves multiple attempts and extreme body movements to create sufficient force to open the knife not designed to be opened in this manner, and in some cases without actually demonstrating that

they can physically accomplish the task, simply assuming that *some* person could. Defendants sometimes interpret these State laws so broadly that they deem *any* Common Folding Knife to be prohibited, regardless of how readily it can actually be opened. NYPD officers arrest and charge individuals found carrying such Common Folding Knives with Criminal Possession of a Weapon in the Fourth Degree, and the DA prosecutes the alleged offenses. A person faces one year in prison if convicted, and most individuals choose to accept plea agreements, rather than bearing the expense, and risk, of a defense on the merits. *See, generally*, Amended Complaint, A227-243.

Like other NYC Retailers, Plaintiff Native Leather entered into a Deferred Prosecution Agreement ("DPA") with DA Vance to avoid prosecution under which Native Leather 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 selling switchblade and gravity knives as defined in N.Y. Penal Law § 265.00(4)-(5). A238.

Although most provisions of Native Leather's DPA have expired, Native Leather continues to adhere to its compliance program in an attempt to avoid running afoul of DA Vance's interpretation of the State laws that prohibit switchblade and gravity knives. Under this program, a designated employee tries several times to open each folding knife that Native Leather receives using a

"wrist-flick" procedure. Native Leather only sells folding knives that the designated employee is not able to "wrist-flick" open even one time. However, there is no assurance that some other person will not be able to "wrist-flick" such a knife open in the future, resulting in charges being brought against Native Leather by the DA. *Id*.

Prior to June 2010, Native Leather sold a variety of Common Folding Knives with locking blades, but it now sells only lock-blade Common Folding Knives that have passed the test described above. Native Leather would currently sell a significantly wider variety of Common Folding Knives but for Defendant DA Vance's threat to enforce the gravity knife law against them. A238-39.

Defendants' novel and aggressive application of the Gravity Knife Law in this manner coincides with the appearance of recent case law approving of the wrist-flick method of identifying a gravity knife, despite its inherent subjectivity.

E. Organizational Standing of Knife Rights and Foundation

Knife Rights is a membership organization that has members and supporters throughout the United States, including members and supporters who live in both the City and State of New York, as well as members and supporters who travel through the City and State. One of Knife Rights' core purposes is to vindicate the legal rights of individuals and businesses who are unable to act on their own behalf

in light of the costs and time commitments involved in litigation. Knife Rights brings this action on behalf of both itself and its members. A50-74; A239.

Defendants have arrested, charged, prosecuted, and/or threatened to arrest, charge, and prosecute individual members and supporters of Knife Rights found carrying Common Folding Knives for alleged violations of the State laws that prohibit gravity knives. Individual members and supporters of Knife Rights face an ongoing threat of arrest and prosecution by Defendants for violating the State laws prohibiting gravity knives if they carry Common Folding Knives in the City. *Id*.

The members and supporters of Knife Rights also include individuals who would possess and/or carry Common Folding Knives in New York City, but who refrain from doing so based on their understanding that Defendants would arrest, charge, and prosecute them for allegedly violating the State laws prohibiting gravity knives. These individual members and supporters face an ongoing threat of arrest and prosecution by Defendants for violating the State laws prohibiting gravity knives if they carry Common Folding Knives in the City. A50-74; A239-40.

The members and supporters of Knife Rights also include businesses that have sold Common Folding Knives to individuals and/or businesses in New York City in the past, but that now refrain from doing so based on their understanding

that Defendants would arrest and/or prosecute them for allegedly violating the State laws prohibiting gravity knives. These individual members and supporters face an ongoing threat of arrest and prosecution by Defendants for violating the State laws prohibiting gravity knives if they sell Common Folding Knives to individuals or businesses in New York City. A50-74; A240.

Finally, the members and supporters of Knife Rights include businesses that would sell Common Folding Knives to retailers in New York City, but that are unable to do so because the retailers now refuse to sell some or all of their products in the City in light of Defendants' past and ongoing threatened enforcement of the State laws prohibiting gravity knives. The ongoing enforcement and threatened enforcement of the Defendants prevent these members and supporters from making sales of Common Folding Knives to potential customers in the City. *Id.*

Foundation has paid or contributed towards, and continues to pay and contribute towards, some of the monetary expenses that Knife Rights has incurred and continues to incur in consequence of Defendants' threatened enforcement of the State laws prohibiting gravity knives against Common Folding Knives. These expenditures have come at the expense of other organizational priorities of Foundation. Defendants conducted substantial discovery precisely on the issue of the expenditure of time, energy, and money by Knife Rights and Foundation in this

regard. *Id*. A180-181; A297-98. Plaintiffs answered interrogatories and produced significant documentation, including receipts, expense reports, travel documentation, attorneys' invoices (unrelated to this litigation), etc. Further, the President of Knife Rights and Foundation was deposed extensively on this issue. *See, e.g.*, a small sample of the extensive discovery produced in the case at A180-181; A186-206.

F. Plaintiffs' Claim

Plaintiffs' claim is straightforward. The Amended Complaint asserts that application of the Gravity Knife Law to Common Folding Knives is void for vagueness under the Fourteenth Amendment because no one can determine with any reasonable degree of certainty which Common Folding Knives are legal to possess and/or sell. *See, generally*, Amended Complaint, A227-243.

The Fourteenth Amendment provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. XIV, § 1.

"Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); accord *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006).

A law that burdens constitutional rights or that imposes criminal penalties must meet a higher standard of specificity than a law that merely regulates economic concerns. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). This higher standard applies here because the laws at issue impose criminal penalties.

Here, the vagueness that invalidates the application of the Gravity Knife Law to Common Folding Knives lies is the fact that the only way a Common Folding Knife can be deemed a gravity knife is by application of the Wrist Flick Test. It is undisputed that Common Folding Knives do not open through the force of gravity. This is because Common Folding Knives have a bias toward closure which gravity cannot overcome.[5] Rather, as the Amended Complaint alleges, Defendants try to apply the "centrifugal force" prong of the Gravity Knife Law to Common Folding Knives by attempting to flick them open. If they can be flicked

[5] Plaintiffs are unaware of any case in which Defendants have sought to prove that a Common Folding Knife is a gravity knife by holding it upside down to see whether the mere force of gravity will cause it to open.

open by *anyone*, Defendants will arrest and/or prosecute the person in possession of such Common Folding Knives.

Therein lies the problem. The Wrist Flick Test is inherently indeterminate. As alleged in the Amended Complaint, because of the built-in bias toward closure that normally keeps the knife closed, whether or not a Common Folding Knife can be opened with a flick of the wrist is highly dependent on:

(1) the strength, skill, and dexterity of the individual attempting the wrist flick;

(2) the number of attempts at flicking;

(3) the particular specimen of knife, even for the same knife model;

(4) the amount the knife has been used.

A233.

Thus, a person could hold a Common Folding Knife in his hand and never be able to determine that it is legal. If he is unable to flick it open, it does not mean the knife is legal because Defendants assert that a knife is a gravity knife if *some person at any future time* can manage to flick it open.

Thus, how will a person unable to, himself, flick the knife open conclude that his knife is not a gravity knife? He cannot ask the store clerk, because if the store clerk is unable to flick the knife open that is not dispositive of the issue.

He cannot ask a police officer, because the mere fact that a particular police office cannot flick the knife open is not dispositive of the issue. This is precisely what happened with Copeland. He asked not one but *two* police officers if the knife he possessed was legal. They could not flick it open, and they answered him in the affirmative. Yet, the very next police officer *could* flick it open, and Copeland was arrested for possession of a gravity knife.

Worse still, the officer who arrested Perez did not even bother to try to flick Perez's knife open, concluding that since he thought it could *theoretically* be flicked open it must be a gravity knife. A236, ¶37.

Significantly, there is no number of people a person can consult to determine that his Common Folding Knife is not an illegal gravity knife, because no matter how many individuals fail to flick it open, the very next person might be able to do so, and the person in possession of that knife will be subject to arrest and prosecution.

This is the very problem faced by Native Leather. Even though Native Leather has a procedure in place for an employee to "wrist flick" test their Common Folding Knives, that truly does them no good, because nothing about that employee's inability to open a given knife using a wrist flick insulates them from a decision by the DA to attempt to prosecute them if an NYPD officer can later flick the knife open. Thus, while Native Leather has a procedure in place to *reduce* their

risk of prosecution, they can *never* really know that the DA will not try to prosecute them in the future.

Further, the "Wrist Flick Test" does not specify the number of attempts that may be made in order to open the knife. In fact, Defendants will deem a Common Folding Knife to be a gravity knife no matter how many attempts it takes to open the knife. Thus, even if a knife cannot be opened on the first several attempts, if it can *ever* be opened with a wrist flick, the person will be subject to arrest and prosecution.

Additionally, the ability to flick open a Common Folding Knife can vary from specimen to specimen of the same model. Thus, Common Folding Knives cannot even be identified as gravity knives by model number or name. One specimen of a particular model may not flick open, but another might. So there is no way to conclude that, say, the Buck "Vantage" folding knife is not a gravity knife because even if no one has ever flicked open a Vantage, variability in production means that the next one might flick open.

Finally, as mechanical devices age, they often loosen up. Thus, even if a given Common Folding Knife has never been flicked open, age and usage could loosen the mechanism such that someone could succeed in flicking it open even if that same person could not do it five years earlier. Thus, a person's legal Common Folding Knife might not be a gravity knife when he bought it, but merely through

use and the passage of time it could transform into an illegal gravity knife without him realizing it.

Thus, under Defendants' application of the Gravity Knife Law, there is truly no way for any person to ever conclude that a given Common Folding Knife is not a gravity knife, and thus, there is no way for the Gravity Knife Law to be applied to Common Folding Knives in a manner that comports with the requirements of Due Process. This is entirely due to the fact that the defining characteristic of a Common Folding Knife is that it is designed with a *bias toward closure* such that it *resists* opening. A233; A227-28; A274-77.

This is all in stark contrast to how the Gravity Knife Law works with a traditional gravity knife. Because a traditional gravity knife is designed to freely move in and out of the handle merely by the force of gravity, none of the uncertainties identified above apply.

A true gravity knife can be opened by anyone because no effort is actually required. To the extent that a true gravity knife even requires a flick at all, all that is necessary to flick open a true gravity knife is a mild gesture with the hand. This is because there is no resistance built into the knife mechanism. There is no variation from person to person; there is no variation from specimen to specimen; and true gravity knives do not loosen over time because they are completely loose from the outset. It can be *readily* opened by centrifugal force. A233; A227-28;

A273. The foregoing is consistent with the court's analysis in *Irizarry*. 509 F. Supp. 2d at 205.

Accordingly, the only Constitutional manner in which the Gravity Knife Law can be applied is as to traditional gravity knives. There is no Constitutional way of applying the law to Common Folding Knives because there is no way for a person to know when a given Common Folding Knife would be deemed legal under the Gravity Knife Law. In contrast, since all true gravity knives operate in the same manner, it is easy to identify a true gravity knife. Thus, for the Gravity Knife Law to pass Constitutional muster, the bright line test to distinguish a legal "pocket knife" from an illegal "gravity knife" under New York law must be whether the knife is designed with a bias toward closure. If so, it is not a gravity knife. Thus, Defendants should be enjoined from applying the Gravity Knife Law to Common Folding Knives.

This is the essence of the claim pleaded in the Amended Complaint. Yet, the District Court's ruling below imposed a pleading requirement for standing that cannot be sustained and should be reversed so that Plaintiffs' claims may proceed on the merits.

SUMMARY OF ARGUMENT

I. The District Court dismissed the Amended Complaint, holding as to each Plaintiff that their allegations were "hypothetical" and "speculative" because they did not identify specific knives they wished to possess and/or sell. In doing so, the court entirely missed the gravamen of Plaintiffs' allegations and created a high and unusual standard for alleging standing that is not the law.

In order to demonstrate standing to challenge a criminal statute, a plaintiff need only refrain from taking action that he alleges would expose him to criminal liability. Messrs. Copeland, Perez, and Native Leather have each done this. They have specifically alleged that they would possess and/or sell, as the case may be, Common Folding Knives, but they do not because they fear arrest and/or prosecution by Defendants.

The District Court's requirement that they identify in the Amended Complaint specific knives they wish to possess and/or sell is nonsensical given the nature of the claim, and, in fact, creates an impossible standard to satisfy. The very nature of the cause of action alleged is that the Wrist Flick Test employed by Defendants to determine whether a given knife is a prohibited gravity knife is inherently subjective, variable, and indeterminate when applied to Common Folding Knives. As such, it is impossible to know which Common Folding Knives are legal to possess and sell. If a person is unable to open a given knife with a flick

of the wrist, that tells him nothing about whether or not it is legal because, according to Defendants, such a knife is a prohibited gravity knife if *anyone at any time* can flick it open with his wrist.

This means that no one can ever be certain that any Common Folding Knife is legal to possess, since one can ever exclude the possibility that someone, some day will succeed in flicking it open, thereby exposing him to arrest and prosecution by Defendants. Thus, Plaintiffs must avoid all Common Folding Knives in order to ensure that no enforcement action will be taken against them, even though, as a matter of New York law, not all Common Folding Knives can be deemed gravity knives (under New York law, at least some Common Folding Knives are legal "pocket knives"). It is therefore impossible to single out particular knives at issue, and the District Court erred in requiring it.

II. The District Court abused its discretion in denying Plaintiffs' motion for reconsideration as to their request for leave to file an amended pleading.

In connection with the motions to dismiss, Plaintiffs requested that, in the event the court felt that the Amended Complaint was defective, the court should grant leave to amend. Even though Plaintiffs felt that the detail sought by the District Court was impossible to provide, Plaintiffs felt it was important to at least *try* to satisfy the court in this manner. The court disregarded that request and never even addressed it in its Decision and Order dismissing the Amended

Complaint. Thus, Plaintiffs moved for reconsideration. Because leave to amend should be freely given, the District Court abused its discretion.

First, the court erroneously implied that Plaintiffs had already had the opportunity to cure any pleading defects. But, the Amended Complaint was filed in response to Defendants' original motions to dismiss, not any ruling by the court.

Second, the court erroneously stated that, in seeking reconsideration, Plaintiffs were seeking to relitigate an issue already decide by the court. However, the court never decided Plaintiffs' request to amend in the first instance, so a motion for reconsideration was appropriate.

Third, the court erroneously ruled that leave to amend should be denied because discovery was closed. Discovery was not closed. There remains a deposition to be taken of Plaintiffs' expert. Further, no new issues were raised in the proposed Second Amended Complaint. Thus, no new discovery would have been needed, in any event, had the amended pleading been allowed. Finally, it is no basis to deny leave to amend merely because discovery might be needed. Had the original complaint contained all of the allegations of the proposed Second Amended Complaint, Defendants would have had to conduct whatever discovery was appropriate anyway. The amendment would have imposed no burden that Defendants were not already obligated to bear as litigants.

Fourth, the court erroneously stated that the parties had filed summary judgment motions. In fact, they filed motions to dismiss under Fed. R. Civ. P 12(b)(1) which are directed to the face of the pleadings, not to discovery materials.

It is fundamentally unfair to dismiss an action because the court believes that the pleading lacks sufficient detail and then deny leave to amend when the plaintiffs attempt to provide such detail, and in that regard the District Court abused its discretion in denying leave to amend.

III. The trial court erred in refusing to recognize Knife Rights's associational standing to assert claims on behalf of its members. Courts in this Circuit generally follow *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) which held that § 1983 claims are personal and cannot be brought by an association on behalf of its members. However, two years after *Aguayo* was decided, the Supreme Court impliedly overruled *Aguayo* in *Warth v. Seldin*, 422 U.S. 490 (1975), by recognizing the propriety of associational standing in a case brought in this Circuit pursuant to§ 1983. The Supreme Court specifically disapproved the reasoning in *Aguayo*. The only reason *Aguayo* was not explicitly overruled is that the judgment of this Court in *Warth*, which held that the organizational plaintiff had no standing, was affirmed on other grounds – specifically that it had not established the *elements* required for associational

standing. Thus, the District Court erred in finding that Knife Rights did not have associational standing, and the judgment below should be reversed.

STANDARD OF REVIEW

On appeal, this Court reviews dismissal for lack of standing *de novo*. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009). The Court "assume[s] all well-pleaded factual allegations to be true, and determine[s] whether they plausibly give rise to an entitlement to relief." *Id.* (internal quotation marks and citations omitted). The Court "construe[s] plaintiffs' complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in plaintiffs' favor." *Id.* (internal quotation marks and citations omitted).

The trial court's denial of leave to file an amended complaint is reviewed "for abuse of discretion, unless the denial was based on an interpretation of law, such as futility, in which case we review the legal conclusion *de novo*." *Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012).

ARGUMENT

I. The District Court Erred in Requiring Plaintiffs to identify Specific Knives in Order to Establish Standing; The Impossibility of Knowing Which Knives Might Expose Plaintiffs to Arrest and Prosecution is the Basis of the Underlying Claim Itself and is Precisely What Makes the Challenged Law Unconstitutionally Vague.

The District Court dismissed the Amended Complaint, holding as to each Plaintiff that their allegations were "hypothetical" and "speculative" because they did not identify specific knives they wished to possess and/or sell. In doing so, the court entirely missed the gravamen of Plaintiffs' allegations, creating a standard for alleging standing that is not the law.

In reaching its decision, the court treated the motions as motions to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). On such motions, the court "borrow[s] from the familiar Rule 12(b)(6) standard, construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein." *Donoghue v. Bulldog Investors General Partnership*, 696 F.3d 170, 173 (2d Cir. 2012).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted).

It is well settled that a plaintiff demonstrates standing by alleging injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014).*

To allege injury from the threatened enforcement of criminal statutes, it is unnecessary for a plaintiff to actually expose himself to criminal liability to challenge the statute. It suffices that he refrain from taking action that he alleges would expose him to criminal liability. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987*); Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979); *Ellis v. Dyson*, 421 U.S. 426, 431-32 (1975).

A plaintiff need only allege that he has refrained from doing what he claims the right to do. 549 U.S. 118, 128-29. The Supreme Court has suggested that it suffices for plaintiffs to allege merely that they would engage in conduct, but for a criminal prohibition, so long as the State does not then assert "that plaintiffs will *not* be prosecuted if they do what they say they wish to do." *Holder*, 130 S. Ct. at 2717 (emphasis added). Defendants make no such assertion.

Here, all Plaintiffs have alleged and documented such injury in discovery, and the judgment below should be reversed.

A. Copeland, Perez, and Native Leather Have Sufficiently Demonstrated Standing.

Copeland, Perez, and Native Leather each sufficiently demonstrate standing because they allege both that Defendants have previously arrested and/or prosecuted them and that they intend to continue to enforce the law the same way in the future.

In the Amended Complaint, Copeland, Perez, and Native Leather each allege that actual enforcement action has already been taken against them. Thus, it is not speculative that Defendants actually enforce the law in the manner alleged. A234-39.

Further, they allege that the enforcement action was taken pursuant to a policy of enforcing the law in this fashion. Thus, it is not speculation that they would be at risk of arrest and/or prosecution if they were in possession of a knife that Defendants could open using the Wrist Flick Test. *Id*.

According to the District Court, the injury is speculative only because Plaintiffs do not allege which knives they wish to possess and they therefore cannot allege that the injury is concrete. SPA7-9. But this misunderstands the nature of the injury. This is a vagueness challenge. Inherent in such challenge is the inability to know what conduct will result in liability.

Plaintiffs refrain from engaging in lawful activity, possessing legal "pocket knives," *see Dreyden*, 15 N.Y.3d at 104, precisely *because* they cannot determine which knives fall into that category. The very nature of the claim is that it is impossible for Plaintiffs to know which knives are legal, and they therefore cannot possibly allege which knives they wish to possess, nor need they, since the uncertainty arising from the alleged vagueness applies to literally *all* Common Folding Knives.

Thus, they must avoid all Common Folding Knives in order to ensure that no enforcement action will be taken against them.[6] Since it is true, as a matter of law, that not all Common Folding Knives can be gravity knives, *see id.*; see also *Irizarry*, 509 F. Supp. 2d at 209-10, that means that Plaintiffs, by avoiding all Common Folding Knives, are refraining from possessing some knives that are legal and that they have right to possess.

This injury flows directly from the enforcement actions previously taken and threatened in the future by Defendants. A favorable ruling would redress this

[6] Native Leather is in an even more untenable position because it sells some Common Folding Knives for which it now employs a wrist flick test to avoid prosecution. However, since any wrist flick test is entirely subjective and indeterminate, there is no way for Native Leather to be sure that the DA will not, again, try to prosecute them even if its employees cannot flick open particular knives.

injury because if Defendants are enjoined from enforcing the Gravity Knife Law against Common Folding Knives, Plaintiffs would possess and/or sell them.

B. Knife Rights and Foundation Have Sufficiently Demonstrated Standing.

The court's ruling with respect to Knife Rights and Foundation is essentially identical to its ruling as to Copeland, Perez, and Native Leather. Organizational plaintiffs can allege injury where they expend resources that must be diverted from other organizational priorities as a result of the defendant's actions. *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir.1993). The court did not dispute that Knife Rights and Foundation have expended such resources (SPA9-10), and in fact, the record is replete with the substantial discovery taken by Defendants on this issue, including answers to interrogatories, significant documentation produced, including receipts, expense reports, travel documentation, attorneys' invoices, etc., and the deposition of the President of Knife Rights and Foundation, Douglas Ritter. *See, e.g.*, A180-181; A186-206. Rather, the court found that the resources were expended for injuries to its members that were speculative in the same way the injuries to Copeland, Perez and Native Leather are supposedly speculative. SPA9-11.

But just as with those plaintiffs, Knife Rights and Foundation need only allege that resources were expended to deal with the vague manner in which

Defendants enforce the Gravity Knife Law, resulting in the same types of injuries to their members as Copeland, Perez, and Native Leather.

Knife Rights alleges it has expended its time, energy, and money to counsel and assist many individuals charged with violating the Gravity Knife Law with Common Folding Knives. In several cases, Knife Rights has referred these individuals to counsel, and it has supported their defense with funds, research, and information. Knife Rights has also spent its time, energy, and money to publish materials that warn the public of the City's expansive (and unanticipated) interpretation of "gravity knife," and to provide general counseling and guidance to concerned individuals. Finally, the diversion of resources to NYPD gravity knife arrests has impacted a number of other organizational priorities. Foundation has standing because it has paid some of the costs and has had to put other organizational priorities on hold.[7] A50-74; A180-181; A186-206.

These are injuries that "actually affect" their members in precisely the same way as Copeland, Perez, and Native Leather.

Thus, Knife Rights and Foundation have sufficiently alleged standing, and the judgment below should be reversed.

[7] Such costs *other than* those incurred in this litigation.

II. The District Court Abused its Discretion in Refusing to Allow Plaintiffs to Amend Their Pleading to Address the Court's Opinion.

The District Court abused its discretion in denying Plaintiffs' motion for reconsideration of their request for leave to amend.

In connection with the motions to dismiss, Plaintiffs requested that, in the event the court felt that the Amended Complaint was defective, the court should grant leave to amend. Even though Plaintiffs felt that the detail sought by the court was impossible to provide, Plaintiffs felt it was important to at least *try* to satisfy the court in this manner. The court disregarded that request and never addressed it in its Decision and Order dismissing the Amended Complaint ("Dismissal Opinion"). *See, generally*, SPA1-11.

Reconsideration was the appropriate vehicle because the court entirely disregarded Plaintiffs' request to amend that had been set forth in their opposition to Defendants' motions. Thus, the court overlooked a matter that "might reasonably be expected to alter the conclusion reached by the court." *In re Keyspan Corp.*, No. 01 CV 5852, 2003 U.S. Dist. LEXIS 20964, *7 (E.D.N.Y. Nov. 21, 2003); *see also Shrader v. CSX Corp.*, 70 F.3d 255, 257 (2d Cir. 1995). Plaintiffs responded to Defendants' motions to dismiss by, among other things, specifically requesting that the court grant them leave to file an amended complaint in the event the court found Plaintiffs' pleading inadequate. *Dougherty v. Bd. of Zoning Appeals*, 282 F.3d 83, 89-92 (2d Cir. 2002).

However, the court's Dismissal Opinion does not address this request.

As the Court is aware, the Federal Rules of Civil Procedure provide that district courts should "freely give" leave to amend. *See* Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). "[T]he Supreme Court has emphasized that amendment should normally be permitted." *Nerney v. Valente & Sons Repair Shop*, 66 F.3d 25, 28 (2d Cir. 1995). "The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir.1993). No such factors are present, and accordingly, Plaintiffs should have had the opportunity to address the issues that the court had identified.

The court made several erroneous statements in its Memorandum Decision and Order on reconsideration ("Reconsideration Opinion") which militate strongly in favor of reversal.

A. The District Court Erroneously Implied that Plaintiffs Already had the Opportunity to Cure any Pleading Defects.

In its Reconsideration Opinion, the court states that the "amended complaint failed to cure plaintiff's lack of standing . . . ." SPA14. This misconstrues the record. The Amended Complaint was filed in response to Defendants' initial motions to dismiss, not any ruling by the court. Those early motions asserted

arguments largely distinct from the issues ultimately ruled upon by the court much later in the case.

The request that was ignored by the court and later denied in the reconsideration motion, sought leave to replead in order to *directly* address pleading defects the court believed were present in the Amended Complaint and which it identified in its Dismissal Opinion. Plaintiffs never had the opportunity to do so, since the court had never before articulated the defects it thought were present in Plaintiffs' pleading.

Thus, the request to replead was the very first time Plaintiffs sought to address the court's concerns, and it should have been granted.

B. The District Court Erroneously Stated that Plaintiffs Were Seeking to Relitigate an Issue Already Decided by the Court.

In its Reconsideration Opinion, the court states that the Plaintiffs' "sole argument is that the Court denied their request to amend their already-amended complaint." SPA15. This is incorrect. The court never decided Plaintiffs' request to amend. Thus, the "matter overlooked" is precisely the request for leave to amend that Plaintiffs advanced and which the court ignored. This is a "matter[] . . . which counsel believes the Court overlooked," LR 6.3, and which "might reasonably be expected to alter the conclusion reached by the court," *Skaftouros v.*

United States, 759 F. Supp. 2d 354, 361 (S.D.N.Y.) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)), *rev'd* 667 F.3d 144 (2d Cir. 2011).

Supreme Court precedent requires courts to grant leave to amend unless specific factors are found to be present. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (reversing district court's denial of plaintiff's request to vacate judgment and allow amendment of the complaint). Hence, the fact that the court's Dismissal Opinion did not address this request suggests that the court overlooked it.

Further, other courts in the Southern District of New York have granted reconsideration of orders dismissing complaints and allowed leave to amend. *See In re Bear Sterns Cos.*, no. 07 Civ. 10453, 2011 U.S. Dist. LEXIS 103061, *9-10 (S.D.N.Y. Dec. 13, 2011) (granting reconsideration of order dismissing complaint and allowing plaintiffs to amend pleadings); *Yu v. State Street Corp.*, no. 08 Civ. 8235, 2010 U.S. Dist. LEXIS 70931, * 3-4 (S.D.N.Y. Jul. 14, 2010) (same).

On reconsideration, Plaintiffs did not seek to relitigate the motion, since they never obtained a decision in the first instance. The court simply disregarded it, and Plaintiffs merely sought a decision on the merits of the request. Thus, to the extent Plaintiffs' motion for reconsideration was denied as an improper vehicle for the relief sought, that decision was erroneous and it should be reversed.

C. The District Court Erroneously Stated that Discovery was Closed.

In its Reconsideration Opinion, the court states that the "discovery in this case has long since been closed." SPA15. That is incorrect. Expert discovery was ongoing, and the deposition of Plaintiffs' expert Paul Tsujimoto still remains to be taken.

Further, "the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading." *United States v. Cont'l Ill. Ins. Co.*, 889 F.2d 1248, 1255 (2d Cir. 1989); *see also S.S. Silberblatt, Inc. v. E. Harlem Pilot Block*, 608 F.2d 28, 43 (2d Cir. 1979) ("the burden of undertaking discovery, which [defendant] would have shouldered had the proposed amendment been incorporated in the complaint as originally filed, hardly amounts to prejudice").

Finally, the court erred in concluding that additional discovery was needed. The proposed Second Amended Complaint did not add new parties, nor did it add new claims. All it did was attempt to add the type of detail Plaintiffs thought the court was seeking. Defendants specifically elected not to depose Copeland and Perez, and there would be no need to do so if the amendment were allowed. A352-53; A358-59. Ironically, the court insisted that the Amended Complaint had insufficient detail and then denied leave to amend when Plaintiffs sought to provide that additional detail. Plaintiffs should not be whipsawed this way.

Thus, not only was discovery not complete, but it was erroneous to consider the asserted need for additional discovery as a basis to deny leave to amend, and the judgment below should be reversed.

D. The District Court Erroneously Stated that the Parties Had Filed Summary Judgment Motions.

In its Reconsideration Opinion, the court states "[n]ot only have defendants filed a summary judgment motion, but the Court has also granted it." SPA18. This is incorrect. Neither of Defendants' motions were summary judgment motions. They were motions to dismiss, based on the face of the Amended Complaint. A244; A261. It is also clear from the Dismissal Opinion that the court *treated* them as motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and that the decision was entirely based on the face of the pleading, not on any discovery. SPA5; SPA1-11. Thus, no motions or decisions of the court relied in any way on the status of discovery in the case. Thus, the court erred in denying leave to amend, and the judgment below should be reversed.

Fundamentally, it is unfair to first dismiss a pleading because it lacks detail and then deny leave to amend in order to provide that detail on the basis that the new detail would require additional discovery. As is clear from *Continental Illinois* and *Silberblatt*, if the original pleading had contained the level of detail required by the court's standing decision, Defendants would have had to engage in

the additional discovery anyway. Thus, there can be no prejudice to Defendants in allowing an amendment. The court abused its discretion in denying leave to amend, and the judgment below should be reversed.

III. The District Court Erred in Failing to Follow *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) and *Warth v Seldin*, 422 U.S. 490 (1975) in Denying Associational Standing to Knife Rights.

The court erred in refusing to recognize Knife Rights' standing to assert claims on behalf of its members.[8] The reluctance of courts in this Circuit to recognize associational standing in § 1983 cases can be traced back to 1973, when this Court held, in *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974), that § 1983 claims are personal and cannot be brought by an association on behalf of its members. *See* 473 F.2d at 1099 ("Neither [the] language nor the history [of § 1983] suggests that an organization may sue under the Civil Rights Act for the violation of rights of members."). This has remained the law in this Circuit, despite the fact that two years later, in *Warth v. Seldin*, 422 U.S. 490 (1975), the Supreme Court recognized the propriety of associational standing in a Civil Rights Act case. This Court should revisit and disregard the *Aguayo* rule as contrary to later Supreme Court precedent as required

[8] "While Knife Rights and the Foundation cannot bring a § 1983 suit on behalf of their members . . . ." SPA10.

by *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010), when Circuit precedent has been put into doubt by intervening Supreme Court precedent.[9]

In *Warth*, a zoning case involving, among other claims, a claim under 42 *U.S.C.* § 1983, the Supreme Court recognized the right of an association to pursue a claim on behalf of its members:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

422 U.S. at 511 (citations omitted). While the Supreme Court affirmed this Court's decision that the plaintiff-associations in *Warth* lacked standing, it did so for different reasons than this Court. 422 U.S. at 493 ("For reasons that differ in

[9] If this Court reverses on the issues addressed in Point I and/or Point II above, it need not reach the issue of associational standing and the doubtful continuing vitality of the *Aguayo* rule, as once one plaintiff's standing is established, the Court need not pursue the standing issue further. *Horne v. Flores*, 557 U.S. 433, 446 (2009); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977).

certain respects from those upon which the Court of Appeals relied, we affirm."). While this Court, relying on *Aguayo*, held that "[i]t is highly doubtful that an organization has standing to represent its members in most cases under the Civil Rights Act," (*Warth v. Seldin*, 495 F.2d 1187, 1194 (2d Cir. 1974)), the Supreme Court recognized the propriety of associational standing generally, but found that the specific plaintiff-associations in *Warth* had not satisfied its requirements. In affirming the judgment below, the Supreme Court necessarily disapproved of the reasoning in *Aguayo*. The only reason *Aguayo* was not explicitly overruled is that the judgment was affirmed on other grounds – that is, the associations had not met the specific elements articulated by the Supreme Court for associational standing. Had those plaintiffs met the required elements, there can be no doubt that *Aguayo* would have been explicitly overruled.

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the Court reaffirmed its endorsement of associational standing, distilling from *Warth* a three-factor test to determine whether an association has standing to sue on behalf of its members:

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343. *Accord Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990) (permitting § 1983 action by an association on behalf of its members)

Warth, *Hunt*, and *Wilder* all post-date *Aguayo*. None of them suggest that associational standing does not extend to § 1983 claims. Indeed, *Warth* recognized the propriety of associational standing in a case that involved a § 1983 claim, and in *Wilder* the only plaintiff *was* an association asserting a § 1983 claim on behalf of its members. *Aguayo*'s blanket prohibition on associational standing in § 1983 cases is irreconcilable with *Warth*, and at least one district court within this Circuit has already recognized this plain fact. In *Huertas v. E. River Housing Corp.*, 81 F.R.D. 641, 652 (S.D.N.Y. 1979), the court found associational standing contrary to the *Aguayo* rule.

This Court's continued adherence to *Aguayo* is also at odds with the recognition by every other circuit court that has directly addressed the issue of the applicability of associational standing in § 1983 cases. *See, e.g., R.I. Brotherhood of Correctional Officers v. State of R.I.*, 357 F.3d 42, 48 (1st Cir. 2004) ("The court conceded that section 1983 claims are governed by *federal* standing rules, which allow an association to sue on behalf of its members where the members would have standing to sue themselves, the interests are germane to the association's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (internal quotation marks

omitted) (citing *Hunt*)); *Polaroid Corp. v. Disney*, 862 F.2d 987, 998 (3d Cir. 1988) ("Organizations raising constitutional challenges brought under 42 *U.S.C.* § 1983 have also been allowed to gain standing by asserting the interests of their members." (citing *Hunt*)); *Envtl. Tech. Council v. State of S.C.*, 2000 U.S. App. LEXIS 12137, at *4 (4th Cir. June 2, 2000) ("It is well established that organizations satisfying the requirements for representational standing may bring actions to vindicate the federal rights of their members under 42 *U.S.C.* § 1983." (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990) (permitting a § 1983 action by an association on behalf of its members)); *Neighborhood Action Coalition v. City of Canton*, 882 F.2d 1012, 1017 (6th Cir. 1989) (holding that organization had associational standing to seek injunctive relief on behalf of its members in connection with § 1983 claim); *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532 (8th Cir. 2005) ("The Supreme has never held (and neither have we) that associational standing is not available to § 1983 plaintiffs alleging Fourth Amendment violations."); *Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehabilitative Servs.*, 958 F.2d 1018 (10th Cir. 1992) (applying *Hunt* test for associational standing in § 1983 case, but holding that plaintiffs failed to satisfy third prong).

A panel of this Court is free to revisit a previous panel's decision if an intervening Supreme Court decision casts doubt on the earlier decision. *In re*

Zarnel, 619 F.3d 156, 168 (2d Cir. 2010) ("[I]f there has been an intervening Supreme Court decision that casts doubt on our controlling precedent, one panel of this Court may overrule a prior decision of another panel. The intervening decision need not address the precise issue decided by the panel for this exception to apply." (internal quotation marks and citations omitted)). Because *Aguayo*'s prohibition on associational standing in § 1983 cases is contrary to the Supreme Court's decisions in *Warth* and *Hunt*, this Court should not follow the *Aguayo* rule and, instead, should rule consistent with, not only Supreme Court precedent, but also the law of every other Circuit to consider this issue.

This Court's recent statement, in *Nnebe v. Daus*, 644 F.3d 147, 156 n.6 (2d Cir. 2011), that *Aguayo* remains controlling law in this Circuit, even after *Warth*, is not a bar to this Court's revisiting *Aguayo*. That statement in *Nnebe* was based upon the premise that this Court has "reaffirmed the *Aguayo* rule in [*League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985)] nine years after *Warth*." 644 F.3d at 156 n.6. But *League of Women Voters* did not specifically consider the effect of *Warth* and *Hunt* on the *Aguayo* rule. Rather, in one paragraph of analysis the Court simply cited the *Aguayo* rule and cited *this Court's* decision in *Warth*. It failed to recognize that, although it affirmed the judgment, the Supreme Court disagreed with this Court on the key aspect of the reasoning in *Warth*: The

Supreme Court's affirmance was based not on a categorical or near-categorical rejection of associational standing in § 1983 cases, as in *Aguayo*, but upon a finding that the plaintiffs in *Warth* did not satisfy the elements of associational standing. Contrary to *Aguayo*, *League of Women Voters*, and *Nnebe*, the Supreme Court in *Warth* recognized the general applicability of associational standing in Civil Rights Act cases.

Knife Rights has satisfied each of the elements for associational standing set forth in *Hunt*. First, for the reasons discussed above, its individual members would have standing to file suit: Knife Rights' members 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. A239-40, ¶¶ 48-51. Second, the interests that Knife Rights seeks to protect with this action are central to its purpose of "vindicate[ing] the legal rights of individuals and businesses who are unable to act on their own behalf in light of the costs and time commitments involved in litigation." A239, ¶ 47. Third, Knife Rights seeks declaratory and injunctive relief that would benefit its membership collectively and does not require participation by individual members as, for example, a claim for damages would.

This Court has never specifically considered the effect of the Supreme Court's decisions in *Warth* and *Hunt* on the continued vitality of *Aguayo*. Because

Aguayo is irreconcilable with *Warth* and *Hunt*, this Court should disregard *Aguayo*, hold that Knife Rights has sufficiently alleged associational standing pursuant to principles set forth in *Warth* and *Hunt*, and reverse the judgment below.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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May 15, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned certifies that the brief complies with the applicable type-volume limitations. The brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This certificate relies upon Microsoft Word 2010's word count feature; the program used in drafting this brief. The brief complies with the typeface requirements for Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Words' word processing program in 14-point Times New Roman font.

Dated: May 15, 2014

Respectfully submitted,

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIFE RIGHTS, INC., et al.,

Plaintiffs,

-v-

CYRUS VANCE, JR., et al.,

Defendants.

11 Civ. 3918 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiffs Knife Rights, Inc., John Copeland, Pedro Perez, Native Leather, Ltd., and Knife Rights Foundation, Inc. filed suit against Manhattan District Attorney Cyrus Vance, Jr., and the City of New York under 42 U.S.C. § 1983 on June 9, 2011. Plaintiffs allege that Defendants' application of New York Penal Law § 265.01's prohibition on the possession of switchblade knives and gravity knives to possessors of common folding knives ("CFKs") makes § 265.01 void for vagueness under the Due Process Clause of the Fourteenth Amendment.

Defendants have each moved to dismiss Plaintiffs' claims for lack of standing and failure to state a claim. The Court agrees that Plaintiffs lack standing to attack the prohibitions on both switchblade knives and gravity knives. Therefore, Defendants' motions are GRANTED and the case is DISMISSED.

I. BACKGROUND

The core allegation of Plaintiffs' complaint is that Defendants enforce the law against criminal possession of a weapon in the fourth degree, N.Y. Penal Law

§ 265.01 (McKinney 2013), against possessors of "folding pocket knives that are designed to resist opening from the closed position," which Plaintiffs call "Common Folding Knives" ("CFKs"). (Am. Compl. ¶¶ 1, 3, ECF No. 61.)

Section 265.01 states in relevant part that a "person is guilty of criminal possession of a weapon in the fourth degree" when he or she possesses any "gravity knife" or "switchblade knife." N.Y. Penal Law § 265.01. A "switchblade knife" is defined in the Penal Law as "any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife." Id. § 265.00(4). A "gravity knife" is defined 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." Id. § 265.00(5).

A. Pedro Perez and John Copeland

On April 15, 2010, New York City Police officers stopped Perez and charged him with possession of a gravity knife. (Am. Compl. ¶¶ 33–37.) On October 10, 2011, Copeland was charged by New York Police Department officers with possession of a gravity knife. (Am. Compl. ¶¶ 25–28.) The charges against Perez and Copeland were both resolved by Adjournments in Contemplation of Dismissal. (Am. Compl. ¶¶ 31, 38.) Neither Plaintiff alleged that N.Y. Penal Law § 265 was void for vagueness when he was charged with possession of gravity knives in 2010 or 2011. (See id.)

Both Plaintiffs now claim that they want to possess knives similar to the ones that they possessed when charged, but that they have not bought such knives because they lack certainty about the law and whether "any particular CFK might be deemed a prohibited switchblade or gravity knife." (Am. Compl. ¶ 32, 39.)

B. Native Leather, Ltd.

Plaintiff Native Leather is a New York City knife retailer. On June 17, 2010, District Attorney Vance "announced plans to pursue charges" against retailers, including Native Leather, for "marketing prohibited switchblade and gravity knives." (Id. ¶¶ 40–41.) In response, Native Leather, like other retailers, entered into a Deferred Prosecution Agreement under which it turned over many of its knives, paid monetary penalties, and pledged to cease from selling prohibited knives. (Id. ¶ 42–44.) Native Leather did not allege that N.Y. Penal Law § 265 was void for vagueness before turning over the knives it possessed.

Native Leather states that to avoid further prosecution, it only sells knives that a "designated employee is not able to 'wrist-flick' open," and does not sell "assisted-opening knives" that it would otherwise sell. (Am. Compl. ¶¶ 45–46.)

C. Knife Rights, Inc., and Knife Rights Foundation, Inc.

Plaintiffs Knife Rights, Inc. ("Knife Rights"), and Knife Rights Foundation, Inc. ("the Foundation"), are nonprofit organizations. (Id. ¶¶ 10, 13.) Knife Rights sues on behalf of members and supporters whom Defendants have arrested, charged, prosecuted, and/or threatened to arrest, charge, and prosecute for carrying CFKs. (Id. ¶¶ 47–51.) The Foundation alleges that it "has paid or contributed

towards, and continues to pay and contribute towards, some of the monetary expenses that Knife Rights has incurred and continues to occur in consequence of Defendants' threatened enforcement of [N.Y. Penal Law § 265.01] . . . at the expense of other organizational priorities." (Id. ¶ 52.)

D. Procedural History

Defendants argue that no party has standing to challenge the definition of "switchblade knife," because no one charged or threatened to charge Copeland, Perez, and Native Leather with possession of a switchblade. (City of New York's Mem. of L. in Supp. Mot. to Dismiss (City Mem.) 11–12.) Defendants also argue that no party has standing to challenge the definition of "gravity knife," because Copeland, Perez, and Native Leather face no actual or imminent injury from the ban on gravity knives, especially because no party has alleged the specific types of knives it wants to sell or to carry. (Mem. of L. in Supp. D.A. Vance's Mot. to Dismiss (Vance Mem.) 11–12.) Defendants also allege that Knife Rights and the Foundation lack standing entirely because they face no injury whatsoever from the knife ban. (City Mem. 8–11; Vance Mem. 8–10.)

Because the Court agrees that all parties lack standing to challenge the definitions of "switchblade knife" and "gravity knife," Defendants' motions to dismiss are GRANTED.[1]

[1] Because the Court resolves the Motions to Dismiss on standing, the Court need not reach Defendants' further argument that the prohibitions on possessing gravity or switchblade knives under N.Y. Penal Law § 265.00(4)–(5) are not unconstitutionally vague. (See City Mem. 12–23; Vance Mem. 13–24.)

II. STANDARDS OF REVIEW

A. Rule 12(b)(1)

The Court considers a motion to dismiss for lack of standing as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. See, e.g., Rothstein v. UBS AG, 708 F.3d 82, 90 (2d Cir. 2013). On such motions, the Court must "borrow from the familiar Rule 12(b)(6) standard, construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein." See Donoghue v. Bulldog Investors Gen. P'ship, 696 F.3d 170, 173 (2d Cir. 2012).

B. Rule 12(b)(6)

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). That is, "the plaintiff must provide the grounds upon which [its] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted). "[M]ere conclusory statements" or "threadbare recitals of the elements of a cause of action" are insufficient. Id.

C. Standing

Article III of the United States Constitution limits the jurisdiction of the federal courts to adjudicating actual "cases" and "controversies." Allen v. Wright, 468 U.S. 737, 750 (1984). "[A]n essential and unchanging part" of Article III's case-or-controversy requirement is standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling." Horne v. Flores, 557 U.S. 433, 445 (2009) (citing Lujan, 504 U.S. at 560–61).

Where a plaintiff claims standing based on an imminent rather than actual harm, the standard is high. "'[T]hreatened injury must be certainly impending to constitute injury in fact,'" and "'[a]llegations of possible future injury' are not sufficient." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

D. "Void for Vagueness"

"The 'void for vagueness' doctrine, grounded in the Due Process Clause, 'requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" United States v. Hashmi, No. 06 Crim. 442 (LAP), 2009 WL 4042841, at *6 (S.D.N.Y. Nov. 18, 2009) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

III. DISCUSSION

The Court agrees that all Plaintiffs lack standing to challenge the provisions defining "switchblade knife" and "gravity knife." The Court therefore need not reach the question whether the provisions are in fact void for vagueness.

A. Standing as to Perez, Copeland, and Native Leather

Plaintiffs allege that Perez and Copeland want to carry certain knives and that Native Leather wants to sell certain knives, but that all parties fear arrest under the switchblade and gravity knife provisions. (Mem. of Law in Opp'n to Def. City's Second Mot. to Dismiss (Pls.' Opp'n to City) at 24; Am. Compl. ¶¶ 32, 39, 46.)

Plaintiffs' concerns are insufficient to confer standing, because they fail 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. See Lujan, 504 U.S. 560–61. Copeland and Perez may have faced injury when they were arrested, and Native Leather may have faced an injury if D.A. Vance pursued charges against it for selling prohibited knives. (Am. Compl. ¶ 30–31, 38, 40, 42.) But no Plaintiff moved to dismiss the charges on the basis that the provisions in question were unconstitutionally vague. Instead, both individual Plaintiffs resolved their charges through Adjournments in Contemplation of Dismissal, and Native Leather voluntarily entered into an agreement with the City in exchange for its agreement not to pursue charges. Thus, 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, 557 U.S. at 445.

The injury that Plaintiffs do allege is completely hypothetical and "highly speculative." Clapper, 133 S. Ct. at 1148. Perez and Copeland claim that they want to possess a knife "similar" to the one they possessed at the time of their arrests.[2] (Am. Compl. ¶ 32, 39.) But neither individual alleges the make and model of knife that he wants to carry or specifically describe it, and this Court declines—especially on such limited factual allegations—to engage in "guesswork as to how independent decisionmakers will exercise their judgment." Clapper, 133 S. Ct. at 1150 (citing Whitmore, 495 U.S. at 159–60). Nor do Plaintiffs allege any facts showing why they cannot purchase another type of tool or knife not prohibited by law.

Similarly, the only harm that Native Leather currently suffers is its inability to sell illegal knives in order to "adhere to its compliance program." (Am. Compl. ¶ 44.) An agreement to follow the law hardly creates an actual and imminent injury in fact. Native Leather further argues that it is unable to stock certain knives because of a speculation that "some other person" might be able to "wrist-flick' them open and thus implicate the statute. (Id. at 45.) That concern is mere conjecture. "A plaintiff must allege something more than an abstract, subjective fear that his rights are chilled in order to establish a case or controversy." Nat'l Org. Marriage,

[2] The Court notes that Perez and Copeland were arrested for possessing—and profess a future desire to possess—knives that were allegedly gravity knives, not switchblade knives. (See Am. Compl. ¶¶ 30–32, 37–39.) Furthermore, Native Leather and other retailers turned over knives "similar" to those possessed by Perez and Copeland—i.e., also gravity knives. (See Am. Compl. ¶¶ 40–42.) Thus, even if Plaintiffs could claim an injury based on their interest in possessing "similar" knives in the future, those claims are relevant only to the gravity ban, not the switchblade ban.

Inc. v. Walsh, 714 F.3d 682, 689 (2d Cir. 2013). Native Leather's desire to skirt the edges of the law does not create an injury sufficient for Article III standing. See Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952) ("Nor is it 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.").

Because all three Plaintiffs allege an injury that is far "too speculative for Article III purposes," Lujan, 504 U.S. at 565 n.2, their Complaint is a prototypical request for an advisory opinion. 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: "Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Id. at 1146.

B. Standing as to Knife Rights and the Foundation

Knife Rights and the Foundation make an even more attenuated claim for standing: they argue that they have standing because they have expended resources to oppose the switchblade ban. (See Pls.' Opp'n to City 21–23; Am. Compl. ¶ 52.)

While Knife Rights and the Foundation cannot bring a § 1983 suit on behalf of their members, they have standing to sue if they themselves "independently satisfy the requirements of Article III"—that is, that they themselves have suffered an actual or imminent injury in fact that is fairly traceable to Defendants' conduct and that can redressed by a favorable decision. Nnebe v. Daus, 644 F. 3d 147, 156 (2d Cir. 2011).

Plaintiffs argue that the expenditure of litigation expenses that causes a "perceptible impairment" to their other priorities can constitute an injury in fact sufficient to show standing. See Nnebe, 644 F.3d at 157–58. But 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. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Nnebe, 644 F.3d at 157–58; Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 905 (2d Cir. 1993); New York v. U.S. Army Corp. of Eng'rs, 896 F. Supp. 2d 180, 191 (E.D.N.Y. 2012). "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. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 (1976).

Here, the injury that the organization Plaintiffs allege to their members is—like the injury alleged by the individual Plaintiffs, and for the same reasons—merely "speculative." Lujan, 504 U.S. at 565 n.2. 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 based on their fears of hypothetical future harm that is not certainly impending." See Clapper, 133 S. Ct. at 1151.

IV. CONCLUSION

Plaintiffs have failed to allege a "concrete, particularized, and actual or imminent" injury that would be "redressable by a favorable ruling." Horne, 557 U.S. at 445. Therefore, no Plaintiff has standing to challenge the prohibition on possessing switchblade knives. As such, the Court need not address whether the Penal Law's definition of "switchblade knife" is unconstitutionally vague.[3]

For the reasons set forth above, defendants' motions are GRANTED and the case is DISMISSED. The Clerk of Court is directed to close the motions at ECF Nos. 62 and 65 and to terminate this case.

SO ORDERED.

Dated: New York, New York
September 24, 2013

K. B. Forrest

KATHERINE B. FORREST
United States District Judge

[3] While the Court does not reach the issue, the Court notes that several courts have already held that the definitions of knives are not vague. See, e.g., People v. Herbin, 927 N.Y.S.2d 54, 56 (App. Div. 2011) ("[T]he statutory prohibition of possession of a gravity knife is not unconstitutionally vague. . . . [The statute's] 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.") (citations omitted); People v. Kong Wang, No. 570304/05, 851 N.Y.S.2d 72, at *1 (App. Term Oct. 31. 2007) (per curiam) ("[T]he Penal Law provisions defining 'gravity knife' are not impermissibly vague as applied to defendant.") (citations omitted).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

KNIFE RIGHTS, INC., et al.,

Plaintiff,

-against-

CYRUS VANCE, JR., et al.,

Defendants.

----------X

11 **CIVIL** 3918 (KBF)

JUDGMENT

Defendants having each moved to dismiss Plaintiffs' claims for lack of standing and failure to state a claim, and the matter having come before the Honorable Katherine B. Forrest, United States District Judge, and the Court, on September 24, 2013, having rendered its Memorandum Decision and Order granting defendants' motions and dismissing the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Decision and Order dated September 24, 2013, defendants' motions are granted and the case is dismissed; accordingly, the case is closed.

Dated: New York, New York
September 25, 2013

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIFE RIGHTS, INC., et al.,

Plaintiffs,

-v-

CYRUS VANCE, JR., et al.,

Defendants.

11 Civ. 3918 (KBF)

MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Before the Court is plaintiffs Knife Rights, Inc., John Copeland, Pedro Perez, Knife Rights Foundation, Inc. and Native Leather, Ltd.'s motion for reconsideration of the Court's September 25, 2013 Memorandum Decision & Order ("Decision," ECF No. 80) pursuant to Local Rule 6.3. (ECF No. 82.) In that Decision, the Court dismissed plaintiffs' complaint because they had no standing to challenge defendants' prohibition on the possession of switchblade and gravity knives. (See Decision 1, 11.) For the following reasons, plaintiff's motion for reconsideration is DENIED.

On June 9, 2011, over two years ago, plaintiffs filed their initial complaint. (ECF No. 1.) On December 16, 2011, defendants filed a motion for judgment on the pleadings, in which they argued, inter alia, that plaintiffs lacked standing to challenge the laws at issue here. (ECF No. 33 at 8–11.) After several months of motion practice, lasting from May 23 to September 24, 2012, plaintiffs filed an

amended complaint. (See ECF Nos. 47–61.) That amended complaint failed to cure plaintiffs' lack of standing, which this Court found fatal to their claims. As the Court noted in its Decision, no plaintiff in this case alleged a "concrete, particularized, and actual or imminent" injury that would be "redressable by a favorable ruling." (Decision 11 (citing Horne v. Flores, 557 U.S. 433, 445 (2009)).) Accordingly, the Court dismissed plaintiffs' complaint. (Id.)

Plaintiffs filed the instant motion for reconsideration on October 7, 2013. (ECF No. 82.) In order to fully consider the motion, the Court directed plaintiffs to submit a proposed amended complaint (ECF No. 85), which they did on October 28. (Proposed Am. Compl., ECF No. 88.)

"Reconsideration of a court's previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." Global View Ltd. Venture Capital v. Great Cent. Basin Exploration, L.L.C., 288 F. Supp. 2d 482, 483 (S.D.N.Y. 2003) (citations and internal quotation marks omitted). "The standard of granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995) (citations omitted). Furthermore, "a motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." Id. This stringent standard is designed "to ensure finality and to prevent the practice of a losing party examining

a decision and then plugging the gaps of the lost motion with additional matters." Range Road Music, Inc. v. Music Sales Corp., 90 F. Supp. 2d 390, 392 (S.D.N.Y. 2000) (citations and internal quotation marks omitted).

Here, plaintiffs have failed to satisfy the demanding standard governing a grant of reconsideration. Plaintiffs do not "point to controlling decisions or data that the [Court] overlooked." Shrader, 70 F.3d at 257. Rather, their sole argument is that the Court denied their request to amend their already-amended complaint. (See Mem. of L. in Supp. of Pls.' Mot. for Reconsideration ("Pls.' Mot.") 1, ECF No. 83.) Furthermore, plaintiffs explicitly move to amend their complaint in order to address the standing deficiencies that the Court described in its Decision. (Reply in Supp. of Pls.' Mot. for Reconsideration ("Pls.' Reply") 3–5, ECF No. 87.) Their motion thus evinces an intent 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. See Range Road Music, 90 F. Supp. at 392; see also Virgin Atl. Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) ("The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.") (citation and internal quotation marks omitted).

Even if plaintiffs' motion to amend the complaint were an appropriate basis on which to move to reconsider the Decision, the Court must nonetheless deny plaintiffs' motion. As the Court noted on October 29 and 30, 2013, discovery in this case has long been closed. (See ECF Nos. 89, 91.) Accordingly, the Court instructed

the parties to indicate whether plaintiffs' proposed second amended complaint contained new factual material as to whether additional discovery would be required (ECF No. 89), which the parties did on November 8, 2013. (ECF Nos. 92, 93.) Plaintiff also filed a motion for leave to respond to defendants' statement ("Pls.' Mot. to Resp.", ECF No. 94), which the Court has reviewed and denies as moot, as set forth below.

The Court may deny leave to amend a complaint pursuant to Rule 15(a) where amendment would cause delay combined with prejudice to the nonmoving party. See, e.g., Magnuson v. Newman, No. 10 Civ. 6211 (JMF), 2013 WL 5942338, at *2 (S.D.N.Y. Nov. 6, 2013). Furthermore, "[c]ourts have typically found amendments to be prejudicial in circumstances where discovery has been completed." Id. (citation and internal quotation marks omitted); see also Krumme v. WestPoint Stevens Inc., 143 F.3d 71, 87 (2d Cir. 1998) (denying leave to amend where "the proposed amendments [were] based on facts [previously] known to Defendant"). Finally, permitting a proposed amendment is "especially prejudicial" in a situation in which discovery has already been completed and one party has already filed a motion for summary judgment. Ansam Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 424, 446 (2d Cir. 1985).

The parties here dispute exactly the extent to which the proposed second amended complaint alters the underlying legal theories and the need for further discovery. (See ECF Nos. 92–94.) No matter: plaintiffs' second amended complaint alters the case sufficiently to cause prejudice to defendants.

According to plaintiffs, the proposed complaint "does not contain any new factual materials as to which no discovery was taken," because it "narrows" rather than shifts their claims: plaintiffs now omit allegations regarding the prohibition on "switchblade" knives and instead focus on the "gravity" knife ban that defendants actually enforced against plaintiffs. (Pls.' Statement Regarding Further Needed Discovery 1, ECF No. 92.) In their submissions, plaintiffs argue that the proposed second amended complaint merely provides additional details to bolster their claims, and that discovery has already been taken as to each of the broad topics on which they have provided additional detail. (Id. at 1–2.)

However, plaintiffs do not dispute defendants' argument that at least some new discovery would be required to address certain allegations in the second amended complaint. For example, while the amended complaint alluded generally to plaintiff Copeland and Perez's inability to carry their desired knives, the proposed second amended complaint makes new allegations describing plaintiffs' need for a specific type of knife. (Compare, e.g., Am. Compl. ¶¶ 12, 28, 36, ECF No. 61, with Proposed Am. Compl. ¶¶ 56, 61.) Accordingly, defendants would need to serve additional interrogatories and requests to admit upon the plaintiffs as well as to depose Copeland and Perez, who have not yet been deposed in this matter. (Defs.' Letter 2, ECF No. 93.) Plaintiffs' motion to respond to defendants' statement does not dispute that proposition. (See generally Pls.' Mot to Resp.)

Furthermore, the changes to plaintiffs' claims, even where they do not make entirely new allegations, are nonetheless dramatic enough to cause prejudice to

defendants. For example, the proposed second amended complaint alters its focus from the improper enforcement of New York Penal Law § 265.01 against "common folding knives" to the enforcement of the law against "locking-blade folding knives." (Compare, e.g., Am. Compl. ¶¶ 3–6, 23, 32, 39, with Proposed Am. Compl. ¶¶ 4, 5, 23, 57, 62, 83.) Plaintiffs argue that this change merely narrows their claim such that the case no longer concerns switchblades, and that discovery has already occurred with respect to the "basic issue" in both complaints: whether the Penal Law is void for vagueness. (Pls.' Mot to Resp. 2.) Plaintiffs miss the point. "While 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 Complaint." (Defs.' Letter 2 (emphasis added).) That is sufficient to show prejudice. See, e.g., iMedicor, Inc. v. Access Pharms., Inc., 290 F.R.D. 50, 53 (S.D.N.Y. 2013) (denying a motion to amend because the defendant there "would have pursued different and additional discovery if it knew that plaintiff's proposed additional claims were part of the complaint").

The Court need conduct no further analysis here. Discovery has long been closed. See Magnuson, 2013 WL 5942338, at *2. Not only have defendants filed a summary judgment motion, but the Court has also granted it. See Ansam Assocs., 760 F.2d at 446. By inserting allegations specific to standing—the basis on which the Court previously granted summary judgment against plaintiffs—plaintiffs here have sought to "plug[] the gaps of [their] lost motion." Range Road Music, 90 F.

Supp. 2d at 392. Granting a leave to amend is inappropriate under these circumstances.

For these reasons, plaintiffs' motion for reconsideration (ECF No 82) is DENIED. Because plaintiffs' motion for leave to respond to defendants' statement (ECF No. 94) would not alter that result, that motion is DENIED as moot.

The Clerk of Court is directed to close the motions at ECF Nos. 82 and 94.

SO ORDERED.

Dated: New York, New York
November 20, 2013

KATHERINE B. FORREST
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIFE RIGHTS, INC.; JOHN COPELAND; PEDRO PEREZ; KNIFE RIGHTS FOUNDATION, INC.; and NATIVE LEATHER, LTD., Plaintiffs, -against- CYRUS VANCE, JR., in his Official Capacity as the New York County District Attorney; and CITY OF NEW YORK, Defendants.	No. 11 Civ. 3918 (KBF) (RLE) ECF Case **NOTICE OF APPEAL**

Notice is hereby given that Plaintiffs KNIFE RIGHTS, INC., JOHN COPELAND, PEDRO PEREZ, KNIFE RIGHTS FOUNDATION, INC., and NATIVE LEATHER, LTD. hereby appeal to the United States Court of Appeals for the Second Circuit from the Decision and Order granting Defendants' motions to dismiss, entered in this action on September 25, 2013 (Doc. No. 80), and from the Opinion and Order denying Plaintiffs' motion for reconsideration for leave to amend, entered in this action on November 20, 2013 (Doc. No. 95).

Dated: New York, New York
December 18, 2013

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