No. 18-918

IN THE

Supreme Court of the United States

JOHN COPELAND, PEDRO PEREZ, AND NATIVE LEATHER LTD.,

Petitioners,

v.

CYRUS VANCE, JR. IN HIS OFFICIAL CAPACITY AS THE NEW YORK COUNTY DISTRICT ATTORNEY, AND CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CITY OF NEW YORK IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

A New York statute prohibits as a "gravity knife" any folding knife that can be opened and locked in place using centrifugal force or gravity. Petitioners, two individuals and a retailer that were arrested and prosecuted for violating this statute, assert that the statute is void for vagueness because the "wrist-flick test" used by law enforcement to identify such knives produces inconsistent results.

The question presented is as follows:

Do *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), permit petitioners to establish the facial invalidity of the statute notwithstanding the district court's undisturbed factual findings, after a bench trial, that the wrist-flick test produced consistent results as applied to petitioners' own knives, and produces consistent results as applied to other knives?

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INTRODUCTION

Petitioners ask the Court to decide an abstract question of law that has not been meaningfully addressed by the lower courts, was not properly presented below, and would not affect the outcome of the case. The Court should deny the petition.

New York prohibits possession of any folding knife that can be opened and locked in place "by the force of gravity or the application of centrifugal force." N.Y. Penal Law § 265.00(5); *id.* § 265.01(1). By longstanding judicial interpretation and law-enforcement practice, this gravity-knife statute prohibits possession of knives that can be opened and locked with a flick of the wrist. The Police Department of the City of New York (NYPD) and the New York County District Attorney's Office (DA) use the so-called wrist-flick test to identify unlawful gravity knives.

The individual petitioners were arrested and prosecuted for possessing knives that opened in this way on the first try by police officers of ordinary skill and strength. The commercial petitioner was cited for stocking knives that readily opened with a flick of the wrist. Petitioners sued the City of New York and New York County District Attorney Cyrus Vance, Jr., alleging that the statute is void for vagueness as to a broad class of commercially available folding knives. They argued primarily that the wrist-flick test fails to

provide constitutionally adequate notice by allegedly producing indeterminate results.

After a bench trial, the district court rejected petitioners' challenge. The court of appeals affirmed, construing the challenge as facial and holding that petitioners had failed to demonstrate, under the standard in *United States v. Salerno*, 481 U.S. 739 (1987), that there is no set of circumstances in which the gravity-knife statute can be validly applied to the class of folding knives at issue.

The court of appeals' judgment does not warrant further review in this Court. Petitioners purport to identify a conflict among the circuits as to whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), displaces the *Salerno* standard for all facial vagueness challenges or, instead, just for challenges to statutes sharing particular key features with the statute struck down in *Johnson*. No court of appeals, however, has yet considered in depth the application of *Johnson* to more typical criminal statutes. And petitioners identify no case where the outcome has turned on how broadly to apply the *Johnson* test. Any difference in the views expressed in passing by the courts of appeals on that question does not require the Court's intervention now. Rather, the issue should be allowed to develop further.

This case would not be the right one for the Court to address this issue in any event.

Petitioners waived any challenge to the application of the *Salerno* standard by affirmatively invoking that standard throughout the litigation, until after oral argument in the court of appeals. Nor does the case squarely present the issue proposed by petitioners, where the district court's factual findings would preclude facially invalidation under either the *Johnson* or *Salerno* standard.

The arguments of petitioners' amici also do not justify granting review. None of the various tangential and extra-record issues that they raise is fairly encompassed within the question presented, and in any event none would support a facial challenge to the statute.

STATEMENT

A. The gravity-knife statute

Since 1958, the State of New York has prohibited the possession of a "gravity knife," which 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." N.Y. Penal Law § 265.00(5); *see id.* § 265.01(1). The definition of a gravity knife under the statute is a functional one—a knife must open by means of gravity or centrifugal force and lock in place. To determine whether a particular knife meets that statutory definition, New York City police officers

employ the "wrist-flick test" (Appendix (A) 5). This test relies on the force of a one-handed flick of the wrist to determine whether a knife will open from a closed position and lock (A5, 55, 76).

Police officers are trained in the wrist-flick test, which has been used by the NYPD to identify gravity knives since the statute's effective date (A55). Arrests and prosecutions for possession of a gravity knife occur only when a knife has opened in response to the wrist-flick test (A6). Conviction under the statute requires knowledge of possession of a knife, but not knowledge that the knife meets the statutory definition of a gravity knife. *People v. Parrilla*, 27 N.Y.3d 400, 404 (2016).

The statute's late-1950's enactment came in response to evidence that the existing ban on switchblades was ineffective (Second Circuit Joint Appendix (JA) 330, 863, 881). Legislators realized that there were knives that could be concealed and deployed almost as readily as switchblades, but that were not covered by the switchblade statute because they were not spring-loaded (JA330). The NYPD recommended criminalizing gravity knives, which it argued were "as much a hazard to the safety of the general public as the switchblade knife," and which, following the enactment of the switchblade statute, had been "used increasingly as weapons in the perpetration of such crimes as homicides, assault, rape, and robbery" (JA875).

At the time of enactment, lawmakers understood that the gravity-knife statute was intended to cover knives that opened and locked with the flick of the wrist. In fact, during a 1957 meeting of the Committee to Ban Teen-age Weapons, which proposed the gravity-knife ban, the committee chairman opened a knife with a flick of his wrist (instead of using gravity) in order to demonstrate the dangerous nature of the weapon (JA330).

New York City law enforcement continues to view the gravity-knife statute as an important public safety tool because a substantial number of homicides, non-fatal stabbings, sexual assaults, robberies, burglaries and other violent crimes are committed using knives (JA102, 853). For example, in 2009, approximately 30 percent of all homicides in Manhattan involved knives (JA102).

B. The petitioners' lawsuit

Petitioners were each charged in 2010 with a misdemeanor violation of the statute for possessing folding knives that, when subjected to the wrist-flick test, functioned as gravity knives (A6–7; JA 748–49, 897, 903). Petitioners John Copeland and Pedro Perez were approached by police in public after the officers observed a knife clipped to their pockets. The officers who arrested Copeland and Perez caused their knives to open and lock on the first attempt of the wrist-flick test (A6–7). Both petitioners accepted an adjournment in

contemplation of dismissal (*i.e.*, a six-month adjournment of the case ultimately leading to dismissal if the defendant successfully complies with the terms of the agreement), and Perez agreed to perform seven days of community service (JA44, 46).

Native Leather, Ltd., a retail store, was charged after DA investigators discovered that some of the folding knives available for purchase at the store opened with a flick of the wrist (A7). Caroline Walsh, the owner of Native Leather, signed a deferred prosecution agreement with the DA (*id.*).

In 2012, Petitioners filed suit against District Attorney Vance and the City claiming that New York's ban on gravity knives is void for vagueness under the Due Process Clause of the Fourteenth Amendment as applied to what petitioners called "common folding knives"—a category of knives that is not recognized in New York case law or the statute (A7–8). According to petitioners, the New York Legislature intended the gravity-knife statute to apply only to what petitioners called "true" gravity knives, which can be opened by the force of gravity alone as well as by a flick of the wrist (A8, 51–52). Petitioners claimed that the statute had historically not been applied to common folding knives that are designed to resist opening from their folded and closed position (A51–52, 76). Petitioners chiefly argued that the gravity-knife statute cannot lawfully be applied to common folding knives because the wrist-flick test is so

indeterminate that ordinary people cannot reliably distinguish lawful from prohibited knives (JA36–38).

C. The bench trial and the district court's ruling

Following a bench trial, the district court issued findings of fact and conclusions of law rejecting petitioners' vagueness claim, and entered judgment for the defendants. The court evaluated petitioners' challenge as both facial and as-applied, and held that it failed under either framing.

The district court concluded that petitioners had adequate notice that their own knives were unlawful (A72). The court rejected their contention that the DA and NYPD had adopted the wrist-flick test only shortly before their arrests. The court explained that a long line of New York cases endorsed the use of the wrist-flick test to identify knives that open through the application of centrifugal force (*id.*). Accordingly, "[b]oth the statutory text and these judicial decisions provided plaintiffs with the requisite notice that their conduct was prohibited" (*id.*). Moreover, the court determined that there was no evidence that the petitioners had tried, close to the time of their arrests, to open their knives by application of the wrist-flick test. Nor was there evidence that the officers who arrested Copeland and Perez, as well as the investigators who tested the Native Leather

knives, possessed any special strength, skill, or dexterity (A74).

The district court further found that petitioners had failed to establish a basis for prospective relief. To show that they faced the possibility of violating the statute again in the future, petitioners posited various hypothetical scenarios in which the outcome of the wrist-flick test might vary from person to person (A72–73). These hypotheticals were unavailing because none of the petitioners had demonstrated that the hypotheticals were likely to occur to them or anyone else in the future (A56, 78). Indeed, the court found that the evidence in the record established that the wrist-flick test was applied consistently and that there was "no evidence" that the manner of conducting the test differed from officer to officer, or that application of the test by two different officers had yielded different outcomes (A55–56). The court concluded that "the evidence supports a known, consistent functional test for determining whether a knife fits the definition of a 'gravity knife' and does not support inconsistent outcomes under that test" (A56–57).

Given the broad nature of the relief requested, the district court also considered whether petitioners had mounted a valid facial challenge (A69–70). The court concluded that because the gravity-knife statute "was, and will continue to be, constitutionally applied to plaintiffs," it was not unconstitutional in all of its applications, and

therefore not facially invalid under the test of *United States v. Salerno*, 481 U.S. 739 (1987) (A70). The court also considered petitioners' facial challenge under a different standard—articulated by the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (plurality op.)—and rejected petitioners' facial challenge because the statute was not "permeated with vagueness" (A70 n.24 (quotation marks omitted)).

D. The court of appeals' affirmance

The court of appeals affirmed the district court's judgment in a unanimous decision (A3–4). Turning first to the issue of whether petitioners challenge should be understood as facial or as-applied, the court determined that the nature of the relief that petitioners were seeking and their method of proof showed that their challenge was facial in nature (A14–17).

The court explained that a proper prospective as-applied challenge seeks to prove that a statute cannot constitutionally be applied to a specific course of conduct that the challenger intends to follow (A14–15). Petitioners, however, sought "not a declaration that the statute cannot be applied to certain knives they wish to personally carry, but a declaration that the statute cannot constitutionally be applied to *anyone* carrying *any* knife in the very large 'common folding knife' category" (A15). The court held that the evidence in the record showed, contrary to petitioners assertions, that for decades

respondents had enforced the gravity-knife statute against what petitioners called "common folding knives"; thus, as petitioners were forced to conceded at oral argument, their challenge, if successful, would "disable the entire statute" (A15–16). Moreover, petitioners did not "tailor the proof to the specific conduct that [they] would pursue but for fear of future enforcement" (A16), but instead offered hypotheticals—a type of proof that is inappropriate for an as-applied challenge (A16–17).

The court of appeals also rejected plaintiffs' contention that they need not show the unconstitutionality of the statute's application to them when they were arrested and charged in 2010. The court explained that when an enactment had been previously applied to a party challenging the statute on its face, a court must first evaluate the claim as applied to the challenger's own conduct (A17–18). Thus, petitioners could not prevail on a facial challenge without showing that the statute failed to provide them with constitutionally adequate notice that the conduct leading to their 2010 arrests was unlawful (*id.*).

Of particular relevance here, the court of appeals noted that petitioners had "conceded" in the district court that the *Salerno* rule applied to "an ordinary facial vagueness claim" (A17). Although the petitioners attempted to walk back this concession in a letter submitted after oral argument, the court of appeals was not persuaded. Relying on *Dimaya*, which had recently been

decided, petitioners asserted that a statute "must be clear in *all* its applications" to survive a vagueness challenge. 2d Cir. ECF No. 123 at 1. The court rejected this reasoning, explaining that it "gets the rule backward" because, "[u]nder a long line of decisions that *Dimaya* did not disturb, a statute will generally survive a facial challenge so long as it is not *invalid* in all its applications" (A18 n.3).

Nevertheless, the court of appeals noted that the *Salerno* rule no longer had universal application as a result of this Court's *Johnson* and *Dimaya* rulings (A11 n.2). The court explained that in "exceptional circumstances" where a criminal statute "require[s] courts to imagine an ordinary version of a crime and assess whether such idealized conduct implied some degree of risk," the statute "may be struck down as facially vague even where it has some valid applications" (*id.*). Because these "exceptional circumstances" were not present in this case, the court of appeals concluded that petitioners could "prevail on their vagueness claim only if they show that the statute was vague as applied to them in the 2010 enforcement actions" (A18).

On the merits, the court of appeals held that petitioners had failed to mount a successful facial challenge because the enforcement action against at least one of the plaintiffs, Native Leather, was constitutional. Based on the record, the court of appeals concluded that Native Leather had not

shown that it lacked sufficient notice or the opportunity to understand that it sold illegal gravity knives (A28). Indeed, the court of appeals found that "Native Leather offered no evidence that *any* of its seized knives responded inconsistently to the wrist-flick test, much less that *all* of them did" (*id.*).

Even looking beyond the facts of Native Leather's own case, the court of appeals concluded, petitioners failed to show that the gravity-knife statute could not be validly applied in a substantial number of cases. The court noted that petitioners "acknowledge, for example, that some common folding knives may have a 'very light bias toward closure,' with a blade that fits only 'loose[ly]' in the handle" (A34). Such knives would readily open on any application of the wrist-flick test. Yet petitioners made "no effort to explain why an ordinary person would lack notice that such a knife was proscribed by the gravity knife law" (*id.*).

REASONS FOR DENYING THE PETITION

Certiorari should be denied for three main reasons. First, the supposed circuit split identified by petitioners is not yet ready for review. No court of appeals has engaged in depth with the question of whether *Johnson* abrogated the *Salerno* rule for all void-for-vagueness challenges, or just for challenges to statutes similar in kind to the ones considered in *Johnson* and *Dimaya*. Nor have there

yet been any cases where this question was critical to the outcome. Second, this case is a poor vehicle for addressing the question presented because petitioners failed to preserve the question, and they also failed to create a factual record that would allow them to succeed even under the standard for which they now advocate. Third, the concerns voiced by the petitioners' amici are far afield from the question presented and provide no ground for granting the petition.

A. The superficial conflict between the circuits does not require this Court's intervention.

Petitioners argue that there is a "deep and intolerable" conflict between the Second Circuit's briefly stated view of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and the view of Fourth and Eighth Circuits that those decisions state a new standard for facial vagueness challenges generally (Pet. 34). But this supposed circuit split amounts to a few disparate statements that have yet to produce divergent outcomes as to similar statutes. This supposed split does not warrant this Court's intervention.

The statutes at issue in *Johnson* and *Dimaya* were plagued by "hopeless indeterminacy." *Johnson*, 135 S. Ct. at 2558. The statute in *Johnson*, the residual clause of the Armed Career Criminal Act of 1984 (ACCA), required a court

evaluating whether to impose a sentencing enhancement for a prior offense to "imagine" an "idealized ordinary case of the [defendant's] crime." *Id.* at 2557–58. Application of the clause involved two levels of indeterminacy—"about how to measure the risk posed by a crime" and "about how much risk it takes for the crime to qualify as a violent felony." *Id.* at 2558. After four previous cases in which it struggled to apply this analysis, the Court concluded in *Johnson* that "[t]he indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557.

In reaching this conclusion, the Court reasoned that the possibility of a valid application of the law was insufficient to redeem the residual clause. *Id.* at 2561. The Court explained that "our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* Three years later, in *Dimaya*, the Court considered a very similar residual clause, this time found in the Immigration and Nationality Act, and in a "straightforward application" of *Johnson* held that this residual clause was also unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1213.

The federal courts of appeals have applied the *Johnson* standard in challenges to statutes that, like the ACCA residual clause, require

consideration of idealized versions of crimes. *See, e.g.*, *United States v. Simms,* 914 F.3d 229, 232 (4th Cir. 2019). Several courts of appeals, including the court below, have suggested that *Johnson* applies only to such statutes. Several other courts of appeals have expressed the view that *Johnson* displaces the general rule—articulated in *United States v. Salerno*, 481 U.S. 739 (1987), and other decisions—that a statute is facially invalid only if it has no valid applications. These different views have not produced divergent results. With the exception of criminal statutes that require consideration of idealized version of offenses, we are not aware of a single court of appeals decision that has struck down a law on the basis of *Johnson* that would have been upheld under prior law.[1]

Some courts, including the Fourth and Eighth Circuits, have assumed, without in-depth discussion, that *Johnson* and *Dimaya* broadly repudiated the *Salerno* rule. These courts have stated that, no matter the nature of the statute, challengers are no longer required to show that a law is invalid in all of its applications to establish the law's facial invalidity. *See Kolbe v. Hogan*, 849

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[1] In a decision not cited by petitioners, the Fourth Circuit has characterized *Johnson* as an application of the existing rule that a statute is invalid if it "specif[ies] 'no standard of conduct'" and lacks a "'comprehensible normative standard.'" *Doe v. Cooper*, 842 F.3d 833, 842 (4th Cir. 2016) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

F.3d 114, 148 n.19 (4th Cir. 2017); *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016). Nonetheless, in those cases the courts upheld the statutes in question against facial vagueness challenges.

In a footnote in the decision below, the Second Circuit took a different view of *Johnson* and *Dimaya*. The court stated that the decisions endorse a special standard of facial invalidity applicable in the "exceptional circumstances" presented by statutes like the ones at issue in those cases (A11 n.2). Outside of those circumstances, the court stated, the decisions did not displace the *Salerno* rule.[2]

The D.C. Circuit has, like the Second Circuit, read *Johnson* and *Dimaya* more narrowly, applying the *Salerno* rule—again, with minimal discussion—

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[2] Petitioners fault the Second Circuit for failing to address *Johnson* in *New York State Rifle and Pistol Association v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), a case that they mistakenly suggest was decided in 2018 (Pet. 33). However, there is no indication that the parties in that case argued that the court should apply *Johnson*—which was decided after oral argument in the case—to the vagueness challenge there. And in *Expressions Hair Design v. Schneiderman*, the Second Circuit acknowledged that *Johnson* weakened the universal application of the *Salerno* rule, but, given the clear validity of the statute in question, did not have occasion to decide the full implications of *Johnson*. *See* 808 F.3d 118, 143 n.17 (2d Cir. 2015), *reversed on other grounds*, 137 S. Ct. 1144 (2017).

to a more garden-variety criminal statute. *See Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) (regulation authorizing revocation of instructor certification based on the "best interests" of the Navy Junior ROTC program). In a citation parenthetical, the court distinguished *Johnson* as involving a statute that called for consideration of "an idealized ordinary case of the crime" rather than "real-world facts or statutory elements." *Id*.

This distinction finds support in *Johnson* itself, which recognized the difference between the kind of hopelessly indeterminate statute at issue there and a vagueness challenge involving the application of a statute to real-world conduct. *Johnson,* 135 S. Ct at 2561; *see also Johnson*, 135 S. Ct. at 2580 n.2 (Alito, J., dissenting) (positing "that the Court does not mean to abrogate the no-set-of-circumstances rule in its entirety"). But the merit of this reading has not yet been fully addressed in the lower courts. In the four years since *Johnson* was handed down, no court of appeals has examined its impact on the *Salerno* rule in any depth, and a number of circuits have found no occasion to address the issue. No court of appeals has grappled with another circuit's reading of the case. And no court of appeals has found that the choice of a broad or narrow reading of *Johnson* affected the outcome of a vagueness challenge to a more typical criminal statute.

The Court has long noted that "[i]t may be desirable to have different aspects of an issue

further illuminated by the lower courts. Wise adjudication has its own time for ripening." *Md. v. Baltimore Radio* Show, 338 U.S. 912, 918 (1950); *see also United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting the Court's beneficial practice of "permitting several courts of appeals to explore" an issue and "waiting for a conflict to develop" before granting review). This case is a prototypical instance where it would be beneficial to allow the question presented to further percolate before this Court wades in.

B. This case would be a poor vehicle for resolving the question presented because it is unpreserved and academic here.

Even if this apparent split were worthy of review now, this case would be a poor vehicle for examining the issue. Petitioners waived their challenge by invoking the *Salerno* standard in the district court and up through and including oral argument in the court of appeals. In any event, this case does not properly present the issue because petitioners' vagueness challenge would fail under either view of the law, given the district court's undisturbed factual findings.

1. Petitioners failure to preserve their challenge below presents a barrier to this Court's review. *See Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (question presented in the petition but "not raised in the Court of Appeals is not properly before us"). As the court of appeals recognized,

petitioners conceded in the district court that *Salerno* supplied the appropriate standard to evaluate their claims (A17). The district court then used the *Salerno* rule to conclude that their facial challenge could not succeed (A70), and on appeal, petitioners did not dispute that aspect of the district court's legal analysis or otherwise invoke *Johnson* in their briefing (2d Cir. ECF Nos. 28, 91).

Petitioners first raised *Johnson* and *Dimaya* only after oral argument. And when they did, in a post-hearing letter, they misstated the rule of *Dimaya*, arguing that a statute "must be clear in *all* its applications" to survive a vagueness challenge (2d Cir. ECF No. 123 at 1). Petitioners' delays and misstatements ensured that the Second Circuit did not get a proper opportunity to consider the question presented in the petition.

2. This case also does not properly present the issue proposed by petitioners because the gravity-knife statute was constitutionally enforced against petitioners' own conduct. There is general agreement among the circuits that *Johnson* and *Dimaya* left undisturbed "the general rule that a defendant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge." *United States v. Cook*, 914 F.3d 545, 554 (7th Cir. 2019); *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) ("'[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of

others.'" (quoting *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494–95 (1982))). After *Johnson* and *Dimaya*, the courts of appeals thus have continued to reject facial vagueness challenges when the statute at issue was constitutionally applied to the challenger. *See, e.g.*, *United States v. Westbrooks*, 858 F.3d 317, 325 (5th Cir. 2017) (collecting cases and applying this principle), *judgment vacated on other grounds*, 138 S. Ct. 1323 (2018); *United States v. Hosford*, 843 F.3d 161, 170 (4th Cir. 2016) ("[I]f a law clearly prohibits a defendant's conduct, the defendant cannot challenge, and a court cannot examine, whether the law may be vague for other hypothetical defendants."); *United States v. Lechner*, 806 F.3d 869, 875 (6th Cir. 2015) ("[A] void-for-vagueness challenge requires the defendant to prove the statute was misleading as applied to his particular case." (quotation marks omitted)); *but see Henry v. Spearman*, 899 F.3d 703, 709 (9th Cir. 2018) (suggesting that *Holder* and *Hoffman Estates* "may not reflect the current state of the law" on this point).

The outcome in the Eighth Circuit's decision in *Bramer*, one of the two cases highlighted by petitioners, turned on this principle. The defendant there raised a facial vagueness challenge to a federal statute that prohibited an "unlawful user" of a controlled substance from possessing a firearm. The Eighth Circuit found that *Johnson* relieved the defendant of having to prove that the statute was "vague in all of its applications," but still found that

the defendant was required "to show that the statute is vague as applied to his particular conduct." *Bramer*, 832 F.3d at 909–10. Applying this standard, the Eighth Circuit rejected the vagueness challenge because the defendant had admitted in a plea agreement to being an unlawful user of marijuana while in possession of multiple firearms. The Eighth Circuit held that there was "no basis in the record to conclude that the term 'unlawful user' of a controlled substance was unconstitutionally vague as applied to him." *Id.* at 910.

As the court of appeals correctly concluded below, this principle precludes petitioners from prevailing on their facial challenge (A27–28). The district court found that "[e]ach of plaintiff Copeland and Perez's knives opened on the first Wrist-Flick test applied. The knives confiscated from plaintiff Native Leather also opened by application of the Wrist-Flick test" (A72). Moreover, the district court found that because "it is clear from the statutory text that the Wrist-Flick test involves the use of centrifugal force," both this text and numerous judicial decisions interpreting it "provided plaintiffs with the requisite notice that their conduct was prohibited" (*id.*).

3. Even if a court could ignore how the gravity-knife statute was applied to petitioners' own conduct, petitioners' facial challenge would be doomed to fail even under the *Johnson* standard for two additional reasons.

First, petitioners' hypotheticals are unsupported by the record. Petitioners' central claim has always been that the wrist-flick test is inherently variable and produces inconsistent results based on the strength, dexterity, and skill of the police officer administering it (A41). When given the opportunity at trial to establish this fact, however, petitioners failed to do so (A55–56).

In its post-trial decision, the district court explained that the record did not suggest that "the manner of conducting the Wrist-Flick test is, in fact, different from officer to officer" and that there was "no evidence" before the court that "two different police officers—each applying the Wrist-Flick test to a knife (either plaintiffs' or any other person's) on the same occasion—had different outcomes" (*id.*). The court further found petitioners' live knife demonstration unpersuasive, and declined to credit the testimony of the witness responsible for it (A47, 55–56). The court ultimately concluded that "while plaintiffs have described hypothetical scenarios that are possible, they did not introduce sufficient evidence for the Court to find that any of the scenarios are probable as to plaintiffs or anyone else" (A56).

The court of appeals did not disturb any of these factual findings, and similarly found that "defendants have consistently used the wrist-flick test to identify illegal folding knives" and "the record as to any variation in the outcome of the wrist-flick test is sparse" (A21, 28).

Second, petitioners have already conceded that there is an entire category of "common folding knives" that clearly fall within the gravity-knife statute's prohibition. The court of appeals noted that petitioners "acknowledge, for example, that some common folding knives may have a 'very light bias toward closure,' with a blade that fits only 'loose[ly]' in the handle" (A34). Such knives would readily open on any application of the wrist-flick test. Yet petitioners made "no effort to explain why an ordinary person would lack notice that such a knife was proscribed by the gravity knife law" (*id.*). Petitioners do not suggest that *Johnson* would permit facial invalidation of a statute that can constitutionally be applied in such a substantial number of cases.

C. The issues raised by amici are beyond the scope of the question presented.

Petitioners' amici champion the importance of this petition based on issues that are not part of, or fairly encompassed by, the question presented. In many cases, these issues were not part of the record below or were only tangentially considered by the court of appeals. If the Court were to grant the petition, the concerns raised by the amici would not be addressed in the Court's decision on the merits. Consequently, these submissions provide no basis to grant the petition.

1. Amici Constitutional Law Scholars urge the Court to clarify the distinction between an as-

applied and facial challenge (Constitutional Law Scholars Br. 12–16). This question is beyond the scope of the question presented. In fact, the question presented presumes that this Court *must* treat petitioners' challenge as facial. Otherwise there would be no occasion to decide whether *Johnson* abrogates the *Salerno* rule for all facial challenges.

In any event, this case is not the right one for articulating the differences between as-applied and facial challenges because the court of appeals, in a detailed analysis of this question, correctly determined that petitioners' claim was decidedly facial in nature. The court noted that the claim would, if successful, "disable the entire statute" and provide relief to parties not before the court (A15–16).[3] Such a challenge is facial under this Court's precedent. *See Doe v. Reed*, 561 U.S. 186, 194 (2010) ("The claim is 'facial' in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly…."); *City of Chi. v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality op.) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights,

[3] Although petitioners conceded that the gravity-knife statute can be validly applied to "true gravity knives," the record demonstrated that the statute was enforced far more commonly against "common folding knives" (A15). The DA and the City did not use petitioners' concession that the statute can validly be applied to "true gravity knives" to argue that their claim failed under *Salerno* (A18 n.4).

but those of others who may also be adversely impacted by the statute in question.").

The court of appeals also looked to the method of proof that petitioners submitted (A14–17). The court reasoned that a properly formulated prospective as-applied challenge would rely on proof of the specific conduct that the challenger would pursue but for fear of future enforcement. *See, e.g., Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149 n.1 (2017). Petitioners, in contrast, offered hypothetical scenarios in which the gravity-knife statute might fail to provide adequate notice. This form of argument is permitted in a facial challenge, but not an as-applied one. *See Vill. of Hoffman Estates*, 455 U.S. at 495 (explaining that, in a facial challenge, courts may examine hypothetical applications of the law after considering complainant's conduct).

2. Amicus Legal Aid Society contends that the wrist-flick test gives the DA and the NYPD "unfettered discretion" to target groups deemed to "merit their displeasure" (Legal Aid Br. 12). This argument, too, is not properly presented by this case. Indeed, the court of appeals noted that the petitioners did not argue that the gravity-knife statute invites arbitrary enforcement (A31). The petition makes no reference to such potential concerns.

Amicus's contentions are also wrong. The court of appeals held that "[t]he gravity knife law … does

not authorize or even encourage arbitrary and discriminatory enforcement" (A33 (quotation marks omitted)). Indeed, the cases that Legal Aid relies on involve quite different statutes, and thus highlight the weakness of their argument. In *Morales*, this Court invalidated a loitering law where the guilt of the offender hinged on an officer's "inherently subjective" determination of whether an individual was stationary with "no apparent purpose." *Morales*, 527 U.S. at 60–62. And in *Giaccio*, this Court held as void for vagueness an act that authorized juries to assess costs against acquitted defendants with a threat of imprisonment until the costs were paid. *Giaccio v. Pa.*, 382 U.S. 399, 402–05 (1966). The act contained "no standards" whatsoever to guide the jury's determination, nor did it place "any conditions of any kind" on the jury's power. *Id.* at 403.

In contrast, the gravity-knife statute does not require such subjective judgments by police officers or otherwise leave room for the exercise of discretion in determining which knives are prohibited. Rather, whether a knife is a gravity knife is an objective question—a knife either does or does not open by the flick of the wrist.

The anecdotes offered by Legal Aid regarding five of its clients who were arrested and convicted implicate a different provision of the state penal law, N.Y. Penal Law § 265.02(1), that makes it a felony for a person with a past criminal conviction to possess a gravity knife. At most, the anecdotes

raise questions about whether particular sentences imposed under that separate statute were unduly harsh. What those anecdotes do not show is that the wrist-flick test—applied by officers who lack control over sentencing—leads by its nature to arbitrary and discriminatory enforcement.

Legal Aid's contention that the DA and the NYPD enforce the statute against individuals they deem "undesirable" (Legal Aid Br. 14) has no basis in the record. The claim is also undermined by the DA's efforts to curb the sale of illegal knives at nationally recognized retail stores, an effort aimed at preventing all members of the public from possessing these knives (JA102–03). Moreover, there is no indication in amicus's anecdotes that the police officers or prosecutors applied the wrist-flick test in a way that would enable them to control its outcome or bring within the scope of the statute a knife that should have been deemed lawful. Indeed, none of the anecdotes include a claim that police officers required more than one attempt of the wrist-flick test to open the subject knives at the time of the underlying arrests, or that amicus's clients were unable to open the knives in the same manner that the officers did.

Legal Aid incorrectly asserts that if the court of appeals' rejection of petitioners' facial challenge is left to stand, none of their clients will have recourse to challenge the gravity-knife statute on vagueness grounds (Legal Aid Br. 1–2). However, the court of appeals specifically noted that its decision did not

preclude others from bringing as-applied challenges (A26). In fact, a plaintiff recently prevailed in the district court in just such an as-applied challenge—a ruling that is currently on appeal to the Second Circuit. *Cracco v. Vance,* No. 14 Civ. 8235 (PAC), 2019 U.S. Dist. LEXIS 52292, at *30 (S.D.N.Y. Mar. 27, 2019), *appeal noticed*, No. 19-1129 (2d Cir. Apr. 24, 2019).

3. Amici Criminal Law Professors and the Cato Institute argue that the gravity-knife statute's lack of a *mens rea* requirement regarding whether the knife possessed qualifies as a gravity knife, *see People v. Parrilla*, 27 N.Y.3d 400, 404 (2016) exacerbates the statute's purported vagueness (CLS/Cato Br. 6–10). Amici urge this Court to grant the petition "to clarify the constitutional outer limits of combining a vague law with the lack of a *mens rea* requirement" (*id.* 10).

This issue is wholly unrelated to the question presented by petitioners. The petition asks this Court to consider whether the *Salerno* rule is inapplicable to all facial vagueness challenges. The Court can answer this question without considering whether a criminal statute is void for vagueness because it lacks a *mens rea* requirement. Indeed, petitioners do not identify this question as one requiring this Court's review. As a result, this argument provides no additional grounds to grant the petition.

In any event, the argument lacks merit because the statute's omission of a *mens rea* requirement regarding whether the knife possessed qualifies as a gravity knife does not render the statute unconstitutionally vague. The court of appeals rejected a similar argument when amici made it below (A35–38). Regardless of the elements of the offense, the inquiry remains the same—whether the statute gives adequate notice to the public and provides sufficient guidance to those charged with enforcing it (A36). For the reasons stated above, the court of appeals correctly concluded that the gravity-knife statute is not unconstitutionally vague on its face.

Roaming further afield of the issues raised in the petition, amici appear to also argue that the statute's lack of a *mens rea* requirement violates the Due Process Clause independently of the vagueness claim (CLS/Cato Br. 7–10). This argument is similarly unavailing. As the court of appeals noted, this Court has "been at a pains not to constitutionalize *mens rea*" (A37). *See, e.g.*, *Smith v. California*, 361 U.S. 147, 150 (1959) ("[I]t is doubtless competent for the States to create strict criminal liabilities by defining criminal offenses without any element of *scienter* ...."); *United States v. Balint*, 258 U.S. 250, 252 (1922) ("[I]n the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide that he who shall do them shall do them at his peril and will not be heard to plead in

defense good faith or ignorance." (quotation marks omitted)).

The cases that amici relied on do not suggest otherwise (CLS/Cato Br. 8–9). They all deal with statutory construction—whether Congress intended to include a *mens rea* requirement in the statute—not whether Congress could have constitutionally omitted one. For example, in *Staples v. United States*, this Court concluded that Congress had intended to include a *mens rea* requirement in the otherwise silent National Firearms Act. 511 U.S. 600, 619 (1994). Notably, the *Staples* Court observed that Congress "remains free to amend [the statute] by explicitly eliminating a mens rea requirement." *Id.* at 615 n.11. This statement would make no sense if the Court had thought that the statute would be unconstitutionally vague, or would otherwise violate the Due Process Clause, in the absence of a *mens rea* requirement.

At best, amici's cases only suggest in dicta that a "legislature might be unable to create a strict liability ban on indisputably harmless and everyday items" (A37). *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564 (1971) (stating that a strict liability ban on "[p]encils, dental floss, [and] paper clips" "might raise substantial due process questions"). However, the court of appeals correctly noted below that "[a]ssuming *arguendo* that *International Minerals* accurately locates the constitutional line, the

gravity knife law falls comfortably on the safe side of it. A knife is not a paper clip" (A37).

The New York Legislature determined that gravity knives posed a significant risk to public safety despite their potential for innocent use. Its decision to dispense with a *mens rea* requirement was constitutionally permissible and consistent with the legislative purpose "to prophylactically intercept the possession and use of weapons" in the community. *People v. Saunders*, 85 N.Y.2d 339, 343 (1995); *see Balint*, 258 U.S. at 254 (explaining that Congress, in enacting the Anti-Narcotic Act, "weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided").

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In sum, no issue raised by petitioners or their amici warrants this Court's intervention. The question presented is underdeveloped in the lower courts and not yet ready for review. Even if it were ready for review, petitioners have failed to preserve the question and its application to this matter would be purely academic. Petitioners failed to make a record that would permit holding the gravity-knife statute invalid under any standard for a facial challenge that the court of appeals might have applied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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