

No. 18-918

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In The Supreme Court of the United States

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JOHN COPELAND, ET AL.,  
*Petitioners,*

v.

CYRUS VANCE, JR., ET AL.,  
*Respondents.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Second Circuit

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF CRIMINAL LAW PROFESSORS AND  
THE CATO INSTITUTE AS *AMICI CURIAE* IN  
SUPPORT OF GRANTING CERTIORARI**

ILYA SHAPIRO	ERIK S. JAFFE
CLARK M. NEILY III	<i>Counsel of Record</i>
JAY R. SCHWEIKERT	SCHAERR   JAFFE LLP
TREVOR BURRUS	1717 K Street, NW, Suite 900
CATO INSTITUTE	Washington, DC 20006
1000 Mass. Ave., NW	(202) 787-1060
Washington, DC 20001	<a href="mailto:ejaffe@schaerr-jaffe.com">ejaffe@schaerr-jaffe.com</a>
(202) 842-0200	
<a href="mailto:ishapiro@cato.org">ishapiro@cato.org</a>	

*Counsel for Amici Curiae*

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**MOTION FOR LEAVE TO FILE BRIEF OF  
*AMICI CURIAE***

*Amici curiae* Criminal Law Professors and the Cato Institute respectfully move for leave to file the following brief in support of the petition for certiorari.

Petitioners were notified of *amici's* intent to file this brief more than 10 days prior to its filing date and consented to the filing of this brief. Respondent City of New York was notified of *amici's* intent to file this brief 9 days prior to its filing date and has consented to the filing of this brief. The one-day delay was harmless given that respondent had already waived its right to a response thus mooting the benefit of the notice rule. Should this Court call for a response from respondent City of New York, it will have ample opportunity to address this brief. Respondent Vance received notice yesterday due to a mistaken belief that counsel of record for the City of New York represented all respondents in this Court when he filed a waiver. Upon learning of his mistake, counsel of record for *amici* sought permission from counsel for respondent Vance, who stated that respondent Vance took no position on the request. That is the same response given to other *amici* who earlier sought consent and indicates that the filing of *amicus* briefs was not a factor in respondent's decision not to seek an extension of time to respond. Accordingly, assuming respondent Vance intends to file a current response notwithstanding notice of other forthcoming *amicus* briefs, the delay in notice of this brief, even further assuming respondent Vance was unaware of the request made to respondent City of New York, was harmless.

*Amici* are a group of criminal law professors whose teaching and research involve fundamental questions of criminal responsibility, and the Cato Institute. The individual criminal law professors are: Professors Gideon Yaffe, Jeffrey Fagan, Stephen P. Garvey, Stephen J. Morse, Kenneth W. Simons, and Steven Zeidman. Further information about the law professor *amici* is contained in the appendix, attached hereto. Institutional affiliations are listed for identification purposes only, and the views herein are those of the listed individuals, not of their institutions.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

*Amici* are interested in this case given that the New York's indeterminate means of defining a "gravity knife" makes it virtually impossible for citizens to know if their behavior is lawful. That vagueness, coupled with the lack of a *mens rea* requirement as to whether a presumptively lawful pocket knife consti-

tutes a prohibited gravity knife, offends due process limitations on the government's power to deprive individuals of their liberty via criminal penalties. It is fundamentally unfair to impose criminal liability on persons who could not have known their conduct was illegal and who did not have any intent to commit an illegal act.

Respectfully submitted,

ERIK S. JAFFE  
*Counsel of Record*  
GENE C. SCHAERR  
SCHAERR | JAFFE LLP  
1717 K Street, NW, Suite 900  
Washington, D.C. 20006  
(202) 787-1060  
ejaffe@schaerr-jaffe.com

ILYA SHAPIRO  
CLARK M. NEILY III  
JAY R. SCHWEIKERT  
TREVOR BURRUS  
CATO INSTITUTE  
1000 Mass. Ave., N.W.  
Washington, D.C. 20001  
(202) 842-0200  
ishapiro@cato.org

*Counsel for Amici Curiae*

Dated: February 15, 2019

**QUESTION PRESENTED**

Whether a plaintiff need show that a law under which it is impossible reasonably to determine whether one's conduct is lawful, and which imposes strict liability as to the indeterminate element, is vague in all of its applications to succeed in a facial vagueness challenge?

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are a group of criminal law professors whose teaching and research involve fundamental questions of criminal responsibility, and the Cato Institute. The individual criminal law professors are: Professors Gideon Yaffe, Jeffrey Fagan, Stephen P. Garvey, Stephen J. Morse, Kenneth W. Simons, and Steven Zeidman. Further information about the law professor *amici* is contained in the appendix, attached hereto. Institutional affiliations are listed for identification purposes only, and the views herein are those of the listed individuals, not of their institutions.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Notice and consent are addressed in the incorporated motion for leave to file, at the beginning of this brief.

conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

*Amici* are interested in this case given that the New York's indeterminate means of defining a "gravity knife" makes it virtually impossible for citizens to know if their behavior is lawful. That vagueness, coupled with the lack of a *mens rea* requirement as to whether a presumptively lawful pocket knife constitutes a prohibited gravity knife, offends due process limitations on the government's power to deprive individuals of their liberty via criminal penalties. It is fundamentally unfair to impose criminal liability on persons who could not have known their conduct was illegal and who did not have degree any intent to commit an illegal act.

### SUMMARY OF ARGUMENT

*Amici* agree with petitioners that this Court should grant review to address the proper manner by which vagueness challenges may be brought against criminal statutes. Pet. 25-27, 34-36. Where a law is vague in a substantial percentage of its applications and provides a reasonable person no means of knowing whether their prospective conduct is legal, it should either be stricken or narrowed to remove the infirmity.

This case is important because the Second Circuit's error in its analysis puts millions of people at risk of criminal prosecution for ordinary and common conduct without any criminal intent. The facts in this case demonstrate that there is no reliable way a layperson can be confident that a perfectly ordinary folding knife he or she possesses is legal.

This *amicus* brief raises the further point that this is a particularly good case for addressing the standards for vagueness challenges given that the law being challenged also lacks a *mens rea* requirement as to the very element challenged as vague. Thus, while the prospective vagueness makes it impossible for law-abiding citizens to know whether their otherwise lawful conduct is within the lines of the law, because the gravity knife law also applies strict liability, the law is simultaneously indifferent to their efforts to behave lawfully. It is that combination of vagueness and strict liability that makes this case especially important, troubling, and deserving of review.

## ARGUMENT

### **I. This Case Is Important Because Numerous People Are at Risk of Committing Innocent Crimes Under the Decision Below.**

As the court of appeals acknowledged, Pet. App. 5, there is no *mens rea* requirement as to whether an otherwise ordinary and lawful folding pocket knife constitutes an illegal gravity knife. It thus does not matter whether a defendant believed a knife was a permissible folding knife, whether a defendant tried and failed to open the knife using a “wrist flick,” or even received advice from a trained police officer that the knife was lawful. Pet. App. 6. If at any point any officer is capable of opening the knife with a wrist flick on even one out of ten tries, Pet. App. 7, the knife is an illegal gravity knife. There is no safe harbor, and there is no defense of good faith, diligent effort, or anything else related to a citizen’s attempt to

ascertain the lawful nature of the knife. Pet. App. 23-24.

While such a law is problematic enough on its face, it is all the worse given that folding knives routinely are employed in the City and elsewhere in the State as ordinary hand tools. In fact, they are simply the folding version of a common cutting tool that dates to the Stone Age, and that can be found today in essentially every household and workplace—where they are used routinely, often daily, for entirely peaceful purposes.

As one New York court has noted, the folding knives that are potentially prohibited by the gravity knife law are:

widely manufactured and sold across the country in hardware and outdoor stores under brand names such as Clip-it, Husky Utility Folding Knives and other brands. They are sold for and are used for purely legitimate purposes. Despite “locking” safety features, many can be “flicked” open with the appropriate amount of force. Thus, these knives are routinely carried by many New Yorkers for legitimate purposes ignorant of the fact that they may be in violation of the law and face a potential automatic one-year jail sentence.

*People v. Trowells*, No. 3015/2013, at \*4 (N.Y. Sup. Ct., Bronx County, July 11, 2014).

It is worth noting in this regard that in 2010, when the District Attorney of New York seized some 1,300 purportedly illegal gravity knives, he obtained them not from the pockets of robbers, or from smugglers, or from black marketeers—but from the aisles

of ordinary stores including Orvis and Home Depot. *See* Appendix on Appeal, at A782-A792 (“Deferred Prosecution Agreement” between Orvis and the District Attorney of New York); A804-A814 (same with respect to Home Depot).

The use of folding knives by the individual plaintiffs in this case provides a particularly vivid example of the innocent conduct that is criminalized every day under the gravity knife law. Simply put, the plaintiffs here were not criminals. John Copeland—a world-recognized painter—bought his folding knife at Paragon Sports in Manhattan and used it in connection with his work. Pet. 14. Pedro Perez has been a purveyor of fine arts and paintings for over 22 years and used his folding knife to cut canvas and open packaging. *Id.* Yet the gravity knife law criminalized these men’s indisputably ordinary and innocent occupational conduct.

Accordingly, entirely innocent persons having no criminal intent can be arrested and charged with a crime they neither intended to commit nor knew they had committed. Indeed, the court below was largely indifferent to that concern, suggesting merely that individual as-applied challenges could be raised to such prosecutions. Pet. App. 24-26.

But the notion that citizens who wish to know how to conform their behavior to the law must wait until they are prosecuted to challenge the law is both unreasonable and implausible as a remedy for constitutional deficiencies such as are present here. It is unreasonable because it requires citizens to proceed at their peril notwithstanding their best efforts to conform their behavior to the law, or it requires that

they risk a significant penalty rather than accept any inevitable plea offer, just to vindicate their rights. Indeed, violation of the gravity knife law is no “minor” violation. Jail time is available for misdemeanor convictions, and even more troubling, violations can sometimes be punished as felonies. N.Y. PENAL L. §§ 70.00(2)(d), (3)(b); 265.02(1).

Of the many objectives of the criminal law and of due process, certainly one goal must be to ensure that innocent people, engaged in innocent conduct, will not face the stigma of criminal prosecution and conviction—much less conviction for a felony. Yet under the gravity knife law, New York indisputably has charged and convicted large numbers of New Yorkers who had no genuine culpability whatsoever.

That virtually every resident of New York faces a comparable risk of criminal conduct merely from owning a common folding knife makes this an important case worthy of this Court’s attention.

## **II. The Combination of Vagueness and the Lack of a *Mens Rea* Requirement for the Vague Element Is Particularly Subversive of Fundamental Fairness and an Important Issue for this Court.**

While it is bad enough that the law in this case is indeterminate as to whether a permissible folding knife constitutes a gravity knife, the fact that it lacks a *mens rea* requirement for that element makes it doubly offensive to due process. While the court below observed that a *mens rea* requirement would likely mitigate much of the vagueness objection in this case, and that this Court has not held that *mens rea*

is a requirement of due process in all cases, it largely sidestepped the synergistic consequences of vagueness and strict liability combined. Pet. App. 35-37.<sup>2</sup>

In felony cases, in particular, the gravity knife law presents a scenario where strict liability is extremely likely to run afoul of historical notions of fairness in the criminal law, and hence potentially the Due Process Clause. *Cf. Staples v. United States*, 511 U.S. 600, 618-19 (1994) (discussing common-law background rule requiring *mens rea*). Indeed, while the court below recognized that innocent conduct might still result in liability, it refused to grant any prospective relief merely because it felt that one of the three plaintiffs—the commercial seller—had not exercised sufficient due diligence to ascertain whether its knives were capable of opening with a wrist flick. Pet. App. 27. The irony of that was apparently lost on the court—such diligence, of course, would not have been a defense to strict liability. And, the fact that petitioner Copeland exercised extraordinary due diligence—asking two police officers if the knife was legal and having them perform the wrist-flick test, Pet. App. 7—was also of little concern to the court.

But such absurd results—ignoring all good faith efforts by an individual but chiding the commercial seller for insufficient irrelevant efforts—demonstrates how the lack of *mens rea* coupled with

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<sup>2</sup> A plurality of this Court in *City of Chicago v. Morales* observed that even where the only constitutional interests at stake were basic “liberty” interests protected by the Due Process Clause, a vague statute that imposes criminal penalties without a *mens rea* requirement is particularly suited for a facial challenge. 527 U.S. 41, 53-55 (1999) (plurality opinion).

an indeterminate element exceeds the “outer limits of what is permissible” under the Due Process Clause, failing to protect innocent conduct. *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 515 (E.D.N.Y. 1993).

In *Staples*, for example, the defendant was in possession of a rifle that had the external appearance of an entirely lawful semi-automatic weapon, the AR-15. But the rifle had been internally modified so that it was capable of firing fully automatically (*i.e.*, as a machine gun), an illegal characteristic. *Staples*, 511 U.S. at 603. The government contended it need only prove that *Staples* was knowingly in possession of the firearm, regardless of his knowledge of its illegal full-auto capability. *Id.* at 608.

The Supreme Court, however, required the government to prove both that the defendant knowingly possessed the firearm, and that the defendant was aware of the weapon’s unlawful characteristic. *Id.* at 619. To do otherwise, the *Staples* Court noted, would mean that

any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun’s firing capabilities, if the gun turns out to be an automatic.

*Id.* at 615. While *Staples* addressed a matter of statutory construction, the historical fairness concerns are the same that would inform a due process analy-

sis of an attempt to deprive a person of their liberty based on a vague strict liability crime.

This same reasoning with respect to *mens rea* applies to statutes criminalizing the possession of unlawful “analogue” drugs. To avoid imposing the stigma of criminal punishment upon innocent conduct, the Supreme Court has required not only that a defendant knowingly possessed the substance in question, but also that the defendant “knew he was dealing with ‘a controlled substance.’” *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015). The latter knowledge can be shown in two ways—“either by knowledge that a substance is listed or treated as listed by operation of the Analogue Act, or by knowledge of the physical characteristics that give rise to that treatment.” *Id.* at 2306.

The analyses in *Staples* and *McFadden* echo the Court’s earlier observation, in *United States v. International Minerals & Chemical Corp.*, that prohibiting possession of apparently ordinary items can run afoul of the Due Process Clause. As that Court noted:

Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require, as in [*United States v. Murdock*, 290 U.S. 389 (1933)], “*mens rea*” as to each ingredient of the offense.

402 U.S. 558, 564-65 (1971). While the court below sought to distinguish knives from paper clips, Pet. App. 37, that distinction falls apart upon cursory review. Ordinary knives in general, and pocket knives in particular, are not such unusual or uniquely dan-

gerous items that anyone would be on inherent notice that they were risking illegality. Indeed, every camper, boy scout, construction worker, and countless ordinary citizens own and routinely carry folding pocket knives. That such a knife is capable of causing injury is no more important than the fact that a pencil can be used to stab and dental floss can be used to strangle. What matters is that ordinary folding knives are both extremely common and, in general, completely lawful. That some of those knives might be imagined to pose a unique threat due to their ease of opening is certainly a policy choice New York can make, but when it does so with an indeterminate definition and strict liability, it has gone too far.

This Court should grant the petition both to consider the proper methodology for considering prospective as-applied vagueness challenges and to clarify the constitutional outer limits of combining a vague law with the lack of a *mens rea* requirement. The inability of ordinary citizens to determine whether their conduct is lawful, and the law's complete disregard for culpable intent, violates due process.

### CONCLUSION

For the foregoing reasons, and those stated by petitioners, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE  
*Counsel of Record*  
GENE C. SCHAERR  
SCHAERR | JAFFE LLP  
1717 K Street, NW, Suite 900  
Washington, D.C. 20006  
(202) 787-1060  
ejaffe@schaerr-jaffe.com

ILYA SHAPIRO  
CLARK M. NEILY III  
JAY R. SCHWEIKERT  
TREVOR BURRUS  
CATO INSTITUTE  
1000 Mass. Ave., N.W.  
Washington, D.C. 20001  
(202) 842-0200  
ishapiro@cato.org

*Counsel for Amici Curiae*

Dated: February 15, 2019

## APPENDIX OF LAW PROFESSOR *AMICI*

Gideon Yaffe is the Wesley Newcomb Hohfeld Professor of Jurisprudence and Professor of Philosophy & Psychology at Yale University. His research interests include the study of intention and the theory of action.

Jeffrey Fagan is the Isidor and Seville Sulzbacher Professor of Law and Professor of Epidemiology at Columbia University. His research and scholarship examine legal and social regulation of police. He is Fellow of the American Society of Criminology and served on the Committee on Law and Justice of the National Research Council.

Stephen P. Garvey is Professor of Law at Cornell Law School. He has written and taught in the areas of capital punishment, criminal law, and the philosophy of criminal law. He is co-author of a widely used casebook on criminal law.

Stephen J. Morse is the Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry at the University of Pennsylvania. He is an expert in criminal law and mental health law and has written extensively about *mens rea* and strict liability.

Kenneth W. Simons is the Chancellor's Professor of Law and Professor of Philosophy by courtesy at the University of California, Irvine School of Law. Prof. Simons specializes in criminal law and torts, and has published on the justifiability of strict criminal liability.

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Steven Zeidman is a Professor of Law at CUNY School of Law. His research interests include criminal procedure, evidence, and criminal justice generally. He supervises students representing indigent clients in the New York City Criminal Court.