UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-1129 Caption [use short title] Joseph Cracco v. Vance

Motion for: leave to file brief of amici curiae

Set forth below precise, complete statement of relief sought:

Leave of the court to file the attached brief of proposed amici curiae in support of Plaintiff-Appellee's opposition to the Motion to Dismiss the Appeal and vacate the judgment below

MOVING PARTY: proposed amici curiae ☐ Plaintiff ☐ Defendant ☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Appellant Vance

MOVING ATTORNEY: Daniel Schmutter & Justine M. Luongo

OPPOSING ATTORNEY: Elizabeth Krasnow

[name of attorney, with firm, address, phone number and e-mail]

Hartman & Winnicki P.C.
74 Passaic Street
Ridgewood, NJ 07450

Legal Aid Society
199 Water Street
New York, NY 10038

New York County District Attorney's Office
New York NY 10013

Court-Judge/Agency appealed from: United States District Court, Southern District of New York (Paul A. Crotty U.S.DJ)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): (Appellee consents to this motion; Appellant opposes)

Opposing counsel's position on motion:
☑ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: /s Daniel L. Schmutter **Date:** 7/26/2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH CRACCO, Plaintiff-Appellee, -against- CYRUS R. VANCE, JR., Defendant-Appellant. THE CITY OF NEW YORK, Police Officer JONATHAN CORREA, Shield 7869, Transit Division District 4, and Police Officer JOE DOE, Defendants.	Case No.: 19-1129

BRIEF OF PROPOSED AMICI CURIAE KNIFE RIGHTS FOUNDATION, INC. AND THE LEGAL AID SOCIETY IN SUPPORT OF MOTION TO APPEAR AS AMICI CURIAE IN CONNECTION WITH THE MOTION TO DISMISS THE APPEAL AND VACATE THE JUDGMENT BELOW

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INTRODUCTION

Knife Rights Foundation, Inc. ("Knife Rights"), and the Legal Aid Society ("Legal Aid") request leave to file the accompanying amici curiae brief in support of Plaintiff-Appellee Joseph Cracco in connection with his opposition to the pending motion by Defendant-Appellant New York County District Attorney Cyrus Vance (the "DA") seeking to dismiss the appeal and vacate the judgment below. Plaintiff-Appellee consents to the amici brief, but the attorneys for the DA have stated that they do not consent, thereby necessitating this motion.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Knife Rights Foundation, Inc. is a non-profit organization that serves its supporters and the public, through direct and grassroots advocacy, focused on protecting the rights of knife owners to keep and carry knives and edged tools. The purposes of the Knife Rights Foundation include the promotion of education regarding state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide. Knife Rights was a principle sponsor of the prior lawsuit *Copeland v. Vance*, 893 F.3d 101 (2d. Cir. 2017), *cert denied*, ___ U.S. ___, (2019).

The Legal Aid Society (Legal Aid) is the oldest and largest private non-profit legal services agency in the nation, dedicated since 1876 to providing quality

legal representation to low-income New Yorkers. It has served as New York's primary public defender since 1965 and has represented thousands of individuals arrested by the New York City Police Department (NYPD) for alleged violations of New York Penal Law Sections 265.01(1) and 265.02(1) for possession of so-called "gravity knives." Despite the recent legislative repeal of PL 265.01 (1) and 265.02(1) Legal Aid is deeply concerned that NYPD will continue to exploit the unconstitutional wrist-flick test to arrest thousands of New Yorkers who commute to work while possessing folding knives that they use as tools.

Proposed Amici seek to submit the attached brief in support of Plaintiff-Appellee's opposition to the motion to dismiss and vacatur of the judgment below because the judgment below represents a critically important recognition by a court of law of the harmful impact the subject regulatory approach, and ones like it, have on the constitutional rights of millions of otherwise law-abiding people.

II. AUTHORITY TO FILE THE AMICI CURIAE BRIEF

While serving on the U.S. Court of Appeals for the Third Circuit, Justice Samuel Alito stated, "I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Comm'r,* 293 F.3d 128, 133 (3d Cir. 2002) (citing Michael E. Tigar and Jane B.

Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Judge Alito quoted the Tigar treatise for the statement that "'[e]ven when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.'" 293 F.3d at 133.

This circuit customarily grants leave to file amicus briefs. *See, e.g.*, *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 560 n.2 (2d Cir. 2016); *Abdollah Naghash Souratgar v. Fair*, 720 F.3d 96, 101 (2d Cir. 2013) ("granted leave for the filing of amicus briefs"); *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 98 n.13 (2d Cir. 2012).

In an email denying the request for consent, the DA asked that Proposed Amici include this statement explaining their refusal to consent:

> The District Attorney's Office opposes the motion of Knife Rights and the Legal Aid Society to file amicus curiae briefs in connection with the fully-briefed motion of the District Attorney to dismiss and vacate because the Federal Rules of Appellate Procedure do not authorize the filing of amicus curiae briefs in connection with non-merits motion practice, see generally F.R.A.P. 29; Local Rule 29.1, and because, even if there were a procedural basis for the instant application, it is untimely under Federal Rule of Appellate Procedure 29(a)(6) with the result that the District Attorney did not have the opportunity to address the new arguments of the proposed amicus curiae in his reply brief.

While the DA is correct that Rule 29 does not specifically address amicus practice in connection with motions, it also does not appear that there is any rule or decision specifically precluding such briefing.

In light of Rule 29's silence on this issue, prior to preparing these papers, counsel for Knife Rights contacted the Clerk's office. The Clerk's office was unaware of any rule precluding the proposed submission and directed counsel to submit the brief as soon as possible.

The Court should grant leave to file the proposed amici curiae brief. There is a fundamentally important reason that amicus curiae practice is liberally allowed. Amicus curiae briefing can be of considerable assistance to a court. Assistance to the court is the touchstone of amicus curiae practice, and the proposed brief should be evaluated based on its level of helpfulness rather than procedural technicalities.

Any claimed prejudice can be easily remedied by allowing the DA to submit a responsive brief. The pending motion was only filed mere weeks ago, and a decision to accept or reject an amici brief that could be of considerable assistance to the Court ought not turn on such technicalities.

III. THE AMICI BRIEF WILL ASSIST IN THIS COURT'S RESOLUTION OF THE PENDING MOTION

The proposed brief will advance two arguments. (1) The case is not moot because the legislation repealing the statutory ban on gravity knives did not repeal the definition of gravity knife found in N.Y. PENAL LAW §265.00(5), which is the source of the unconstitutional wrist flick test, and also did not impact the remaining gravity knife bans on New York City subways and buses (thus allowing continued unconstitutional activity by law enforcement against law abiding New Yorkers). (2) The alleged mootness arises from actions taken by Appellant-Movant, the DA, and therefore vacatur of the judgment below is not proper under *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).

Both of these arguments are dispositive of the motion in favor of Plaintiff-Appellee and will assist the Court is deciding the motion.

CONCLUSION

The accompanying amici curiae brief would aid this Court with respect to the foregoing points of argument, from the relevant perspective of millions of New Yorkers. Accordingly, Knife Rights and Legal Aid respectfully request leave to file the accompanying amici curiae brief.

Respectfully submitted,

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Dated: July 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH CRACCO, Plaintiff-Appellee, -against- CYRUS R. VANCE, JR., Defendant-Appellant. THE CITY OF NEW YORK, Police Officer JONATHAN CORREA, Shield 7869, Transit Division District 4, and Police Officer JOE DOE, Defendants.	Case No.: 19-1129

BRIEF OF AMICI CURIAE KNIFE RIGHTS FOUNDATION, INC. AND THE LEGAL AID SOCIETY IN SUPPORT OF PLAINTIFF-APPELLEE'S OPPOSITION TO THE MOTION TO DISMISS THE APPEAL AND VACATE THE JUDGMENT BELOW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Amici Curiae Knife Rights Foundation, Inc. and Legal Aid Society 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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INTRODUCTION AND IDENTITY OF AMICI CURIAE

Knife Rights Foundation, Inc. is a non-profit organization that serves its supporters and the public, through direct and grassroots advocacy, focused on protecting the rights of knife owners to keep and carry knives and edged tools. The purposes of the Knife Rights Foundation include the promotion of education regarding state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide. Knife Rights was a principle sponsor of the prior lawsuit *Copeland v. Vance*, 893 F.3d 101 (2d. Cir. 2017), *cert. denied*, ___ U.S. ___, (2019).

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this Court to uphold the lower Court's holding that the wrist-flick test renders the statutory definition of a gravity knife void for vagueness.

Amici submit this brief in support of Plaintiff-Appellee's opposition to the motion to dismiss and vacatur of the judgment below because the judgment below represents a critically important recognition by a court of law of the harmful impact the subject regulatory approach, and ones like it, have on the constitutional rights of millions of otherwise law-abiding people.

ARGUMENT

I. Assembly Bill 5944 Did Not Moot the Appeal Because Gravity Knives Remain Illegal on New York City Subways and Buses, and the NYPD has Announced its Intention to Enforce Those Prohibitions

Respondent New York County District Attorney Cyrus A. Vance, Jr. (the "DA") moves for an order dismissing the appeal and vacating the judgment below, arguing that legislation signed into law on May 30, 2019 renders the appeal moot. The DA, however, failed to inform the Court that gravity knives remain illegal on public transportation in New York City, and the New York Police Department ("NYPD") intends to continue enforcing these unconstitutionally vague prohibitions.

The DA is correct that Assembly Bill 5944 ("AB 5944") was signed on May 30, 2019 by Governor Andrew Cuomo, repealing the prohibition on gravity knives found in N.Y. PENAL LAW § 265.01(1). However, the DA failed to inform the

Court that AB 5944 did not repeal the *definition* of "gravity knife" found in N.Y. PENAL LAW § 265.00(5), which is one of the statutory provisions being challenged in this lawsuit, and which is the very source of the unconstitutionally vague "Wrist Flick Test" -- the main subject of this vagueness challenge.

Further, Respondents failed to inform the Court that AB 5944 did not remove all gravity knife prohibitions from the law. Gravity knives remain illegal on New York City subways and buses, and therefore the unconstitutionally vague definition of gravity knife found in § 265.00(5) will continue to place Petitioners and other New Yorkers in jeopardy,

Rules of the Metropolitan Transportation Authority governing subway and bus operations throughout the City provide as follows:

> **Section 1050.8 - Weapons and other dangerous instruments**
>
> (a) No weapon, dangerous instrument, or any other item intended for use as a weapon may be carried in or on any facility or conveyance. . . . For the purposes hereof, a weapon or dangerous instrument shall include, but not be limited to, a firearm, switchblade knife, boxcutter, straight razor or razor blades that are not wrapped or enclosed in a protective covering, *gravity knife*, sword, shotgun or rifle. [Emphasis added.]

21 NYCRR § 1050.8.

> **Section 1040.9 - Firearms or other weapons**
>
> No weapon, dangerous instrument, or any other item intended for use as a weapon may be carried in or on any facility or train. . . . For the purposes hereof, a weapon or dangerous instrument shall include, but not be limited to, a firearm, switchblade knife, *gravity knife*, boxcutter, straight razor or razorblades that are not wrapped or enclosed in a protective covering, sword, shotgun or rifle. [Emphasis added.]

21 NYCRR § 1040.9.

> **Section 1044.11 - Firearms or other weapons**
>
> No weapon, dangerous instrument, or any other item intended for use as a weapon may be carried in or on any facility or conveyance. . . . For the purposes hereof, a weapon or dangerous instrument shall include, but not be limited to, a firearm, switchblade knife, *gravity knife*, box cutter, straight razor or razorblades that are not wrapped or enclosed in a protective covering, sword, shotgun or rifle. [Emphasis added.]

21 NYCRR § 1044.11.

Penalties for violating these prohibitions include fines or civil penalties up to $100 and up to 30 days in prison. *See* 21 NYCRR § 1040.12; 21 NYCRR § 1044.14; 21 NYCRR § 1050.10.

(The foregoing, collectively, the "MTA Rules.")

Thus, in reality, gravity knives remain illegal to possess in the New York City if you happen to be one of the more than 5 million New Yorkers who ride the subway or the nearly 2 million New Yorkers who ride the bus to work every day. *See* http://web.mta.info/nyct/facts/ridership/ (last accessed June 6, 2019).

The NYPD has explicitly declared its intention to continue to enforce this gravity knife prohibition in, at least, the New York City subways. One day after AB 5944 was signed into law, the NYPD issued the following statement from its office of the Deputy Commissioner, Public Information ("DCPI") to Albany Bureau Chief Jesse McKinley of the New York Times:

> The NYPD opposed the legislation because gravity knives are in reality rapidly-deployable combat knives, and there have been more than 1600 stabbings and slashings in New York City so far this year.[1] The public should also be aware that the possession of gravity knives in the New York City subway system remains illegal. The NYPD will continue its work to ensure New York City remains the safest big city in America.

(*See* e-mail from DCPI to New York Times Albany Bureau Chief Jesse McKinley and New York Times story dated May 31, 2019, attached at Supp.App.1 to Supp.App.8 of Exhibit 1 to James M. Maloney's Declaration in Opposition to the District Attorney's Motion to Dismiss.)

The NYPD statement makes it clear that they do not consider AB 5944 the end of the story regarding gravity knife enforcement against ordinary law abiding New Yorkers possessing common folding knives, the most commonly possessed pocket knives in the United States. The use of aggressive and misleading hyperbole such as "rapidly-deployable combat knives" (which they are not) and the

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[1] Notably, the City cannot actually connect these crimes to the every-day common folding knives law abiding folks carry and which the City tries to label "gravity knives." The juxtaposition of this number with the inflammatory phrase "rapidly-deployable combat knives" appears intentionally misleading.

promise that NYPD will "continue its work" in this regard makes the NYPD's intention to continue its unconstitutionally vague gravity knife enforcement activities unmistakable. Indeed, the inconsistent messages from the state and the NYPD do little more than set a trap for the unwary and compounds the existing vagueness and notice problems – New Yorkers who reasonably believe that the ban has been repealed may be fooled into mistakenly believing that they can carry their work tools on their person and find themselves confronted by the police on public transportation as a result.

Continued gravity knife enforcement action under the MTA Rules would require the NYPD to apply exactly the same unconstitutionally vague Wrist Flick Test from N.Y. PENAL LAW § 265.00(5) as was previously used unconstitutionally to enforce the now repealed N.Y. PENAL LAW § 265.01(1).

It difficult take seriously the DA's statements to the contrary when the NYPD takes a very aggressive position publicly but the DA tries to take a contrary position with various courts. More importantly, the DA's naked suggestion that the NYPD intends to change its tactics is wholly irrelevant to the question of mootness, as even some sort of voluntary announcement by the NYPD (as opposed to the DA who is not the NYPD) that they are renouncing (1) the use of the Wrist Flick Test or (2) future enforcement of the MTA Rules, such voluntary cessation represents a clear exception to the doctrine of mootness and cannot divest this

Court of Article III jurisdiction. A party voluntarily ceasing the complained of conduct can readily change its mind and resume that very conduct after a dismissal order is entered. *See Knox v. Serv. Emps. Int'l Union Local 1000*, 567 U.S. 298 (2012).

Thus, in reality, little has changed with the signing of AB 9544. Law abiding New Yorkers are still at risk of being charged by the NYPD with unlawful gravity knife possession using the unconstitutionally vague Wrist Flick Test that is being challenged in this lawsuit, and millions of New Yorkers remain prospectively in jeopardy. Accordingly, the appeal is not moot.

II. Even if the Court Dismisses the Appeal on the Ground of Mootness, the Judgment Below Should not be Vacated Because the Dismissal on Mootness Will Have Resulted from the DA's Own Action

In the event the Court dismisses the appeal as moot, the DA has also asked the Court to vacate the judgment below. In doing so, the DA fails to recognize the impact of the leading case on the subject, *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). In that case, the Supreme Court discussed in detail the history and basis for the principle invoked here by the DA and surveyed the applicable case law.

The Court explained that the vacatur principle is fundamentally a discretionary equitable doctrine and exists to provide fairness to the party against whom the judgment was entered below but who nevertheless lost the opportunity to have the judgment reviewed on appeal. The Court noted:

> The reference to "happenstance" in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.

Id. at 25. Because of this, the question is not simply who caused the mootness, as the DA appears to argue. The question is fairness to the relevant appellant who ostensibly has lost the ability to obtain appellate review. In this case, granting vacatur would allow the DA to manipulate this Court's Article III jurisdiction.

This case presents unusual facts, and research has no found no similar case for comparison. Here the DA was presented with a strategic choice: (1) litigate the appeal on the merits to try to obtain a reversal, or (2) argue mootness and try to obtain vacatur. In effect, the DA concluded that it has two bites at the apple. It can try to effectively win the appeal right at the outset by arguing mootness and seeking vacatur rather than having to prevail on the heavier lift of winning the appeal on the merits. This motion is a strategic short cut to prevailing on its appeal.

Importantly, the DA brought the mootness motion. If the DA prevails in its mootness position, its own motion will be the reason it cannot obtain appellate review. If the DA actually cared about being deprived of appellate review, it should be arguing *against* mootness, not for mootness. Certainly, the Court could examine mootness on its own motion. But the position taken by the DA on mootness matters for the purpose of the vacatur doctrine, because the vacatur doctrine is all about fairness to the appellant. As the Supreme Court explained in *U.S. Bancorp*, vacatur is highly dependent on the voluntary choices made by the appellant. Here, the Appellant chose to support mootness, thereby hoping to usher in its own inability to obtain substantive appellate review yet, in fact, win its appeal employing that jurisdictional shortcut.

The DA is the proverbial child who murders his parents and then throws himself on the mercy of the court because he is an orphan. The DA's strategy is highly manipulative of the Court's Article III jurisdiction, and indulging this approach threatens to encourage similar manipulative strategic behavior from other parties in the future.

Having made the very motion and having argued in favor of mootness, the DA should be precluded from befitting from its position by also obtaining vacatur if its mootness position prevails. A party in the position of the DA should be required to oppose mootness (at least where, as here, there is a clear good faith

argument against mootness) in order to seek vacatur if mootness is found. That way, such a party can at least be said to have tried to defend its ability to appeal on the merits. A party complaining that it has lost the ability to seek appellate review ought to at least have done everything it can to defend the viability of that appeal.

Of course, Amici believe the argument against mootness should win the day. But even if it does not, the argument against mootness here is not only a good faith argument, but it is in fact quite strong. There is no reason the DA could not and should not have taken the opposition position on mootness. The only explanation for this motion is its manipulative strategic behavior on the jurisdictional issue. The DA should not be rewarded for that strategic behavior by obtaining vacatur of the judgment below.[2]

[2] In that regard, this situation shares some of the concerns that apply to the doctrine of judicial estoppel. Judicial estoppel prevents a party from playing fast and loose with the court by taking one position and then when it prevails on that position for one purpose, reversing its position on that issue later for another purpose. See, e.g. *New Hampshire v. Maine*, 532 U.S. 742 (2001). Here the DA is the one arguing in favor of mootness in the first instance and then, if it prevails, it is complaining about the impact mootness has on its right to appeal. Playing fast and loose in this manner should not be encouraged.

Accordingly, if the Court finds that the appeal is moot, the judgment below should not be vacated.

Respectfully submitted,

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Dated: July 26, 2019