Appeal No. 20-1033

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FRANCIS RAIA,
Defendant-Appellee.

On Appeal from the U.S. District Court for the District of New Jersey
No. 2-18-cr-00657-001, Honorable William J. Martini

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMM IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the *amici curiae* National Association of Criminal Defense Lawyers and FAMM are not subsidiaries of any other corporation and no publicly held corporation owns 10 percent or more of any *amici curiae* organization's stock.

/s/ Roberto Finzi
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Dated: April 21, 2020

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The issue presented in this case is of nationwide importance. NACDL has taken a leadership role in education and advocacy under the First Step Act, having launched, together with co-*amicus* FAMM, the COVID-19 Compassionate Release Clearinghouse, a large-scale initiative to train pro bono

[1] Counsel for all parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting this brief; and no person other than the *amici curiae* or their counsel contributed money intended to fund preparing or submitting this brief.

attorneys to represent federal inmates seeking compassionate release. Thus, NACDL has a particular interest in the development of the law defining the discretion the Act confers upon federal courts to grant relief in all meritorious cases.

FAMM is a nonpartisan, national advocacy organization that promotes fair and effective criminal justice reforms to make our communities safe. Founded in 1991 as "Families Against Mandatory Minimums," FAMM promotes change by seeking to give voices to individuals (and their families) who are directly affected by aggressive sentencing and prison policies. FAMM has worked for many years to improve the federal Bureau of Prisons (BOP) compassionate release program. FAMM members incarcerated in the BOP and their loved ones routinely contacted FAMM regarding significant delays in processing requests and denials of requests. In March 2019, following passage of amendments to 18 U.S.C. § 3582(c)(1)(A) in the First Step Act, FAMM launched the Compassionate Release Clearinghouse to identify federal prisoners eligible for release whose requests were ignored or denied by the BOP, and match those individuals up with *pro bono* counsel recruited and trained to represent them in court. FAMM participates in this case as *amicus* because it is keenly interested in ensuring that the First Step Act reforms are implemented in such a way as to achieve Congress's goal of "increas[ing] the use and transparency of compassionate release." First Step Act, Pub. L. 115-391, § 603(b) (catchline).

BACKGROUND AND SUMMARY OF ARGUMENT

Appellee Raia's Petition for Rehearing addresses the discretion of a district court to excuse the 30-day waiting period for compassionate release under the First Step Act, 18 U.S.C. § 3582(c)(1)(A).[2] On April 2, 2020, the Panel declined to remand this case under Federal Rule of Appellate Procedure 12.1, stating that remand would be "futile." In so ruling, the Panel necessarily concluded that the 30-day waiting period cannot be excused or waived.[3] That conclusion was inconsistent with both Supreme Court and Circuit precedent. The ruling creates inconsistency in the Circuit's treatment of all claims-processing rules, and undermines courts' equitable authority in a wide range of cases.

As explained below, the 30-day waiting period is a nonjurisdictional claims-processing rule. Courts may excuse noncompliance with that rule absent an express prohibition on doing so. Remand is therefore not "futile." The Panel's *sua sponte* conclusion to the contrary was error.

Rehearing should be granted to correct the Panel's error and confirm that judges are empowered to address "extraordinary and compelling" circumstances

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[2] The Petition reviews the full context of this case. The provision at issue is quoted in full below, at 9.

[3] In keeping with recent Supreme Court usage, *amici* suggest that the term "excuse" is properly employed in this context to refer to judicial action declining to enforce a limitation, while "waive" and "forfeit" reference actions of the adverse party. *See Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019).

even when they arise exigently. At a minimum, the Panel should grant rehearing and order full briefing on this important issue, which was neither decided below nor fully briefed on appeal.

ARGUMENT

The 30-Day Waiting Period Provided by 18 U.S.C. § 3582(c)(1)(A) Is a Nonjurisdictional Claims-Processing Rule That Is Excusable

From its inception, the compassionate release statute empowered courts to reduce a previously-imposed sentence when "extraordinary and compelling reasons" warranted doing so. *See* 18 U.S.C. § 3582(c) (1984). Only the Bureau of Prisons ("BOP") could move a court for relief, however, and rarely did so. As explained further below (at 10-11), with the 2018 First Step Act, Congress amended the statute to allow courts to adjudicate motions filed by defendants themselves.

At issue here is whether one aspect of the new procedure—the lapse of 30 days following the defendant's request to the Warden for a recommendation that BOP file a motion requesting release—is subject to equitable exceptions. The answer to that question is "no" only if the provision is either jurisdictional or by its terms strips the courts of their traditional equitable authority. Both Supreme Court and Circuit precedent demonstrate that neither is the case. Indeed, the text and history of Section 3582(c)(1)(A) reflect Congress's intent that courts exercise their historical role of weighing the equities and determining a sentence, without limitations controlled by the executive branch.

A. The 30-Day Waiting Period in 18 U.S.C. § 3582(c)(1)(A) Is a Nonjurisdictional Claims-Processing Rule

The Supreme Court warns against reading statutory requirements as "jurisdictional" unless Congress clearly so provided. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514-15 (2006); *see Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 (2002); *Fed. Trade Comm'n v. Shire ViroPharma, Inc.,* 917 F.3d 147, 153-54 (3d Cir. 2019). That is because deeming a requirement "jurisdictional" has "harsh consequences": jurisdictional requirements cannot be waived or excused. *Guerra v. Consolidated Rail Corp.*, 936 F.3d 124, 133 (3d Cir. 2019); *Arbaugh*, 546 U.S. at 514-15; *see Bowles v. Russell*, 551 U.S. 205 (2007).

Thus the Supreme Court recognizes a separate category of nonjurisdictional "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times"—*i.e.*, "claims-processing rules." *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). They include, for example, time periods after which filing is disallowed (such as statutes of limitations), actions and waiting periods required before filing (such as exhaustion requirements), and filing formalities (such as verifications). Yet courts retain their full suite of equitable powers to excuse noncompliance with claims-processing rules—"even when," for example, "the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." *Wong,* at 409-10; *see Irwin v. Dep't of Veterans*

Affairs, 498 U.S. 89, 93-96 (1990). That is true whether the rule is statutory, *Wong*, 575 U.S. at 410 (Federal Tort Claims Act), or judge-made. *See Baker v. United States*, 670 F.3d 448, 455 (3d Cir. 2012) (citing *Kontrick v. Ryan*, 540 U.S. 443 (2004)).

Here, neither Section 603 of the First Step Act (which added the 30-day provision) nor Section 3582(c)(1)(A) itself contains the word "jurisdiction" or its equivalent. Because Congress "could have explicitly said" that this 30-day provision was jurisdictional, but did not, the provision should not be construed as jurisdictional. *Beazer East, Inc. v. Mead Corp.*, 525 F.3d 255, 261 (3d Cir. 2008); *see United States v. Weatherspoon*, 696 F.3d 416, 421 (3d Cir. 2012) (holding adjacent provision of Section 3582(c) nonjurisdictional); *see also, e.g.*, *Hassen v. Gov't of Virgin Islands*, 861 F.3d 108, 113 (3d Cir. 2017); *Guerra*, 936 F.3d at 132-33. Indeed, the Department of Justice has recently agreed that the 30-day requirement "is not jurisdictional." Gov't Opp., *United States v. Rabadi*, No. 7:13-cr-00353-KMK, Dkt. No. 87 (S.D.N.Y. Apr. 8, 2020).

Accordingly, the provision—which requires "certain procedural steps"—is a claims-processing rule. *Wong*, 575 U.S. at 410.

B. The 30-Day Waiting Provision Can Be Equitably Excused

1. Statutory Claims-Processing Rules Are Subject to Equitable Exceptions

This Court has long recognized the principle articulated in the Supreme Court cases quoted above: "claims-processing rules . . . are subject to waiver, forfeiture, and equitable exceptions." *Baker*, 670 F.3d at 455. Numerous Circuit

opinions confirm the courts' equitable authority to excuse noncompliance with nonjurisdictional claims-processing rules. *E.g.*, *United States v. Kalb*, 891 F.3d 455, 459-60 (3d Cir. 2018); *Guerra*, 936 F.3d at 132-33 ("[J]urisdictional defects . . . are not subject to equitable tolling, while the opposite is true of claim-processing defects."); *Rubel v. Comm'r of Internal Revenue*, 856 F.3d 301, 304 (3d Cir. 2017); *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 472 (3d Cir. 2017) ("[W]e conclude Rule 4(a)(3) is not jurisdictional so that a party's failure to comply with it may be excused by the reviewing court."). The Supreme Court has even confirmed that courts may in most cases equitably excuse the failure to exhaust administrative remedies despite statutory requirements. *Berryhill*, 139 S. Ct. at 1773-74 (citing, *e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 484 (1986)).

Supreme Court and Circuit precedent also shows that courts lose their equitable authority to excuse noncompliance only when a statute or rule expressly deprives them of it. Thus the Supreme Court held, for example, that the express prohibition in Federal Rule of Appellate Procedure 26(b)(1)—an appellate court "may not extend the time to file . . . a petition for permission to appeal"—deprives courts of equitable authority to extend that time. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715 (2019). Similarly, Federal Rule of Criminal Procedure 45(b)(2)'s prohibition on extending the time to take action under Rule 29 or 33 (unless the Rule expressly authorizes the extension) deprives courts of equitable authority to do so. *Carlisle v. United States*, 517 U.S. 416, 421-27 (1996). *Compare Ross v. Blake,* 136 S. Ct. 1850, 1856-

57 (2016) (language and purpose of PLRA make statutory exhaustion requirement exclusive and absolute), *with Wong*, 575 U.S. at 420 (court may equitably toll statute of limitations absent "affirmative indication from Congress" of intent to preclude that; strong prohibitory language of statute did not curtail court's equitable authority).[4]

This Court follows suit. Thus it held that courts cannot excuse a criminal defendant's noncompliance with the nonjurisdictional 14-day deadline for filing a notice of appeal, which Federal Rule of Appellate Procedure 26(b)(1) expressly prohibits courts from doing unless specifically authorized by Federal Rule of Appellate Procedure 4(b). *United States v. Muhammud*, 701 F.3d 109, 110-11 (3d Cir. 2012); *see also Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 504 (3d Cir. 1998) ("[I]t is much more likely that Congress anticipated that courts would apply traditional equitable tolling principles as they do . . . where there is no explicit limitation to their application.").

2. *The Text and History of Section 3582(c)(1)(A) Support Interpreting the 30-Day Waiting Provision as a Claims-Processing Rule Subject to Equitable Exceptions*

Holding that the First Step Act stripped courts of their equitable authority to excuse noncompliance with claims-processing rules threatens to upend this firmly-established and broad-ranging body of precedent. Examining the statutory

[4] The Supreme Court even leaves open the possibility that a court's equitable authority survives an express statement that otherwise appears to make the claims-processing rule "mandatory." *E.g.*, *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1849 n.5 (2019).

framework in light of Supreme Court and Circuit precedent confirms that the 30-day provision is a mere claims-processing rule that is subject to the courts' control. Its language would not limit a court's equitable authority in any context—let alone in the sentencing context.

The pertinent provision reads:

> The court may not modify a term of imprisonment . . . except . . . upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after [exhausting administrative appeal rights] . . . or the lapse of 30 days from the receipt of such a request [that BOP file a motion] by the warden of the defendant's facility, whichever is earlier . . . if [the Court] finds that extraordinary and compelling reasons warrant such a reduction . . . .

18 U.S.C. § 3582(c)(1)(A)(i).

This text accomplishes two things: first, it empowers the court to reduce a sentence if it finds that "extraordinary and compelling reasons" "warrant" doing so in light of sentencing law and policy. Second, it empowers the court to grant relief on the inmate's own motion—so long as BOP had a period of time (that is, 30 days) to decide whether to move the court for the same relief.

This is not language of prohibition; it is language of *authorization*. It contrasts starkly with the provision at issue in *Wong*, which stated "emphatic[ally]" that untimely claims "shall be forever barred"—yet remained amenable to equitable tolling at the court's discretion. 575 U.S. at 411, 419-20. So too does the First Step Act preserve the courts' equitable discretion.

Considering "the purposes and policies underlying the limitation

provision [and] the Act itself," as the Supreme Court instructs courts to do (*see Ramadan*, 156 F.3d at 501 (quoting *Burnett v. New York Cent. R. Co.,* 380 U.S. 424, 427 (1965)), confirms this conclusion. When it created an option to reduce otherwise final and determinate sentences more than 30 years ago, Congress gave the courts ultimate authority to determine release eligibility—which is, after all, authority to determine the sentence. But the courts' ability to exercise that authority was originally constrained by the requirement that they await a BOP motion (and thus, executive consent). *See* 18 U.S.C. § 3582(c) (1984). BOP rarely agreed to file such motions, leaving inmates no statutory recourse and courts unable to act. Christie Thompson, *Frail, Old, and Dying, but Their Only Way Out of Prison is in a Coffin*, N.Y. TIMES (Mar. 7, 2018), https://tinyurl.com/y7du9qld; *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm'n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep't of Justice) (from 2006-2011, annual average of 24 inmates released on BOP motion); *see also* Jamie Fellner, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*, Hum. Rts. Watch (Nov. 30, 2012), https://tinyurl.com/y8yoeht2.

Against that backdrop, Congress amended Section 3582(c)(1)(A) to allow courts to act on an inmate's own motion. The goal was to expand access to compassionate release—a goal accomplished by eliminating BOP's exclusive control over when judges get to judge whether release is warranted. *See* 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor

of First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

Congress did not remove BOP from the process entirely, however. The 30-day waiting period gives BOP a chance to decide whether to support an inmate's request for release and, in any case, to offer input. But it is part of a statute that honors the courts' traditional authority to act on a party's request for relief, freeing them from awaiting an executive branch "go-ahead." Plainly Congress did not intend to bar courts from acting more quickly when exigencies require. Its goal was to reduce BOP's control over when and whether judges may judge. *See Berryhill*, 139 S. Ct. at 1774 (courts may excuse administrative exhaustion where "Congress wanted more oversight [of agency] by the courts"); *Kalb*, 891 F.3d 455, 459-60. The Panel's conclusion that Congress intended the 30-day provision to rigidly constrain courts' ability to adjudicate compassionate release motions, when the Act expanded courts' ability to do so, "pervert[s] congressional intent." *United States v. Russo*, No. 16-cr-441 (LJL), 2020 WL 1862294, at *6 (S.D.N.Y. Apr. 14, 2020).

Moreover, holding that courts lack even the *option* of excusing noncompliance with the 30-day period would further neither of the "twin purposes" of administrative exhaustion: promoting judicial efficiency and protecting administrative authority. *McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992). The "judicial efficiency" rationale applies when an agency may relieve pressure on the courts by itself granting the relief sought. *Id.* at 148-49. But here, BOP lacks—and

has never had—the ability to *grant* release; it merely decides whether to support a request that a court must adjudicate. *United States v. Haney*, No. 19-cr-00541 (JSR), 2020 WL 1821988, at *3 (S.D.N.Y. Apr. 13, 2020) ("§ 3582(c)(1)(A) does not contain an exhaustion requirement in the traditional sense [in that it] does not necessarily require the moving defendant to fully litigate his claim before the agency."); *see McCarthy*, 503 U.S. at 156 (Rehnquist, J. concurring) (where BOP administrative process cannot furnish remedy prisoners seek, it is "therefore improper to impose an exhaustion requirement").

Nor would prohibiting courts from acting more quickly advance proper deference to agency authority. To the contrary: the courts, not BOP (part of the Department of Justice), have "authority" over criminal sentencing. In fact, courts are "in a unique position to determine whether the circumstances warrant a reduction" in sentence. U.S.S.G. § 1B1.13 (commentary); *see Setser v. United States*, 566 U.S. 231, 242 (2012) (ambiguity in sentencing statute implicating balance of authority between BOP and court resolved in part "by our tradition of judicial sentencing, and by the accompanying desideratum that sentencing not be left to employees of the same Department of Justice that conducts the prosecution," pointing to Section 3582(c)(1)(A)); *see also Stutson v. United States*, 516 U.S. 193, 196-97 (1996). The First Step Act restores the correct balance of authority between the judiciary and the executive branch in the sentencing context: while the executive branch should have a chance to weigh in, the court is always empowered to do justice when "extraordinary

and compelling reasons" warrant—including by excusing full compliance, in exigent circumstances, with the statutory waiting period.

CONCLUSION

The Panel's departure from the rule that courts have discretion to excuse noncompliance with nonjurisdictional claims-processing rules is inconsistent with binding precedent and not justified by the statutory language, purpose, or policy. *Amici* respectfully urge the Court to grant panel rehearing and/or rehearing *en banc*.

Dated: April 21, 2020

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Under 3d Cir. L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Roberto Finzi
Roberto Finzi
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Dated: April 21, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), 32(a)(7)(B), because this brief contains 2,589 words, excluding the parts of the brief exempted by Fed. R. App. P. 29.1(b), 32(f).

Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Further, this brief complies with the electronic filing requirements of 3d Cir. L.A.R. 31.1(c) because the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief, and no viruses have been detected. Pursuant to the Court's March 17, 2020 Notice Regarding Operations to Address the COVID-19 Pandemic, "The filing of paper copies of briefs . . . is deferred pending further direction of the Court."

/s/ Roberto Finzi
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Dated: April 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Third Circuit by using the CM/ECF system on April 21, 2020.

I certify that all participants in the case are registered CM/ECF users and thus will be served by the CM/ECF system, which constitutes service pursuant to Fed. R. App. 25(c)(2).

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