

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**No. 20-1033**

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**UNITED STATES OF AMERICA,**

**APPELLANT,**

**v.**

**FRANCIS RAIA,**

**APPELLEE.**

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

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**BRIEF OF *AMICI CURIAE* FORMER MEMBERS OF THE JUDICIARY IN  
SUPPORT OF PANEL REHEARING AND/OR *EN BANC* REVIEW**

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U.S. Court of Appeals Judge for the Third Circuit, 1992-1999

U.S. District Court Judge for the Western District of Pennsylvania, 1991-1992

**Hon. Stephen M. Orlofsky**

U.S. District Court Judge for the District of New Jersey, 1995-2003

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## TABLE OF CONTENTS

FULL LIST OF <i>AMICI CURIAE</i> .....	ii
TABLE OF AUTHORITIES .....	iv
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT .....	2
ARGUMENT .....	3
CONCLUSION .....	13
CERTIFICATIONS .....	14

## TABLE OF AUTHORITIES

### Cases

<i>United States v. Colvin</i> , No. 3:19CR179 (JBA), 2020 WL 1613943 (D. Conn. Apr. 2, 2020) .....	9
<i>United States v. Epstein</i> , No. CR 14-287 (FLW), 2020 WL 1808616 (D.N.J. Apr. 9, 2020) .....	7
<i>United States v. Jemal</i> , No. CR 15-570, 2020 WL 1701706 (E.D. Pa. Apr. 8, 2020) .....	7
<i>United States v. Jones</i> , No. CR 18-100, 2020 WL 1674145 (W.D. Pa. Apr. 6, 2020) .....	7
<i>United States v. Haney</i> , No. 1:19-cr-541, 2020 WL 1821988 (S.D.N.Y. Apr. 13, 2020) .....	9
<i>United States v. Holden</i> , No. 3:13-CR-00444-BR, 2020 WL 1673440 (D. Or. Apr. 6, 2020) .....	10
<i>United States v. Perez</i> , No. 17 CR. 513-3 (AT), 2020 WL 1546422 (S.D.N.Y. Apr. 1, 2020) .....	9
<i>United States v. Powell</i> , No. 1:94-cr-316(ESH), ECF No. 98 (D.D.C. Mar. 28, 2020) .....	9
<i>United States v. Rivers</i> , No. CR 2017-0023, 2020 WL 1676798 (D.V.I. Apr. 6, 2020) .....	7
<i>United States v. Woodson</i> , No. 18-CR-845 (PKC), 2020 WL 1673253 (S.D.N.Y. Apr. 6, 2020) ....	10
<i>Young v. Martin</i> , 801 F.3d 172 (3d Cir. 2015) .....	11

**Statutes**

18 U.S.C. § 3582(c)(1)(A) ..... 4, 6, 10, 11, 12

**Other Authorities**

Fed. R. App. P. 3(a)(2).....6

Fed. R. App. P. 12.1 ..... passim

Fed. R. Crim. P. 37..... 5, 8, 9

### **INTEREST OF *AMICI CURIAE***

*Amici curiae* are former Members of the Judiciary who have a deep and abiding interest in judicial practice and the administration of justice.<sup>1</sup> Each of the *Amici* has a particular interest in, and experience with, judicial practice, including the Federal Rules of Appellate Procedure. While *Amici* have familiarized themselves generally with the circumstances of Mr. Francis Raia’s petition for compassionate release under the First Step Act, *Amici* do not take a position on whether Mr. Raia is, in fact, entitled to such relief. Rather, *Amici* write based on their view that the panel’s precedential opinion raises concerns regarding sound judicial practices in an emergency context such as the COVID-19 pandemic.

*Amici* respectfully urge this Court to vacate that part of its opinion holding that it would be “futile” to remand to the District Court under Federal Rule of Appellate Procedure 12.1, so the District Court may consider Raia’s request in the first instance, because Raia did not comply with the First Step Act’s exhaustion requirement. Courts around the country have found exceptions to the exhaustion requirements at issue here. Thus, remand would not be “futile.”

Because this Court issued a precedential opinion resolving the exhaustion

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<sup>1</sup> Both parties to this appeal have consented to the filing of this brief.

issue for the entire Circuit without the benefit of either a District Court ruling or meaningful briefing from the parties, limited remand is warranted under Federal Rule of Appellate Procedure 12.1.<sup>2</sup> The adversarial and deliberative aspects of sound jurisprudence should not be overlooked, not even during a pandemic.

### **SUMMARY OF THE ARGUMENT**

This appeal involves an issue of exceptional and immediate importance regarding sound judicial practice: whether a court of appeals should issue a precedential opinion on a far-reaching and debatable issue of first impression, affecting numerous non-party individuals in a wide range of circumstances—some of which are literally matters of life-or-death—that had not been addressed by the district court and was not briefed in the court of appeals by the parties.

By holding that a remand to the District Court would be “futile” because defendant-appellee Francis Raia (“Raia”) failed to satisfy the administrative exhaustion requirement for seeking compassionate release under the First Step Act (the “FSA”), Op. 7, the panel’s opinion imposes an insuperable bar to the District

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<sup>2</sup> *Amici* certify that no counsel for any party authored the brief in whole or in part and that no party or its counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *Amici* or its counsel contributed money that was intended to fund preparing or submitting this brief.

Court’s consideration of Raia’s request. Further, the panel effectively decided a question that has divided courts across the country without acknowledging those authorities holding that the exhaustion requirement is subject to exceptions in the very circumstances presented here and without affording the parties the opportunity to argue why exhaustion should not be required under the FSA.

For these reasons, and as argued below, *Amici* respectfully submit that the panel should vacate that part of its precedential decision finding that “any remand [under Rule 12.1] would be futile.” Op. 7. As outlined below, it is far from certain that remand would be futile. Moreover, long after society emerges from this horrid pandemic, the panel’s decision will continue to exist, foreclosing all future litigants—in a wide variety of contexts, some of which are likely unimaginable as of the date of this brief—from ever asserting that they should be allowed to bypass the exhaustion requirement. To avoid these consequences, *Amici* respectfully ask that this Court grant panel rehearing and/or rehearing *en banc* to ensure that these issues are given a full airing and fulsome review before being resolved in a precedential opinion that sets the law of the circuit.

## **ARGUMENT**

By way of background, Raia was sentenced to three months’ imprisonment after being convicted by jury of a non-violent offense involving allegations that he



paid voters to vote for him in an election. The Government, which sought a lengthier sentence, appealed Raia's sentence to this Court. On March 3, 2020, while the Government's appeal was pending, Raia reported to the federal correctional institution in Fairton, New Jersey to begin his sentence.

Subsequently, the country was beset by the novel coronavirus, which can cause a highly contagious disease, COVID-19, for which there is as yet no known prevention or cure. A global pandemic has killed more than 100,000 people. *See* Mapping the Coronavirus Outbreak Across the World (April 10, 2020 4:37 PM), <https://www.bloomberg.com/graphics/2020-coronavirus-cases-world-map/>. The Federal Bureau of Prisons ("BOP") has acknowledged that COVID-19 cases are present among both inmates and staff in its facilities. *See* COVID-19 Cases, Federal Bureau of Prisons, <https://www.bop.gov/coronavirus/>.

Shortly thereafter, Raia asked the BOP to move the District Court for his compassionate release, that is, a reduction in sentence under the FSA, 18 U.S.C. § 3582(c)(1)(A). Raia, who is 68-years-old and suffers from Parkinson's Disease, diabetes, and a heart condition, argued that he has an increased risk of contracting COVID-19 in BOP custody. Raia further asserted that were he to contract the disease, his preexisting conditions would make it life threatening to him.

By its terms, the FSA requires a defendant to give the BOP thirty days to

respond to a compassionate-release request, measured from the receipt of a request by the Warden, before the defendant may seek such relief on his own motion before a district court. Here, however, before the BOP responded to Raia's request, and before thirty days had passed, Raia filed his own motion with the District Court seeking compassionate release. As relevant here, Raia argued that "[a]lthough 30 days ha[d] not elapsed since his request, the exhaustion requirement is futile in light of the national health emergency." *See* Letter, No. 2:18-cr-00657-WJM (D.N.J. Mar. 24, 2020), ECF No. 84.

The District Court denied Raia's motion for compassionate release on the entirely correct ground that the Government's pending appeal divested it of jurisdiction to decide Raia's motion. Crucially, however, as the panel here noted, before doing so the District Court issued an "indicative ruling," *see* Fed. R. Crim. P. 37, stating that it "would have granted the motion and released Raia to home confinement" due to, *inter alia*, the risks associated with COVID-19 and the non-violent nature of his offense. Op. 6, 7.

With the government's appeal of his sentence already pending in this Court, Raia sought relief here, filing a three-page letter motion with this Court seeking compassionate release under the FSA on the same bases presented to the District Court. Dkt. No. 17-1. In the alternative, Raia asked this Court (inaptly) to dismiss

the Government's appeal under Federal Rule of Appellate Procedure 3(a)(2) so that the District Court may have jurisdiction to consider his motion.

In a precedential opinion that issued less than a week after Raia's three-page letter motion, a panel of this Court denied Raia's motion for compassionate release under the FSA. In so holding, the Court correctly reasoned that it could not grant Raia's motion in the first instance on appeal, and that it could not dismiss the Government's appeal under Rule 3(a)(2). That is all that this Court needed to decide in denying Raia's motion. However, before disposing of Raia's motion, the Court further observed that, while Federal Rule of Appellate Procedure 12.1 provided a path for remand to the District Court to enable the District Court to consider Raia's compassionate-release request in the first instance, remand in this case would be "futile" because "Raia failed to comply with § 3582(c)(1)(A)'s exhaustion requirement," Op. 7, thereby preventing the District Court from considering whether Raia could receive compassionate release even if the matter were sent back to the District Court on a limited remand.

The panel's precedential Rule 12.1 determination, which issued without full briefing on the exhaustion issue or the benefit of a district court ruling, has the effect of making the FSA's exhaustion provision a mandatory procedural barrier to compassionate-release motions that can never be waived or excused under any

circumstances. To be sure, in the days since the panel’s decision, several courts in this Circuit have already cited its rationale in concluding that the 30-day BOP review period is a total prohibition on moving a district court for compassionate release. *See, e.g., United States v. Epstein*, No. CR 14-287 (FLW), 2020 WL 1808616, at \*3 (D.N.J. Apr. 9, 2020) (noting that “[w]hile *Raia* did not specifically address whether the FSA’s exhaustion requirement may be subject to judicially created exceptions, it is implicit in the circuit court’s decision, since it refused to remand the case to the district court to consider the request for compassionate release, because ‘any remand would be futile,’ based upon the failure to exhaust” (citation omitted)); *United States v. Jones*, No. CR 18-100, 2020 WL 1674145, at \*4 n.4 (W.D. Pa. Apr. 6, 2020) (interpreting the panel’s ruling as providing that “the procedural requirements of the First Step Act must be met prior to courts adjudicating” a motion for compassionate release); *United States v. Rivers*, No. CR 2017-0023, 2020 WL 1676798, at \*2 (D.V.I. Apr. 6, 2020) (finding that, as a result of the panel’s opinion, district courts are not permitted “to waive the exhaustion requirement”). Moreover, the Government has already cited the panel’s decision in other cases to maintain that “any request for judicial review” on a motion for compassionate release “is premature . . . where the defendant has not met the statutory prerequisites” for exhaustion. *United States v. Jemal*, No. CR 15-570, 2020 WL 1701706, at \*2 (E.D.

Pa. Apr. 8, 2020).

Importantly, however, as outlined briefly below and more fully in Raia's petition for panel rehearing and/or rehearing *en banc*, there is an ever-growing line of cases holding that the FSA's exhaustion requirement is not inflexible, and may be waived based on certain limited, equitable considerations. These authorities, which the panel did not acknowledge, directly undercut the panel's finding that "remanding the matter under Rule 12.1" so the District Court may consider Raia's compassionate-release motion "would be futile." Op. 7. Surely, as other courts have reasoned in adjudicating the numerous compassionate-release motions filed during the COVID-19 pandemic, should this Court issue a limited remand under Rule 12.1, there is precedent on which the District Court can follow through on its indicative ruling and release Raia to home confinement, without or without monitoring, as a condition of his supervised release.

Federal Rule of Appellate Procedure 12.1(a) provides, in relevant part, that where a party asks a "district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending," a district court may state "that it would grant the motion" if it could. Fed. R. App. P. 12.1(a); *see also* Fed. R. Crim. P. 37(a)(3). In turn, Rule 12.1(b) states that, armed with that "indicative ruling," a court of appeals may remand so the district court can do what it said it

would do. *See* Fed. R. App. P. 12.1(b) (“If the district court states that it would grant the motion . . . the court of appeals may remand for further proceedings but retain jurisdiction . . . .”); *see also* Fed. R. Crim. P. 37(c).

Here, as the panel rightly observed, the District Court has already issued an indicative ruling that it would grant Raia’s compassionate-release request if it had jurisdiction over Raia’s motion. The panel declined, however, to remand under Rule 12.1 because, in its view, the FSA’s “exhaustion requirement . . . presents a glaring roadblock foreclosing compassionate release at this point,” thus rendering “any remand” to the District Court “futile.” Op. 7.

In making this determination, which was essential to its decision “deny[ing] Raia’s motion outright,” Op. 7, the panel ignored a recent line of cases recognizing that—even though the exhaustion requirement appears mandated by statute—it is not absolute, but instead has certain equitable exceptions. *See, e.g., United States v. Haney*, No. 1:19-cr-541, 2020 WL 1821988 (S.D.N.Y. Apr. 13, 2020) (Rakoff, J.); *United States v. Colvin*, No. 3:19CR179 (JBA), 2020 WL 1613943, at \*2 (D. Conn. Apr. 2, 2020) (holding that the exhaustion requirement is subject to waiver); *United States v. Perez*, No. 17 CR. 513-3 (AT), 2020 WL 1546422, at \*3 (S.D.N.Y. Apr. 1, 2020) (same); *United States v. Powell*, No. 1:94-cr-316(ESH), ECF No. 98 (D.D.C. Mar. 28, 2020) (waiving exhaustion requirement on futility grounds).

Altogether, these cases underscore that far from “a glaring roadblock foreclosing compassionate release,” Op. 7, there may actually be a clear path for § 3582(c)(1)(A)’s exhaustion requirement to be waived based on the particular circumstances of a given case. That is not to say that these cases will ultimately carry the day. Indeed, some courts have concluded there are no exceptions to the FSA’s exhaustion requirement. *See, e.g., United States v. Woodson*, No. 18-CR-845 (PKC), 2020 WL 1673253, at \*1 (S.D.N.Y. Apr. 6, 2020) (denying motion where 30-day window for BOP review had not yet expired); *United States v. Holden*, No. 3:13-CR-00444-BR, 2020 WL 1673440, at \*7 (D. Or. Apr. 6, 2020) (denying motion for compassionate release after finding that the Court lacked “the authority to excuse Defendant’s failure to exhaust his administrative remedies or to waive the 30-day waiting period”). Both lines of cases deal with a complex set of U.S. Supreme Court precedents which discuss when administrative exhaustion requirements and other similar pre-filing conditions, whether judicially created or found in statutory language, may (or may not) be subject to judicial excusal.

Nevertheless, this does not change the fact that—as relevant here—the panel resolved the exhaustion waiver issue, which is percolating in federal courts throughout this country and has dire implications given the ongoing COVID-19 pandemic, on a circuit-wide basis without full briefing on the above authorities.

Against this background, and in light of the above authorities concluding that the FSA's exhaustion requirement may under applicable legal principles be waived, *Amici* respectfully submit that remand would not assuredly be futile. Surely, as the "the District Court's indicative ruling *did not mention the exhaustion requirement*," Op. 7 (emphasis added), there still exists the strong possibility that the District Court could grant Raia's motion on limited remand. Remand is, therefore, not futile.

For the foregoing reasons, this Court should remand Raia's compassionate-release motion to the District Court under Rule 12.1. That would provide the District Court with the opportunity to, in the first instance and on full briefing, albeit on an expedited basis, resolve the broad issue of whether § 3582(c)(1)(A)'s exhaustion requirement (including its alternative 30-day pre-filing hold) is subject to waiver. This question, which the panel resolved without the benefit of the District Court's analysis, is of the utmost importance to compassionate-release requests and has sweeping implications far beyond Raia's motion as well as other motions made during the ongoing COVID-19 pandemic. If either party is dissatisfied with the District Court's treatment of this hugely important issue on limited remand under Rule 12.1, they may then appeal the District Court's ruling to this Court on a full record. *See Young v. Martin*, 801 F.3d 172, 182 (3d Cir. 2015) (leaving legal questions not reached in the district court and not briefed on appeal



“for the District Court to address in the first instance on remand”).

Altogether, because of the serious ramifications of the panel’s Rule 12.1 determination, immediate panel reconsideration and/or *en banc* review should be granted. Left uncorrected, the near term effect of the panel’s decision will be to foreclose myriad potentially meritorious compassionate release motions made by vulnerable incarcerated persons during the ongoing national health emergency. While this ground, by itself, is enough to warrant further review here, the panel’s decision also has the long term (perhaps unintended) consequence of resolving the broader issue of whether there are ever exceptions to the FSA’s exhaustion requirement on a Circuit-wide basis without full briefing.

For the foregoing reasons, *Amici* respectfully submit that this Honorable Court should remand Raia’s compassionate release motion under Federal Rule of Appellate Procedure 12.1 for the District Court to consider, in the first instance, (1) whether the FSA’s exhaustion requirement may be waived, and (2) if so, whether the equities warrant granting Raia’s motion under § 3582(c)(1)(A).

## CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant panel rehearing and/or rehearing *en banc*.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

I, Thomas I. Vanaskie, counsel for *Amici Curiae*, Former Members of the Judiciary, hereby certify the following:

1. Pursuant to Local Appellate Rule 46.1(e), I am counsel of record and a member in good standing of the bar of the United States Court of Appeals for the Third Circuit;

2. This brief complies with the type-volume limitation of F.R.A.P. 29(b)(4) because the brief contains 2,405 words, excluding the parts of the brief exempted by F.R.A.P. 32(f);

3. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font;

5. I performed a virus check on the electronically filed copy of this brief using the following software: Windows Defender, Antivirus Version: 1.313.1431.0. No virus was detected;

6. On April 14, 2020, I filed an electronic copy of this brief by CM/ECF. I also caused a copy of this brief to be served electronically on the following counsel for Appellants and Appellees:

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