ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7083

CHARLES STRANGE, et al.,

***Appellants*,**

v.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

Appellees.

Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-00435 (CKK)
(Hon. Colleen Kollar-Kotelly)

No. 19-8004

IN RE: CHARLES STRANGE, et al.,

Petitioners.

Petition for Permission to Appeal Under 28 U.S.C. § 1292(b)
from an Interlocutory Order of the United States District Court
for the District of Columbia, No. 1:14-cv-00435 (CKK)
(Hon. Colleen Kollar-Kotelly)

BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF DISTRICT COURT JUDGMENT

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Court-Appointed Amicus Curiae

January 13, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under D.C. Circuit Rule 28(a)(1), court-appointed amicus curiae Erica Hashimoto states the following:

A. Parties and Amici

Except for the following, all parties and amici appearing before the district court and in this Court are listed in appellants' brief:

Erica Hashimoto from the Appellate Litigation Clinic at Georgetown University Law Center is court-appointed amicus curiae in support of the district court's order.

B. Rulings Under Review

Judge Kollar-Kotelly's June 4, 2019 order denying without prejudice plaintiffs' motion for service by Twitter is unpublished. Doc. 122.

Judge Kollar-Kotelly's July 11, 2019 order granting plaintiffs' motion to certify the June 4, 2019 order for interlocutory appeal is unpublished. Doc. 124.

Judge Kollar-Kotelly's July 30, 2019 order granting plaintiffs' motion to recertify the June 4, 2019 order for interlocutory appeal also is unpublished. Doc. 127.

C. Related Cases

Amicus is not aware of any related cases.

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GLOSSARY

Abbreviation	Meaning
FSIA	Foreign Sovereign Immunities Act

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because plaintiffs alleged violations of 18 U.S.C. §§ 2333, 2339, 2339A for terrorism-related activities and 18 U.S.C. § 1961 *et. seq*.

As discussed in Part I, this Court lacks jurisdiction over the petition for permission to appeal under 28 U.S.C. § 1292(b). The district court denied plaintiffs' motion to serve defendant Hamid Karzai via Twitter on June 4, 2019. The district court certified its June 4, 2019 order for interlocutory appeal under 28 U.S.C. § 1292(b) on July 12, 2019. Plaintiffs failed to timely petition this Court by July 22, 2019. Instead, after the district court granted plaintiffs' motion to recertify the June 4, 2019 order on July 30, 2019, plaintiffs submitted their petition to this Court on August 9, 2019.

Plaintiffs also filed a notice of appeal in Case No. 19-7083 the same day they filed their petition. This Court does not have jurisdiction over that notice of appeal unless it grants the petition for permission to appeal.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction and authority to grant a petition for permission to appeal after a district court recertified an otherwise time-lapsed certification of an order for interlocutory appeal.

2. Whether the district court properly exercised its discretion under Fed. R. Civ. P. 4(f)(3) in declining to authorize service of defendant Hamid Karzai by Twitter.

STATUTES AND REGULATIONS

All pertinent statutes and regulations are included as an addendum at the end of the brief.

STATEMENT OF THE CASE

Plaintiffs are three deceased U.S. servicemen and their parents who allege a number of State and individual defendants, including former President of Afghanistan Hamid Karzai, "purposefully, knowingly, and negligently participated in the shoot-down or suicide bombing of [a helicopter in] a mission named Extortion 17, which resulted in the death of thirty (30) U.S. servicemen." *Strange v. Islamic Republic of Iran*, 320 F. Supp. 3d 92, 95 (D.D.C. 2018). Amicus takes no view on plaintiffs' factual allegations.

The district court dismissed Afghanistan and its three government entities for lack of subject-matter jurisdiction. *See id.* at 99. And plaintiffs voluntarily dismissed three Iranian defendants. *See* Doc. 108. Four defendants remain—Iran, Al Qaeda, the Taliban, and Hamid Karzai. *See* Doc. 115 at 3.

Iran was properly served pursuant to the Foreign Sovereign Immunities Act ("FSIA"). *See* Doc. 115 at 1. Al Qaeda and the Taliban were properly served via international publication with the district court's authorization. *See* Doc. 37; Doc. 26. None has entered an appearance or responded to the complaint. *See* Doc. 122 at 6. Karzai has

not been served. *See* Doc. 122 at 6. The district court stated default judgment proceedings will not take place until plaintiffs properly serve Karzai or dismiss him without prejudice from the suit. *See* Doc. 115 at 3.

A. Plaintiffs' Initial Attempts to Serve Karzai[1]

Because plaintiffs are suing Karzai in his personal, unofficial capacity, the district court held plaintiffs could not use the FSIA's service provisions and instead must serve Karzai as an individual in a foreign country pursuant to Fed. R. Civ. P. 4(f). Doc. 55 at 7, 13–14. It also rejected plaintiffs' claim that they had served Karzai via international publication under Rule 4(f)(3), which allows for other means of service "not prohibited by international agreement, as the court orders." *See id.* at 14–15. Although the district court authorized plaintiffs to serve Al Qaeda and the Taliban via international publication, it had not ordered such service with respect to Karzai. *See id.* Nor did that service by publication clearly convey Karzai was an individual defendant in the lawsuit. *See id.*

[1] Plaintiffs do not challenge any of these district court rulings in this petition for permission to appeal.

Plaintiffs next attempted to serve Karzai pursuant to Rule 4(f)(2). *See* Doc. 122 at 1. Under certain conditions, Rule 4(f)(2) permits extraterritorial service by mail with a signed receipt. Fed. R. Civ. P. 4(f)(2)(c)(ii). Plaintiffs delivered Karzai's summons and complaint to a Mr. Kakar at the Presidential Palace in Afghanistan in June 2016. *See* Pet. Br. at 23. But the district court found this attempted service deficient because plaintiffs could not show Kakar was an agent authorized to accept service on Karzai's behalf. *See* Doc. 122 at 2. The district court allowed plaintiffs more time to establish Kakar was Karzai's authorized agent. *See id.*

In August 2018, while trying to establish Kakar's relationship to Karzai, plaintiffs moved under Rule 4(f)(3) for leave to serve Karzai via Twitter, the social media website. *See* Doc. 116. The district court denied the motion, explaining plaintiffs had not completed efforts to serve Karzai by mail. *See* Doc. 117. The court said it would reconsider the motion if Kakar was not Karzai's authorized agent and plaintiffs could not find anyone authorized to accept service for Karzai. *See* Sept. 4, 2018 Minute Order.

B. Plaintiffs' Attempt to Serve Karzai via Twitter

Plaintiffs, through their counsel's Twitter account, on December 21, 2018 tweeted the following: "Strange v. Islamic Republic of Iran, et al. @KarzaiH." *See* Pet. Br., Ex. 8.[2] The tweet also included a partial screenshot of a summons—addressed to Karzai at an Embassy—in which the only fully readable sentence states: "A lawsuit has been filed against you." *Id.* It also included an embedded link to plaintiffs' counsel's website that, if clicked, would reveal the full summons and complaint. *See* Pet. Br., Ex. 8. Six months later, plaintiffs asked the district court to hold the December 2018 tweet properly served Karzai under Rule 4(f)(3). *See* Doc. 121.

The district court denied plaintiffs' motion without prejudice. *See* Doc. 122 at 6. It first pointed out it had not authorized plaintiffs' December 2018 tweet pursuant to Rule 4(f)(3) and refused to "retroactively approve such service" to find Karzai properly served in December 2018. *See id.* at 3.

The district court, in its discretion, also declined to prospectively order service of Karzai via Twitter. *See id.* at 6. It found plaintiffs'

[2] Twitter's features are described in Part II, *infra*.

proffered evidence tallying tweets from Karzai's Twitter account over ten days in December 2018 insufficient to establish Twitter would be an effective method of service six months later, in May 2019. *See id.* at 3. Plaintiffs' information about Karzai's Twitter account activity was also factually incomplete because not all tweets from Karzai's account are sent from Karzai himself—according to his account, only those signed "HK" are his personal tweets—and plaintiffs did not specify which of the December 2018 tweets were signed "HK." *See id.*

Lacking evidence about Karzai's recent Twitter use, the district court reviewed his account's activity from May 1, 2019 to May 30, 2019. *See id.* Although Karzai's account posted 60 tweets that month, only one tweet was signed "HK." *See id.* The district court also calculated Karzai's Twitter account received about 165 tweets during the week of May 25, 2019. *See id.* Turning from Karzai's account activity to the content of plaintiffs' tweet, the district court questioned whether Karzai would be likely to click the "somewhat-ambiguous link sent by a stranger" to access the service documents on plaintiffs' counsel's website. *See id.* at 6. Because of Karzai's limited personal association with the account, the high volume of tweets regularly directed at his account, and uncertainty

as to the likelihood he would click an unfamiliar link to view the service documents, the district court determined service via Twitter was not "reasonably calculated" to notify Karzai of the lawsuit. *See id.*

C. Certification of the Order Denying Twitter Service for Interlocutory Appeal

After the district court denied plaintiffs' motion to serve Karzai via Twitter, plaintiffs filed a motion to certify the order for interlocutory appeal under 28 U.S.C § 1292(b). *See* Doc. 123 at 1. The district court certified the order on July 12, 2019. *See* Doc. 124 at 1–2. It found § 1292(b)'s three certification requirements met because: (1) the issue involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) immediate appeal would materially advance the litigation. *See id.*

The statute provided plaintiffs ten days—until July 22, 2019—to file an interlocutory appeal petition with this Court. *See* 28 U.S.C. § 1292(b). Plaintiffs failed to do so. On July 23, 2019, they instead filed a motion in the district court seeking an extension of time or recertification of the order. *See* Doc. 125 at 1. The district court directed plaintiffs to address whether (1) the ten-day time limit in § 1292(b) is jurisdictional, and (2) the district court could extend plaintiffs' time to

file a petition for appeal with this Court. *See* July 25, 2019 Minute Order. Plaintiffs acknowledged the deadline is jurisdictional but argued that fact has "no bearing" on the district court's authority to grant extensions. Doc. 126 at 2. Plaintiffs also argued the Supreme Court and several circuits have allowed parties who missed interlocutory appeal deadlines to seek recertification in the district court starting a new ten-day period. *Id.* at 2–4.

The district court concluded it could not grant an extension but granted plaintiffs' motion for recertification on July 30, 2019. *See* Doc. 127 at 2. Although it recognized a circuit split on whether recertification could restart the time to petition for review from an interlocutory order, the district court found no cases within this Circuit addressing the question. *Id.* at 2. The district court found its original reasons for certification remained valid and recertified its June 4, 2019 order without expressing a view about whether recertification provides this Court jurisdiction over the petition for permission to appeal. *Id.*

Plaintiffs petitioned this Court for review on August 9, 2019, ten days after recertification. This Court appointed undersigned counsel as amicus curiae in support of the district court's June 4, 2019 order and

directed plaintiffs and amicus curiae to submit briefs addressing both: (1) this Court's § 1292(b) jurisdiction over a petition to appeal a recertified interlocutory order; and (2) whether this Court should grant the petition for permission to appeal the district court's order on service by Twitter.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over plaintiffs' untimely petition for permission to appeal the district court's certified interlocutory order denying Twitter service. Section 1292(b) allows a court of appeals to permit appeal of a certified interlocutory order if the petition for permission to appeal is filed within ten days of the certified order. 28 U.S.C. § 1292(b). This Court has found 28 U.S.C. § 1292(b)'s deadline jurisdictional, meaning that failure to file a petition to appeal within ten days deprives it of jurisdiction. *Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1194 (D.C. Cir. 2000). But this Court has not addressed the question presented here—whether it has jurisdiction to permit an appeal when a district court recertifies an interlocutory order after the time to petition from its initial certification has expired. Because recertification does not restart the ten-day jurisdictional clock, this Court should dismiss plaintiffs' petition for lack of jurisdiction.

The ten-day deadline established in 28 U.S.C. § 1292(b) is an unalterable jurisdictional rule. Congress defines federal court jurisdiction. It deliberately limited interlocutory appellate jurisdiction to review of petitions filed within ten days of certification. The Supreme

Court has repeatedly held courts have no authority to evade or subvert jurisdictional deadlines for equitable reasons. The Federal Rules of Appellate Procedure further confirm that the unbending nature of § 1292(b)'s jurisdictional filing deadline permits no exceptions.

Contrary to plaintiffs' argument, *Baldwin Cty. Welcome Center v. Brown*, 466 U.S. 147 (1984), and other circuit court decisions tell this Court nothing about its jurisdiction over this petition for appeal from a recertified order. In *Baldwin*, neither the majority opinion nor the parties addressed recertification. To be sure, *Baldwin*'s dissent concluded recertification resets the ten-day clock. But that dissent—along with every circuit case holding recertification resets the jurisdictional clock—pre-dates the Supreme Court's 2007 decision holding that jurisdictional deadlines cannot be extended for equitable reasons. *See Bowles v. Russell*, 551 U.S. 205 (2007). The Seventh Circuit—the only circuit to have considered this question in light of recent Supreme Court cases—held there is no jurisdiction over recertified orders. Even if this Court has jurisdiction, it should still dismiss the untimely petition because § 1292(b) is subject to mandatory claim-

processing rules that preclude recertification from extending § 1292(b)'s filing deadline.

If this Court has jurisdiction over the petition and finds it timely, this Court should either deny permission to appeal because the district court's order on service by Twitter does not meet § 1292(b)'s standards or affirm the district court. Fed. R. Civ. P. 4(f)(3) permits extraterritorial service via Twitter if ordered by the district court, not prohibited by international agreement, and "reasonably calculated" to provide the defendant with notice of the pending action. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); Fed. R. Civ. P. 4(f)(3). The district court properly exercised its discretion to deny plaintiffs' request to serve Karzai via Twitter upon finding such service was not reasonably calculated to notify him of this lawsuit.

Service of Karzai via Twitter does not meet the notice standard set forth in *Mullane* for the three reasons identified by the district court. First, plaintiffs did not show Karzai—who has been sued in his individual capacity—personally uses his Twitter account with regularity. The district court found that although Karzai's Twitter account posted 60 tweets in May 2019, he personally posted only one of those tweets.

Second, Karzai is a public figure whose Twitter account receives many tweets—the district court found 165 in the last week of May 2019. Given the high volume of tweets received by his account and the lack of evidence he previously corresponded with plaintiffs' counsel, plaintiffs did not show he is likely to notice a single tweet from their counsel's account. Finally, the confusing text of plaintiffs' tweet is not reasonably likely to provide adequate notice of the suit, even if Karzai views the tweet.

Refusing to order a method of service not reasonably likely to give notice under Rule 4(f)(3) is not an abuse of discretion, regardless of the previous ineffectiveness of other methods of service. *See Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 84 (D.C. Cir. 2014). *But see* Pet. Br. at 21–27. Because the district court's careful factual reasoning demonstrates plaintiffs' proposed service would not provide Karzai adequate notice, this Court should either (1) deny the petition for permission to appeal because it does not meet § 1292(b)'s standard; or (2) hold the district court's well-reasoned decision did not abuse its discretion.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' UNTIMELY PETITION FOR INTERLOCUTORY APPEAL.

The district court granted plaintiffs' motion to certify the order denying Twitter service for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Doc. 124. This Court may permit appeal of a certified order "if application is made to it within ten days after the entry of the order." 28 U.S.C. § 1292(b). Plaintiffs' ten-day period started July 12, 2019, the day the district court certified the order. *See* Doc. 124; Fed. R. App. P. 5(a)(3).

Plaintiffs did not file their petition within that ten days. Instead, they allowed the time to petition to expire, then asked the district court to *re*certify its interlocutory order, and now argue this Court has jurisdiction to consider their petition because it was filed ten days after recertification. *See* Pet. Br. at 8, 13–16. Although seven circuits in cases from 1975 to 2002 have found jurisdiction to permit review of recertified interlocutory orders, the Seventh Circuit recently held—in light of Supreme Court clarification that jurisdictional deadlines are mandatory—it has no jurisdiction to review a recertified order when § 1292(b)'s statutorily mandated ten days have elapsed from the initial

certification order. *See Groves v. United States*, 941 F.3d 315, 325 (7th Cir. 2019). Neither the Supreme Court nor this Court has addressed this precise jurisdictional question.

This Court has an independent duty to ensure it does not exceed its jurisdiction. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). It considers the jurisdictional question de novo. *See id.* It should conclude § 1292(b)'s jurisdictional ten-day limitation is unalterable by recertification. *See Groves*, 941 F.3d at 325. Federal appellate rules and recent Supreme Court precedent confirm this conclusion. But even if this Court has jurisdiction, the Supreme Court's recent decision on mandatory claim-processing rules forecloses consideration of plaintiffs' petition.

A. Recertification Does Not Restart § 1292(b)'s Jurisdictional Ten-Day Deadline.

This Court has no jurisdiction over plaintiffs' untimely petition; it lacks authority to circumvent Congress's statutory deadline limiting interlocutory appellate jurisdiction. Exercising jurisdiction based on recertification of a § 1292(b) interlocutory order would do just that.

The Constitution empowers Congress to define federal courts jurisdiction. U.S. CONST. art. 3, § 1. The Supreme Court has emphasized

that congressionally created jurisdictional elements are "essential" to the separation of powers, restraining courts from acting unless those elements have been met. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998); *see Groves*, 941 F.3d at 323. Addressing a statute similar to § 1292(b), the Supreme Court recently clarified a statutory time limit to appeal a final judgment "is a jurisdictional requirement" and courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214. Last year, the Court held even a *non*-jurisdictional deadline immoveable. *See Nutraceutical*, 139 S. Ct. at 715. And if courts lack authority to create equitable exceptions even to certain non-jurisdictional deadlines, there can be no question they lack authority to circumvent the constitutional limits of jurisdictional deadlines through recertification.

Section 1292(b) authorizes courts of appeals to permit appeal from a certified interlocutory order only "if application is *made to it within ten days after entry of the order*." 28 U.S.C. § 1292(b) (emphasis added). This Court has held that ten-day limit jurisdictional. *See*, *e.g.*, *Carr Park, Inc. v. Tesfaye*, 229 F.3d 1192, 1194 (D.C. Cir. 2000) (agreeing with all circuits to have addressed the issue that "section 1292(b)'s filing period is

jurisdictional"). The jurisdictional deadline's text does not authorize courts of appeals to extend it in any way including recertification. *See id.* (explaining the statute provides "no exception to the time for filing"); *see Groves*, 941 F.3d at 321. That deadline runs from the date the district court first certifies an order. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a)(3). Plaintiffs' failure to timely comply with § 1292(b)'s jurisdictional deadline therefore "necessitat[es] dismissal." *E.g., Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017).

The only exceptions to jurisdictional deadlines must be in the statute, and Congress created no exceptions for § 1292(b)'s ten-day deadline. *See Bowles*, 551 U.S. at 214. This stands in stark contrast to 28 U.S.C. § 2107(c), which allows a district court to "extend the time for appeal upon a showing of excusable neglect or good cause." Section 1292(b), by comparison, has no language allowing a district court (or this Court) to extend the ten-day period to file a petition for permission to appeal.

Congress had good reason to adopt an absolute rule for interlocutory appeals because such appeals are exceptions to the general rule that appellate courts must await final judgment review. *See*

Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 716 (2019). A litigant who fails to timely file a notice of appeal from a final judgment has no avenue to appeal without a reasonable neglect or good cause exception. But a litigant who misses an opportunity for interlocutory review still may appeal when the litigation is final. *See Groves*, 941 F.3d at 324. Interlocutory appeals—decided while cases are pending in the district court—are intended to materially advance ultimate termination of the district court litigation. Section 1292(b)'s ten-day filing period ensures these appeals proceed quickly to speed resolution in the district court. The timing provisions for interlocutory appeals are therefore "purposefully unforgiving." *Nutraceutical*, 139 S. Ct. at 716; *see Groves*, 941 F.3d at 324. If Congress wanted district courts to have power to extend the interlocutory appeals deadline, as they do for notices of appeal, § 2107(c) shows it knew how to do so. But it did not, and the filing period Congress created in § 1292(b) thus permanently expires ten days after the district court certifies an order for interlocutory appeal. Otherwise, the district court could extend § 1292(b)'s ten-day requirement multiple times for any equitable reason or no reason at all—merely by recertifying the order. Courts of appeals are similarly without

authority to enlarge their jurisdiction by allowing recertification to expand the ten-day period to appeal. *See Groves*, 941 F.3d at 325.

B. The Federal Rules of Appellate Procedure Confirm Recertification Cannot Circumvent § 1292(b)'s Jurisdictional Filing Deadline.

The federal appellate rules confirm § 1292(b) imposes a mandatory ten-day deadline as a prerequisite to interlocutory appellate jurisdiction. Appellate Rule 5, combined with the language of § 1292(b), underscores the ten-day filing deadline starts when the district court first certifies an order for interlocutory appeal. District courts have two options for certifying an order for interlocutory appeal. A district court may certify an order for review at the same time it issues a merits ruling and "shall so state in writing in such order." 28 U.S.C. § 1292(b). Alternatively, a district court "may amend its order, either on its own or in response to a party's motion to include the required permission or statement." Fed. R. App. P. 5(a)(3).

The district court did the latter, amending its June 4, 2019 order on July 12, 2019 to certify it for interlocutory appeal. *See* Doc. 124. Though the court entered its certification as a separate order, Rule 5(a)(3) treats that July 12, 2019 certification order as an amendment to the June 4,

2019 order denying Twitter service. Appellate Rule 5(a)(3) specifies that "the time to petition runs from entry of an amended order." Fed. R. App. P. 5(a)(3). This rule highlights the district court's certification starts § 1292(b)'s ten-day clock to petition this Court. Rule 5(a)(3) does not contemplate a district court amending an already-amended order through recertification.

Two other rules confirm § 1292(b)'s mandatory filing deadline is without extension or exception. Appellate Rule 5(a)(2) specifies timely filing is mandatory: Petitions for permission to appeal "*must be filed within the time specified* by the statute or rule authorizing the appeal." Fed. R. App. P. 5(a)(2) (emphasis added). And Appellate Rule 26(b), which generally authorizes extensions of time, has a significant caveat: Courts of appeals "may not extend the time to file . . . a notice of appeal (except as authorized in Rule 4) *or a petition for permission to appeal*." Fed. R. App. P. 26(b)(1) (emphasis added). Those rules "express a clear intent to compel rigorous enforcement" of filing deadlines. *See Nutraceutical*, 139 S. Ct. at 715.

Plaintiffs argue Appellate Rule 4(a)(5), which permits an extension of time to file a notice of appeal as of right, supports finding

recertification restarts § 1292(b)'s clock. *See* Pet. Br. at 13–14. But Appellate Rule 26(b) directly refutes plaintiffs' argument. As noted, Rule 26(b)(1) recognizes Rule 4(a)(5) does not apply to cases like this one because this is a petition for permission to appeal, not an appeal as of right. Instead, these rules reflect Congress's statutory limitation on interlocutory appellate jurisdiction and reaffirm this Court lacks authority to extend the time to petition for permissive interlocutory appeal.

Simply put, the rules confirm plaintiffs' failure to file their petition in accordance with the statute's deadline deprives this Court of jurisdiction. And because plaintiffs' error is one of "jurisdictional magnitude" without statutory exception, *Bowles*, 551 U.S. at 213, they cannot rely on extension, equitable exception, or recertification to excuse it.

C. The Supreme Court Has Never Addressed Whether Recertification Restarts § 1292(b)'s Ten-Day Deadline, and Circuit Decisions Holding It Does Pre-Date the Court's Recent Cases on Jurisdictional Deadlines.

Citing *Baldwin Cty. Welcome Center v. Brown*, 466 U.S. 147 (1984), plaintiffs argue the Supreme Court has found recertification resets the clock on § 1292(b)'s jurisdictional deadline because it decided a case that

had come to it by way of a recertified order. *See* Pet. Br. at 13–14. Not so. The majority in *Baldwin* never addressed recertification. Instead, the Court summarily reversed on an unrelated question without merits briefing or oral argument. *Baldwin*, 466 U.S. at 152–53 (Stevens, J. dissenting); *see* Addendum 2.

Only Justice Stevens' dissent noted the jurisdictional issue, observing it was a "close one" that had generated a circuit split. *Baldwin*, 466 U.S. at 161–62 (Stevens, J. dissenting). He recognized both that the issue should not be decided summarily and that finding jurisdiction would "essentially render[] the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will." *Id.* at 162. He nonetheless concluded—without analysis—recertification of an interlocutory order could extend § 1292(b)'s deadline. *Id.*

Even if the Court exercised jurisdiction based on recertification *sub silentio*, *Baldwin* at most qualifies as a non-binding "drive-by jurisdictional ruling[]." *Steel Co.*, 523 U.S. at 91; *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006); *Groves*, 941 F.3d at 322. The Supreme Court has repeatedly found "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2

(1996); *see Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

Nor can plaintiffs find persuasive support in the rulings of other circuit courts. To be sure, many circuits have held that district court recertification restarts the jurisdictional clock. *See, e.g.*, *Marisol A. by Forbes v. Giuliani*, 104 F.3d 524, 529 (2d Cir. 1996). But those cases all pre-date *Bowles* and *Nutraceutical*. And the only circuit opinion since those Supreme Court cases finds no jurisdiction over the untimely petition. *Groves*, 941 F.3d at 325. Indeed, in *Groves*, the Seventh Circuit overturned its prior precedent on this issue in light of *Bowles* and *Nutraceutical*. *Groves*, 941 F.3d at 325. The Seventh Circuit reasoned those cases severely undermine the idea that courts may extend fixed jurisdictional deadlines, whether directly or indirectly through recertification. *Id.* at 319–20.

Baldwin, and the pre-*Bowles* circuit decisions, reflect the Supreme Court's once-prevalent lack of precision in distinguishing between jurisdictional timeliness requirements on the one hand and non-statutory timeliness rules and elements of a cause of action on the other.

See, e.g., Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) ("Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis."); *see also Bowles*, 551 U.S. at 209 n.2 (acknowledging "this Court's past careless use of terminology" regarding jurisdictional requirements). More recently, the Court has clarified lower courts must strictly adhere to true statutory jurisdictional deadlines because they implicate the constitutional separation of powers. *See Bowles*, 551 U.S. at 212–13. Like the Seventh Circuit, this Court should hold it has no jurisdiction over the petition for review of the recertified order.

D. Even If This Court Finds Jurisdiction, Appellate Rules 5(a) and 26(b)(1) Preclude Recertification from Extending § 1292(b)'s Filing Deadline.

Even if this Court finds recertification can restart § 1292(b)'s jurisdictional deadline, Appellate Rules 5(a) and 26(b)(1) are mandatory claim-processing rules that foreclose this Court from altering that ten-day filing deadline. The Court recently held Fed. R. Civ. P. 23(f)'s fourteen-day deadline to petition for permissive interlocutory appeal

from a class certification ruling, although non-jurisdictional, is a mandatory claim-processing rule that courts lack authority to alter or extend. *Nutraceutical*, 139 S. Ct. at 715. The Court's unanimous holding and rationale in *Nutraceutical* establish that once Rule 23(f)'s deadline has expired and a party properly invokes the mandatory rule, lower courts lack authority to extend the time to petition for review.[3] So too with § 1292(b) interlocutory appeals. Because Appellate Rules 5(a) and 26(b)(1) govern permissive interlocutory appeals under both Rule 23(f) and § 1292(b), district courts are similarly without authority to restart or extend § 1292(b)'s ten-day filing period by recertifying interlocutory orders. This Court should thus hold § 1292(b)'s ten-day period cannot be circumvented by recertification.

As discussed above, *see supra* Part I.C, circuit cases permitting recertification to restart the ten-day filing period were decided long before the Court decided *Nutraceutical*, and none considers whether

[3] Because Karzai has not been served, he could not raise the mandatory claim-processing rule. The procedural posture of this case therefore precludes this Court from considering waiver or forfeiture.

Rules 5(a) and 26(b)(1) are mandatory claim-processing rules.[4] Those courts have instead adopted a variety of equitable approaches to address recertification. Amicus sets forth those approaches for this Court's information if it concludes it is not required to dismiss plaintiffs' untimely petition:

- Absence of Petitioner Fault: The Third and Sixth Circuits have found a petition for review from a recertified order may be granted if the party seeking certification was not at fault for the untimely petition. *See, e.g., In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).
- Balancing Fault and Prejudice: Several circuits have granted petitions after balancing petitioner's degree of fault against prejudice to the respondent. *See, e.g., Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 867 (4th Cir. 2001).
- Reasons for Certification Remain: One court has concluded petitions may always be granted regardless of petitioner's fault as long as the original reasons for certification still exist.

[4] The *Groves* court found § 1292(b)'s limitation jurisdictional rather than a mandatory claim-processing rule covered by *Nutraceutical*. *Groves*, 941 F.3d at 319.

See Aparicio v. Swan Lake, 643 F.2d 1109, 1112 (5th Cir. 1981).

Each of these approaches, although potentially plausible before *Bowles* and *Nutraceutical*, provide this Court no guidance on the primary jurisdictional question before it. This Court should dismiss plaintiffs' petition for lack of jurisdiction or, alternatively, if this Court concludes Appellate Rules 5(a) and 26(b)(1) are mandatory claim-processing rules, dismiss the petition as untimely.

II. THE DISTRICT COURT PROPERLY DECLINED TO AUTHORIZE SERVICE OF HAMID KARZAI VIA TWITTER UNDER RULE 4(F)(3).

Plaintiffs filed a motion in May 2019 asking the district court to deem former President of Afghanistan Hamid Karzai properly served by their counsel's December 2018 tweet directed at Karzai's Twitter account. *See* Doc. 121. The district court properly exercised its discretion in refusing to "retroactively approve such service" because it had not yet authorized plaintiffs to serve Karzai via Twitter as required by Fed. R. Civ. P. 4(f)(3). Doc. 122 at 3; *see Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 80 (D.C. Cir. 2014) ("To validly effectuate service under Rule 4(f)(3), a plaintiff therefore must affirmatively seek and obtain the district court's authorization for a particular means of service."). And the district

court properly exercised its discretion in declining to prospectively order service by Twitter because the factual record in May 2019 showed Twitter was not "reasonably likely to apprise Defendant Karzai of this lawsuit in which he is being sued in his individual capacity." Doc. 122 at 6.

Fed. R. Civ. P. 4(f) governs service of process on individuals, like Karzai, in foreign countries. Rule 4(f)(3) permits extraterritorial service "by other means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f)(3). Whether to permit service of process by Twitter under Rule 4(f)(3) "is committed to the sound discretion of the district court." *Freedom Watch*, 766 F.3d at 81 (internal quotation marks omitted). Any method of service authorized under Rule 4(f)(3) must comport with the "elementary and fundamental requirement of due process" that it provide "notice reasonably calculated, under all the circumstances, to apprise [the defendant] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The district court's careful and fact-bound determination about whether plaintiffs' tweet would provide reasonable notice to Karzai neither meets § 1292(b)'s

high standards for granting review nor is an abuse of discretion. This Court should thus deny the petition or affirm the district court.

Twitter communication differs from other online and social media communication. The district court's conclusion that plaintiffs' proposed method of serving Karzai does not meet Rule 4(f) standards requires understanding Twitter's features. A brief explanation follows. Twitter is a social media website that "allows its users to electronically send messages of limited length to the public." *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019). Registered users can post their own messages ("tweets"), repost the tweets of others, "like" others' tweets, and reply to tweets. *See id.* Users can also "follow" other users, which means all the followed users' tweets will appear on the user's continuously updated home page. *See id.* Of importance here, users can "mention" (or, more colloquially, "tweet at") each other by including another user's username in a tweet. *See id.* The mentioned user may receive notification when their username is mentioned, *see id.*, and they may view those mentions on a page separate

from their home page.[5] Plaintiffs' December 2018 tweet "mentions" Karzai's username. *See* Pet. Br., Ex. 8.

Twitter differs from email in important ways. First, posting a tweet is akin to posting on a public, online bulletin board that imposes restrictions on the length of the message posted. To be sure, Twitter does have a private, direct-message function. But Twitter users can opt not to receive direct messages from accounts they do not follow, and the direct message function—like most other functions on Twitter—can be "blocked" or "muted," an option that may be useful for popular users who are frequently messaged or mentioned.[6] *See Knight*, 928 F.3d at 231. Second, unlike email, Twitter does not allow Word or PDF document attachments.[7] Rather, if a user wishes to direct another user to a

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[5] *Help Center: About Different Types of Tweets*, TWITTER, https://help.twitter.com/en/using-twitter/types-of-tweets.

[6] *Help Center: Direct Messages*, TWITTER, https://help.twitter.com/en/using-twitter/direct-messages; *Help Center: How to Use Advanced Muting Options*, TWITTER, https://help.twitter.com/en/using-twitter/advanced-twitter-mute-options.

[7] *Help Center: How to Post Photos or GIFS on Twitter*, TWITTER, https://help.twitter.com/en/using-twitter/tweeting-gifs-and-pictures (allowing attachments only of only "GIF, JPEG, and PNG files").

document, that user must embed a link to a separate website containing the document.[8] *See* Pet. Br., Ex. 8.

The district court correctly concluded service of Karzai via Twitter was not "reasonably calculated, under all the circumstances," to notify him of the pending lawsuit, *Mullane*, 339 U.S. at 314, because plaintiffs did not show Karzai: (A) personally uses his Twitter account with any regularity; (B) would likely notice a tweet from a stranger among the large volume of tweets mentioning his account; or (C) would be reasonably likely to click a link to an unknown website on the chance it might contain legitimate legal documents. Doc. 122 at 3–4. Because the record supports that determination, the district court properly exercised its discretion to deny plaintiffs' proposed method of service, and this Court should deny the petition or, if it grants the petition, affirm the district court.

[8] *Help Center: How to Post Links in a Tweet*, TWITTER, https://help.twitter.com/en/using-twitter/how-to-tweet-a-link.

A. The District Court Reasonably Found Plaintiffs Failed to Show Karzai Personally Uses His Twitter Account on a Regular Basis.

Although Karzai has an active Twitter account bearing his name,[9] the record shows his actual engagement with the account is nominal at best. *See* Doc. 122 at 3. To prove Karzai's regular Twitter use, plaintiffs highlight facts regarding his account's activity in December 2018, around the time they tweeted at him. *See* Pet. Br. at 27. Plaintiffs argued Karzai "has a strong presence on Twitter and seems to tweet daily to communicate with his audience" and tallied his accounts' tweets for a ten-day period in December 2018. *See* Doc. 122 at 3 (quoting Doc. 121 at 14); *see also* Pet. Br. at 21. But the district court noted plaintiffs did not indicate "which, if any, of th[o]se tweets were sent by Defendant Karzai personally." Doc. 122 at 3. That missing information was "highly relevant," the district court explained, because Karzai's Twitter profile clarifies not all tweets from the account are sent by Karzai. *Id.* Instead, only tweets signed "HK" are from Karzai himself. *Id.* Conducting its own review of Karzai's Twitter account, the district court determined that only one tweet of 60 from the account had been signed "HK" during the

[9] Hamid Karzai (@KarzaiH), TWITTER, https://twitter.com/KarzaiH.

month of May 2019. *See id.* Stressing Karzai is being sued in his individual capacity, the district court reasoned "[t]he fact that numerous tweets are sent from Defendant Karzai's account by an unknown individual is not sufficient to establish Defendant Karzai's personal presence on Twitter." *Id.*

Plaintiffs rely on cases where courts approved service via email or social media platforms. *See* Pet. Br. at 17–21. But the district court considered each of these cases and identified critical factual distinctions explaining why service in those circumstances was more likely to provide reasonable notification. *See* Doc. 122 at 4–6.[10] "[T]he non-controlling, out-of-circuit cases which were cited by [p]laintiffs," the district court concluded, "are easily distinguishable as they involved service by electronic means other than Twitter, the use of Twitter as a supplementary method of service, or the use of Twitter related to the subject matter of the lawsuit." *Id.* at 6. Given Karzai's "limited personal

[10] For instance, in one case, a defendant sued for financing terrorist organizations had used Twitter to fundraise for those terrorist organizations. Doc. 122 at 5 (distinguishing *St. Francis Assisi v. Kuwait Finance House*, No. 16-cv-3240, 2016 WL 5725002 (N.D. Cal. Sept. 30, 2016)). In another case, the defendant tweeted daily, tweeted it knew about the pending lawsuit, and was also served by first-class mail. *See* Doc. 122 at 5.

presence on Twitter," the district court properly concluded "service by Twitter is not reasonably calculated to apprise him of the pending lawsuit." Doc. 122 at 3.

B. The District Court Reasonably Concluded the High Volume of Tweets Directed at Karzai's Account Reduced the Likelihood a Stranger's Single Tweet Would Provide Notice.

In addition to examining the number of tweets Karzai personally posted, the district court also examined the number of Twitter mentions his account received. The district court explained that during the seven-day period from May 25, 2019 to May 31, 2019, Karzai's account received about 165 Twitter mentions. *Id.* at 3. That means in one week, there were 165 public postings like plaintiffs' December 2018 tweet mentioning Karzai's username. *See* Pet. Br., Ex. 8. "The high volume of tweets" directed at Karzai reasonably led the district court "to question whether or not he would notice a single tweet from a stranger." *See* Doc. 122 at 3. Plaintiffs assert it is "inconceivable" Karzai did not see their tweet, *see* Pet. Br. at 27, but provide no evidence in support.

In distinguishing the cases cited by plaintiffs, the district court noted that, unlike in cases where service via social media was authorized, plaintiffs here did not provide evidence of prior communications with

Karzai or show Karzai had referred plaintiffs to his social media profile. Doc. 122 at 4 (distinguishing *WhosHere, Inc. v. Orun*, No. 1:13-CV-00526, 2014 WL 670817, at *4 (E.D. Va. Feb. 20, 2014)). Nor did plaintiffs show Karzai "is presumably abreast of both the subject matter of the litigation and is likely already in receipt of the complaint" as a result of prior communications. *See WhosHere,* 2014 WL 670817, at *4. The district court was therefore well within its discretion to conclude plaintiffs failed to demonstrate their single tweet would be reasonably likely to provide Karzai with adequate notice of their lawsuit.

C. The District Court Reasonably Inferred Karzai is Unlikely to Click on a Link to an Unknown Website Embedded in a Tweet from a Stranger.

The district court's concerns with service via Twitter were compounded by the content and format of plaintiffs' tweet. The district court explained "Karzai would be required to click on . . . a link to [p]laintiffs' counsel's website containing the service materials" to learn about the lawsuit. *See* Doc. 122 at 4. And plaintiffs "presented no evidence whatsoever" that Karzai "would be likely to click on a link that was tweeted at him from [p]laintiffs' counsel." *See* Doc. 122 at 4. In fact, "due to cyber-security concerns," Karzai may reasonably be "reluctant to

click on a link sent to him by a stranger." Doc. 122 at 4. The district court's inference is sound. Given that Twitter urges users to be cautious when clicking on links,[11] a user may well refuse to click on any links sent to them on the site, even if the link appears to pertain to a legitimate legal matter.[12] *See* Pet. Br., Ex. 8.

Plaintiffs suggest Karzai need only view the tweet via his mentions on the Twitter interface for adequate notice. *See* Pet. Br. at 27. But counsel's tweet did not "convey the required information" to apprise Karzai of the lawsuit and afford him an opportunity to present his objections. *See Mullane*, 339 U.S. at 314. The district court properly acknowledged the inaccuracies in the viewable content of the tweet. *See* Doc. 122 at 4; Pet. Br., Ex. 8. Specifically, plaintiffs addressed the notice to "Afghanistan's embassy in the United States, a location at which Defendant Karzai was not present, making the notice appear to be an

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[11] *See Help Center: Evaluating Links on Twitter*, TWITTER, https://help.twitter.com/en/safety-and-security/account-security-tips ("In general, please use caution when clicking on links.").

[12] *See generally Civil Procedure—Service of Process—District Court Allows Service of Process on an International Defendant via Twitter Under Rule 4(f)(3)*—St. Francis Assisi v. Kuwait Finance House, No. 3:16-cv-3240, 2016 WL 5725002 (N.D. Cal. Sept. 30, 2016), 130 Harv. L. Rev. 1962 (2017) (discussing various problems that may prevent service via Twitter from satisfying constitutional notice standards).

issue for the embassy rather than for Defendant Karzai personally." Doc. 122 at 4; Pet. Br., Ex. 8.

To be sure, a tweet perhaps *could* provide sufficient notice under different circumstances. *See St. Francis Assisi*, 2016 WL 5725002, at *2. But not on these facts. Plaintiffs' flawed December 2018 attempt at service via Twitter highlights the wisdom of Rule 4(f)(3)'s court order requirement. Fed. R. Civ. P. 4(f)(3). Because whether a tweet is reasonably calculated to provide notice depends partly on its form and content, such decisions are best entrusted to the discretionary direction of the district court through Rule 4(f)(3) orders. *See Freedom Watch*, 766 F.3d at 78.

Plaintiffs argue they exhausted other avenues of service and thus needed to serve Karzai via Twitter. *See* Pet. Br. at 21–27. But plaintiffs' alleged exhaustion of other means of service is both irrelevant to whether Twitter would reasonably provide Karzai adequate notice and contradicted by the record. First, a district court is not obligated "to authorize an alternative method of service under Rule 4(f)(3) when there is no other available method to serve the defendant." *See Freedom Watch*, 766 F.3d at 84. And plaintiffs' contention they have "reasonably

attempted to effectuate service on the defendant[]" through other means does not speak to whether service via Twitter will provide sufficient notice in this case. *See* Pet. Br. at 18–19.

Second, in its order originally certifying the question for interlocutory appeal, the district court noted "[p]laintiffs retain the option of properly serving Defendant Karzai via publication." *See* Doc. 124 at 2. Thus, the district court itself explained plaintiffs may still seek Rule 4(f)(3) authorization for service of Karzai. *See id.* For the foregoing reasons, the district court properly exercised its discretion in concluding service via Twitter was not "reasonably likely to apprise Defendant Karzai of this lawsuit." *See* Doc. 122 at 6.

D. This Court Should Deny Plaintiffs' Petition for Permission to Appeal.

The district court did not hold, and Amicus does not argue, that Rule 4(f)(3) prohibits service via Twitter in all circumstances. Because the district court's discretionary decision rests on factual findings about the insufficiency of plaintiffs' evidence, this Court should deny the petition to appeal. *See Kennedy v. Bowser*, 843 F.3d 529, 536 (D.C. Cir. 2016) (holding it is petitioner's burden to persuade this Court "there is no prudential impediment to [its] interlocutory review"). Because

plaintiffs cite no case finding Twitter service appropriate in similar circumstances, the district court's determination does not present a controlling question of law for which there is substantial ground for difference of opinion. *See* 28 U.S.C. § 1292(b). This is particularly true because the district court denied authorization of service via Twitter without prejudice. *See* Doc. 122 at 6. If plaintiffs have information demonstrating Karzai personally uses Twitter often, receives information via Twitter, and opens links from strangers, it may provide that information to the district court. This Court should deny the petition for permission to appeal.

Even if this Court grants plaintiffs' petition, it should affirm because the district court did not abuse its discretion in concluding plaintiffs failed to establish Twitter service would provide Karzai fair notice. *See supra* Part II.A–II.C

CONCLUSION

This Court lacks jurisdiction over plaintiffs' petition to appeal the district court's recertified interlocutory order denying Twitter service and must therefore dismiss the petition. Alternatively, this Court should dismiss the petition as untimely because Appellate Rules 5 and 26(b)(1) are mandatory claim-processing rules that preclude recertification from extending § 1292(b)'s filing deadline. If this Court reaches the petition for permission to appeal, it should either deny the petition or conclude the district court did not abuse its discretion in deciding service by Twitter is not reasonably calculated to provide Karzai notice.

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January 13, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,623 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on January 13, 2020, a copy of Appointed Amicus Curiae's Brief in Support of the District Court was served via the Court's ECF system on plaintiffs' counsel of record.

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