**ORAL ARGUMENT SCHEDULED FOR APRIL 7, 2020**

**CASE NO. 19-7083**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**CHARLES STRANGE, et al.**

**Petitioners,**
**v.**

**THE ISLAMIC REPUBLIC OF IRAN, et al.**

**Defendants.**

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**U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,**
**WASHINGTON, D.C.**
**NO. 1:14-CV-00435 (CKK)**

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# PETITIONERS' FINAL REPLY BRIEF TO THE COURT-APPOINTED *AMICUS CURIAE* IN OPPOSITION TO THE DISTRICT COURT'S JUDGMENT

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**Dated**: February 24, 2020

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## SUMMARY OF THE ARGUMENT

The question before the Court is not whether 28 U.S.C. § 1292(b) is jurisdictional. It is not about enlarging time, reopening a filing period, claim-processing rules or whether a district court judge has the authority to extend time to file an appeal. The question is not even about tolling or equitable exceptions to a general rule. Because the issue is so straightforward and in Petitioners' favor, the court-appointed *Amicus Curiae* go off on tangents and strategically convolute many different issues that are unrelated to the question before the Court: whether a recertification order issued by the district court renders the ten-day limitation outlined in 28 U.S.C. § 1292(b) moot. If the courts are to follow decades of precedent, the answer must be "yes."

Apart from its confused arguments, it is inexplicable that the *Amicus Curiae* would go to such lengths to shield Defendant Hamid Karzai ("Defendant Karzai"), a world renowned criminal who many even in our defense establishment think was and perhaps remains a terrorist collaborator in his own right, at the expense of Gold Star families who tragically lost their sons to Taliban terrorists in the largest loss of life in the Afghan war. Simply put, this criminal Defendant Karzai – who reportedly stole millions in American aid to Afghanistan and pocketed it in his own coffers, notwithstanding his alleged collaboration in the death of our fallen heroes – should not be able to run from American law and our system of justice by

playing service games for years with grief stricken parents of dead servicemen. Petitioners find it hard to understand why the *Amicus Curiae* was assigned to this matter in the first place, given that the Court has very well educated and intelligent law clerks and judges to determine the important issues before it in such an important case.

In their Initial Brief, Petitioners demonstrated that they served Defendant Karzai on four separate occasions. On December 21, 2018, Petitioners served Defendant Karzai via Twitter. All four occasions, particularly the last service by Twitter, were "reasonably calculated" to provide Defendant Karzai with notice of this pending action and therefore he is in default. *See Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950); Fed. R. Civ. P. 4(f)(3). Defendant Karzai is known internationally to participate in terrorist activities this Court should not afford him any privileges. Petitioners rest on the sound arguments in their Initial Brief and do not readdress them here.

## ARGUMENT

Straining to argue that the jurisdictional nature of 28 U.S.C. § 1292(b) precludes this Court from hearing this petition, *Amicus Curiae*'s Summary of Argument fatally undercuts its case. *Amicus Curiae* admits that " . . . 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." Amicus Curiae ("A.C.") at Br. at 12. While this Court has not considered the precise issue raised here, the Supreme Court has addressed it in *Baldwin Cty. Welcome Center v. Brown*, 466 U.S. 147 (1984). *Amicus Curiae*'s analysis of *Baldwin* and the other circuit court decisions is simply incorrect as it mistakenly argues that the majority opinion in *Baldwin* neglected to address recertification and that the more recent Supreme Court decision in *Bowles v. Russell*, 551 U.S. 205 (2007) supersedes and in effect overrules *Baldwin*. *Amicus Curiae* conflate two separate issues.

First, substantively, *Baldwin* implicitly addressed recertification by taking the appeal. "I concur in the majority's holding that there is jurisdiction." *Id*. at 162. While this Court is not bound by its own precedent because there is none, the dissenting opinion in the Supreme Court case of *Baldwin* is telling: "[i]t is quite plain that the District Court in the instant case recertified the interlocutory order nine months after the time for petitioning had expired for the purpose of permitting what would otherwise be a time-barred interlocutory appeal." *Id*. (Stevens, J. dissenting). **I am presently persuaded by the view, supported by commentators, that interlocutory appeals in these circumstances should be permitted,** notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extent at will. *Id*. (emphasis added). *Baldwin* is not overruled.

The highest Court exercised jurisdiction in the *Baldwin* circumstances. *Amicus Curiae* argues that even if, *sub silentio*, the majority exercised jurisdiction based on recertification, it qualifies as a non-binding “drive-by jurisdictional ruling[].” A.C. Br. at 24 (quoting *Steel Co v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998). Petitioners respectfully submit that Supreme Court precedent, whether jurisdictional or not, binds this Court and indeed all other courts to follow the rule of law. The main case *Amicus Curiae* cites in support of its erroneous position that Supreme Court precedent is non-binding and “drive-by”, *Steel Co*., 523 U.S. at 91, references *Gwaltney of Smithfield, Ltd. v .Chesapeake Bay Foundation*, *Inc*., 484 U.S. 49 (1987), a case that was actually overruled on the grounds that *Steel Co*. complained of. Again, the Supreme Court never overruled its decision in *Baldwin*.

Second, the cases *Amicus Curiae* uses in support of its position are either easily distinguishable or entirely inapposite. *Bowles v. Russell*, 551 U.S. 205 (2007) considered reopening a filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6) and whether there are equitable exceptions to jurisdictional requirements; *Nutraceutical Corp v. Lambert*, 139 S. Ct. 710 (2019) discussed whether a court of appeals may forgive on equitable tolling grounds when the opposing party objects and *Groves v. United States*, 941 F.3d 315 (7th Cir. 2019) is a non-binding, unpersuasive case that concedes it creates a circuit split.

In *Bowles v. Russell*, 551 U.S. 205 (2007), the district court purported to extend a party's time for filing a notice of appeal. *Id*. at 206. After an entry of final judgment, Bowles had thirty days to file an appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). Bowles failed to do so timely and asked the district court to extend the time allowed by fourteen days. *Id*. at 207. The district court inexplicitly gave Bowles seventeen days to file his notice of appeal. The Court ruled that because it "has no authority to create equitable exceptions to jurisdictional requirements[,]" it lacked jurisdiction to hear the parties appeal. *Id*. at 214.

In *Nutraceutical Corp v. Lambert*, 139 S. Ct. 710 (2018), pursuant to Federal Rule of Civil Procedure 23(f), Lambert had fourteen days to ask the Court of Appeals for permission to appeal. He instead filed a motion for reconsideration. *Id*. at 711. The question before the Court was whether a court of appeals may forgive a party on equitable tolling grounds *when the opposing party objects that the appeal was untimely*. *Id*. at 714. The Court held that because Appellate Rule 26(b) says that the deadline for the type of filing in Lambert "may not be extended" Federal Rule of Civil Procedure 23(f), a claim-processing rule, "is not amenable to equitable tolling" and the "Court of Appeals erred in accepting Lambert's petition on those grounds." *Id*. at 715.

*Groves v. United States*, 941 F.3d 315 (7th Cir. 2019) is the only case *Amicus Curiae* cites that addresses recertification in the context of 28 U.S.C. § 1292(b) and it is a non-binding, unpersuasive case from the U.S. Court of Appeals for the Seventh Circuit. The court also admitted it creates a circuit split. "Because this opinion overrules our precedent and creates a circuit split, it has been circulated among all judges of this court in regular active service." *Id*. at n.5

Importantly, *none* of the other circuit court decisions Petitioners cited in their Initial Brief confirming recertification restarts the ten-day time period have been overruled. *Groves* overruled its own precedent in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981) but the other circuit court decisions allowing recertification to restart the ten-day clock are in fact good law. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1111 (5th Cir. 1981) ("**Over a year after the district court's order issued**, another judge serving on that court entered a second order adopting the earlier order and, in effect, recertifying the interlocutory appeal") (emphasis added); *Rodriquez v. Banco*, 917 F.2d 664, 669 (1st Cir. 1990); *In re La Providencia Dev. Corp*., 515 F.2d 94, 95-96 (1st Cir. 1975); *In re Benny*, 812 F.2d 1133, 1137 (9th Cir. 1987); *Marisol v. Guiliani*, 104 F.3d 524, 528 (2d Cir. 1997).

Here, the District Court did not extend the time for Petitioners to file their petition for permission to appeal with this Court, like it did in *Bowles*. Even if it did, whether it was proper for the District Court to extend the time for Petitioners

to file their petition is not the issue before this Court. The instant case is not at all like *Nutraceutical Corp* because (1) 28 U.S.C. § 1292(b) is not a claim-processing rule and, fundamentally, (2) no party opposed Petitioners here, which a plain reading of that case requires in order for the court to deny forgiving a party on equitable tolling grounds. The only narrow issue that is before this Court is whether the District Court's recertification of the interlocutory appeal permits this Court to hear the case. Petitioners submit that it does, consistent with Supreme Court precedent and relevant case law.

Petitioners rest on their Initial Brief proving that the District Court properly recertified its Order and that Petitioners successfully served Defendant Karzai.

## CONCLUSION

This Court should grant Petitioners' request for an interlocutory appeal and rule that Petitioners properly served Defendant Karzai pursuant to Federal Rule of Civil Procedure 4(f). The cases *Amicus Curiae* cite to are inapposite and simply do not apply in the factual context of this case. Once this Court confirms service on Defendant Karzai, he will, like all litigants in American courts, be afforded due process to defend himself under our system of justice. Petitioners respectfully request oral argument.

**Dated**: February 24, 2020

Respectfully submitted,

*/s/ Larry Klayman*

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,670 words.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically and served through the Court's ECF system to all counsel of record or parties listed below on February 24, 2020.

*/s/ Larry Klayman*
Larry Klayman