

No. 10-10590

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

v.

**HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also
known as HLF,**

Defendant-Appellant-Cross-Appellee.

On Appeal From the United States District Court
For the Northern District of Texas
Case No. 3:04-CR-240-4 (Jorge Solis, J.)

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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DATED: December 21, 2011

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For Relief And Development

CONSOLIDATED WITH No. 09-10560

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

**MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER;
MUFID ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND
FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,**

Defendants-Appellants.

CONSOLIDATED WITH No. 08-10664

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

**MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER;
MUFID ABDULQADER; ABDULRAHMAN ODEH,**

Defendants-Appellants.

CONSOLIDATED WITH No. 08-10774

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN,

Defendant-Appellant.

CONSOLIDATED WITH No. 10-10586

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHUKRI ABU BAKER, Defendant, NANCY HOLLANDER,

Appellant.

CERTIFICATE OF INTERESTED PERSONS

No. 09-10560

United States of America v. Holy Land Foundation For
Relief and Development, also known as HLF

The undersigned counsel of record for Holy Land Foundation for Relief and Development, also known as HLF, certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America.
2. Abdulqader, Mufid
3. Abu Baker, Shukri
4. Boyd, John W.
5. Cadeddu, Marlo
6. Cline, John D.
7. Cowger, Susan
8. Dratel, Joshua L.
9. Duncan, Theresa M.
10. El-Mezain, Mohammad
11. Hollander, Nancy
12. Holy Land Foundation for Relief and Development
13. Jacks, James
14. Jonas, Barry
15. Junker, Walt
16. Moreno, Linda
17. Mysliwicz, Aaron
18. Natarajan, Ranjana
19. National Security Clinic, University of Texas School of Law

20. Odeh, Abdulrahman
21. Office of United States Attorney, Northern District of Texas
22. Palmer, Joseph F.
23. Shapiro, Elizabeth
24. Solis, Honorable Jorge
25. Tigar, Michael
26. Westfall, Gregory B.

Dated: December 21, 2011

Respectfully submitted,

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STATEMENT UNDER FED. R. APP. P. 35(b)(1)

This appeal presents the following questions of exceptional importance: whether this Court should appoint a third party to act as a corporation's representative for purposes of authorizing and directing counsel for the corporation's criminal appeal, or in the alternative vacate the conviction and sentence, or equitably excuse such authorization, where the corporation no longer functions or has officers or directors, its former chair of the board of directors declined to act on its behalf in the criminal trial or appeal on advice of counsel, where such decision and advice were not based on bad faith, deception, or other improper motive, and the corporation never waived its right to appeal, and the corporation could not otherwise appeal a conviction and sentence obtained by a trial at which it was denied counsel.

The panel's decision as to these questions, under the unique facts of this case, conflicts with numerous Supreme Court decisions confirming Article III courts' powers to appoint counsel and other third-party persons when necessary to achieve justice for the parties or to promote the fair administration of justice. These cases include: *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-110 (1964); *Chambers v. NASCO*, 501 U.S. 32, 43 (1991); *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962); *Ex Parte Peterson*, 253 U.S. 300, 312-313 (1920); and *Gideon v. Wainwright*, 372 U.S. 335,

340 (1963). The decision also conflicts with these decisions of other courts of appeal: *United States v. Bertoli*, 994 F.2d 1002, 1005 (3d Cir. 1993); *United States v. Accetturo*, 842 F.2d 1408, 1413-15 (3d Cir. 1988); *In re McGaughey*, 24 F.3d 904, 907-08 (7th Cir. 1994); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956); *United States v. Rad-O-Lite*, 612 F.2d 740 (3d Cir. 1979); *United States v. Unimex, Inc.*, 991 F.2d 546 (9th Cir. 1993).

Consideration by an *en banc* panel of the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

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STATEMENT OF THE ISSUES

It is undisputed that HLF, a non-profit charitable corporation, was convicted and sentenced, and had millions of dollars forfeited, after a trial at which it had no counsel. It is also undisputed that no corporate representative made a knowing, intelligent waiver of counsel on behalf of HLF. As such, the trial involved Constitutional error of the greatest magnitude and had no known precedent.

The panel ratified this flawed trial by ruling that this Court had no jurisdiction over HLF's appeal because no HLF corporate representative authorized the appeal. It is undisputed that the former chair of HLF's board of directors declined to act as its corporate representative in both this case and appeal on advice of counsel. The district court found that that decision and counsel's advice involved no bad faith, deception or improper motive. In addition, no HLF corporate representative made a knowing, intelligent waiver of appeal on behalf of HLF. Based on these facts, and in the interests of fairness and justice, the district court appointed undersigned counsel as *pro bono* appeal counsel for HLF. HLF's appeal challenged the unconstitutional trial.

The panel dismissed the appeal because of lack of authorization by a corporate representative, despite its acknowledgment that no such representative is available to act on behalf of HLF. The panel declined to impose the remedy requested – the appointment of a third party “trustee” who could act as HLF's

corporate representative and determine whether and how to prosecute this appeal with aid of counsel. The panel also declined in the alternative to equitably excuse the requirement of authorization.

The panel's ruling leaves intact a judgment that was void because the trial court lacked jurisdiction over an unrepresented corporate criminal defendant. This Court imposes remedies to protect the rights of litigants when necessary, and here the appointment of a third party to act as HLF's corporate representative would allow HLF to appeal. A corporation no less than any other criminal defendant deserves protection when it cannot vindicate its rights without assistance. The record here, involving a trial in which HLF was deprived of counsel, and no waiver of the right to counsel or appeal, amply demonstrates the need for such protection.

Therefore, HLF urges this Court to grant rehearing *en banc* to determine, under the unique facts of this case:

1. Whether the panel erred in declining to appoint a third party to act as HLF's corporate representative in order to assist HLF in prosecuting its appeal; and
2. In the alternative, whether the panel erred in declining to equitably excuse the lack of authorization for the appeal by an HLF corporate representative.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSITION

Appellant Holy Land Foundation for Relief and Development ("HLF") was a non-profit charitable corporation that provided humanitarian aid worldwide. It

was shut down in December 2001 when the Department of the Treasury designated it a terrorist organization, seized its assets, and blocked all transactions on its behalf. 2 R.2485-2488. HLF immediately ceased all operations.

In July 2004, HLF was indicted along with five co-defendants who were former directors, officers or associates. 1 R.8-47. The indictment alleged that the defendants provided material support to a foreign terrorist organization, HAMAS, through the provision of humanitarian aid via particular charitable committees in the West Bank, in the Palestinian territories. In fall 2007, HLF and co-defendants were tried before a district court in the Northern District of Texas, and the trial resulted in a mistrial. 3 R.5440-5441. In fall 2008, the same defendants were re-tried, and all defendants were convicted on all counts. 3 R.7079. In both trials, HLF was unrepresented by counsel. In May 2009, HLF was sentenced to one year of probation and a judgment of forfeiture for \$12,400,000. 7 R.9789.

In June 2009, undersigned counsel filed a notice of appeal on behalf of HLF. 3 R.7399. The government moved to strike, before the district court and this Court, and undersigned counsel moved this Court to be appointed as *pro bono* appellate counsel. This Court remanded to the district court to consider that motion and to make related factual findings. 3 R.7765. Before the district court, undersigned counsel also sought appointment of a third party “trustee” to act as HLF’s corporate representative for purposes of this appeal. 3 R.8119, 8192. The court

held an evidentiary hearing. In May 2010, the district court issued a decision appointing undersigned counsel as appellate counsel, making related findings, and declining to appoint a “trustee.” txnd-138723[1] R.145.

HLF and co-defendants appealed the convictions. The government cross-appealed the appointment of counsel. A panel of this Court issued an opinion on December 7, 2011 (hereinafter, “Op.”), affirming the convictions and dismissing HLF’s appeal for lack of jurisdiction. HLF seeks rehearing of the dismissal.¹

STATEMENT OF THE FACTS

HLF, a non-profit charitable corporation, carried out its mission of providing humanitarian relief to needy children and families worldwide through an office based in Texas and overseen by an independent board of directors. Second Trial Exhibits D-67 (R.Exc.2.Tab 3); D-83 (R.Exc.2.Tab 4). When the Office of Foreign Assets Control (“OFAC”) of the Department of the Treasury issued a blocking notice freezing HLF’s assets on December 4, 2001, HLF immediately ceased all charitable activities and internal corporate functions. 2 R.2485-2488.

HLF was indicted along with co-defendants in July 2004. 1 R.8-47; Op.159. From July 2004 to July 2007, HLF was jointly represented, along with co-defendant Shukri Abu Baker, by the law firm of Freedman Boyd Daniels Hollander Goldberg, P.A. (“Freedman Boyd”). 1 R.64; 10 R.238. In September 2006,

¹ HLF joins the petition for rehearing to be filed by co-defendants. Fed. R. App. P. 28(i).

Freedman Boyd filed written waivers of potential or actual conflicts of interest for both co-defendants. Op.160. In July 2007, during voir dire at the first criminal trial, the conflict of interest question arose again. 4 R.1100-1103. The next day, counsel for Ghassan Elashi, former chair of the board of directors of HLF who had been acting as HLF's corporate representative in this case until that point, stated that Elashi could no longer speak for HLF. 4 R.1399-1400; Op.161. Subsequently, Freedman Boyd withdrew from representing HLF because there was no longer a corporate representative for HLF in this case. 4 R.1590-1593; Op.161. The government did not object, and the court proceeded to trial with HLF unrepresented. *Id.*; Op.161-62. The trial ended in mistrial. 3 R.5440-5441.

At the second trial in 2008, the government informed the district court that although HLF was a defendant, it "has no employees and no officers and so there is no one to represent it, but it is an essential part of this lawsuit because of the forfeiture provisions and the funds that are being held subject to being forfeited." 4 R.3534; Op.162. The court stated that it was aware of that, entered a plea of not guilty for HLF, and proceeded to try HLF unrepresented by counsel. 4 R.3534-3536; Op.162. The jury found HLF guilty on all counts. 3 R.7079. In May 2009, the court sentenced HLF, without counsel, to one year of probation and a money judgment against HLF in the amount of \$12,400,000. 7 R.9789; Op.162.

On June 5, 2009, undersigned counsel filed a notice of appearance and notice of appeal on behalf of HLF. 3 R.7397-7400. Undersigned counsel had no prior relationship to HLF, but was informed that HLF was unrepresented at trial. txnd-138723[1] R.174-177. The government moved to strike both notices and HLF opposed. 3 R.7401; 3 R.7698. It then moved this Court to remand the proceeding to the district court, and undersigned counsel moved this Court to be appointed *pro bono* appellate counsel. *United States v. Holy Land Foundation, et al.*, No. 09-10560 (5th Cir.) (No. 51893765, filed Jul. 23, 2009; No. 51900128, filed Aug. 5, 2009). This Court remanded and instructed the district court to consider the motion for appointment. 3 R.7765. Appointment of counsel and a third party “trustee” to act as HLF’s corporate representative was sought. 3 R.8119. The district court held an evidentiary hearing and took testimony regarding Elashi’s decision to stop acting as HLF’s corporate representative. txnd-138723[1] R.170; 326-338. The government argued that Elashi had waived HLF’s right to counsel; that his decision was based on bad faith, deception, or improper motive calculated to “sow the seeds” of reversible error; and that Elashi had waived HLF’s right to appeal. txnd-138723[1] R.386-391. The district court rejected these arguments. Based on testimony by Elashi’s counsel, Baker’s counsel, and HLF’s former counsel, the court found that Elashi’s unwillingness to act as HLF’s representative was understandable based on uncertainty as to HLF’s status and his status with HLF,

and that neither his decision nor the advice of his counsel was based on bad faith, deception, improper motive, or an intention to mislead the court. txnd-138723[1] R.148 n.3, 325-328, 353. The court found no waiver of counsel or appeal. The court appointed undersigned counsel as appellate counsel for HLF “in the interests of fairness and ensuring justice for HLF,” and related back the appointment to the date of the notice of appeal. txnd-138723[1] R.157; Op.164.

HLF appealed its conviction and sentence, arguing that the trial and sentencing violated HLF’s Sixth Amendment right to assistance of counsel, its Due Process Clause right to presence at trial, and its Confrontation Clause rights. Op.165. HLF also argued that if, as the district court found, it was “de facto” represented by co-defendants’ counsel even though they neither purported to nor undertook any actions to represent HLF, such representation was not effective or conflict-free, in violation of the Sixth Amendment. Op.165. The government cross-appealed, arguing that the district court abused its discretion by appointing counsel for HLF because no corporate representative had authorized the appeal. A panel of this Court heard oral argument and issued an opinion on December 7, 2011.

In its opinion, the panel did not address the merits of HLF’s appeal because it dismissed for lack of jurisdiction. Op.166. The panel assumed but did not decide whether the district court had inherent authority to appoint appellate counsel for HLF. It concluded that even if the appointment was appropriate, the appeal fails

because no HLF corporate representative authorized undersigned counsel to file the appeal. The panel reasoned that since the decision to appeal belongs to the client, and the client may refuse to appeal, counsel may not prosecute an appeal without the client's consent, and the district court could not authorize HLF's appeal. Op.168. Confining its ruling to the facts of this case, the panel held that "the district court could not authorize a notice of appeal filed on behalf of an unrepresented defendant corporation by an attorney with no connection to the defendant and where no corporate representative authorized the appeal." Op.168-69. With regard to the request to appoint a third party trustee for HLF's appeal, the panel refused, noting only that HLF might attack its conviction through a petition for a writ of *coram nobis*. Op.168, n.57.

ARGUMENT

I. THE APPOINTMENT OF A THIRD PARTY AS HLF'S CORPORATE REPRESENTATIVE FOR APPEAL IS WARRANTED

If, as the panel concluded, the notice of appeal was defective for lack of authorization, and that defect could not be overcome by the district court's order appointing appellate counsel for HLF, then an appropriate remedy is warranted. Since HLF has a statutory right to appeal, *see* 18 U.S.C. §§3732, 3742, which it never waived, and since no corporate representative is available to help HLF appeal its unconstitutional trial, such a remedy is needed to protect HLF's rights.

Courts routinely take steps to protect litigants who are unable to vindicate their own rights through disability not of their making. In civil cases, courts appoint counsel, guardians ad litem, or next friends to protect the rights of civil litigants who are unable to participate in proceedings by virtue of age, mental disability, or other incapacity. *See e.g. In Re Gault*, 387 U.S. 1, 34-37 (1967) (recognizing right to counsel in juvenile delinquency proceedings); *Vitek v. Jones*, 445 U.S. 480 (1980) (same, in civil commitment proceedings); *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990) (appointment of “next friend” in habeas corpus actions); *Roberts v. Ohio*, 256 F.2d 35, 39 (5th Cir. 1958) (appointment of guardians ad litem to protect minor litigants); *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 988 (5th Cir. 1984) (same).² Courts also appoint third parties such as special masters and receivers when necessary to aid in the administration of justice. *See Ex Parte Peterson*, 253 U.S. 300, 312-313 (1920) (appointing auditor).³ In criminal cases, courts do not try mentally incompetent criminal defendants at all, unless or until they are restored to competency. *Dusty v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162 (1975). Courts also appoint standby counsel for self-represented criminal defendants. *See United States v. Bertoli*, 994

² *See also* Legal Ethics, Lawyer’s Deskbook on Professional Responsibility §1.14 (2011-12 ed.) (duty to protect disabled client).

³ *See also Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982), *opinion amended in part, vacated in part on other grounds*, 688 F.2d 266, *cert. denied*, 460 U.S. 1042 (1983) (appointment of special master); *In re McGaughey*, 24 F.3d 904, 907-08 (7th Cir. 1994) (receiver); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (special master).

F.2d 1002, 1005 (3d Cir.1993); *United States v. Accetturo*, 842 F.2d 1408, 1413-15 (3d Cir. 1988). And of course, courts appoint counsel for indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963).

Such protections serve to ensure the fairness of adversarial proceedings by preventing trials where one party cannot participate through no fault of his or her own. That purpose applies regardless of why the litigant is disabled, whether the litigant faces criminal incarceration or civil harm, or is an individual or corporation. Here, HLF faces the forfeiture of over twelve million dollars in assets. HLF has no representative able to act on its behalf to pursue the appeal. For these reasons, undersigned counsel sought appointment as counsel *and* the appointment of a third party “trustee” to act as HLF’s representative to authorize and direct counsel. 3 R.8119. The district court granted the former but denied the latter as unnecessary.⁴ As a result, no person stood in the client’s shoes to authorize the appeal, directly resulting in the appeal’s dismissal. Had the panel appointed a trustee, the appeal would be explicitly authorized and could be heard on the merits.

The appointment of a trustee for HLF, to determine whether and how to prosecute HLF’s appeal, is warranted. The trustee could be a disinterested attorney who practices before this Court and who assumes the duty to determine and act

⁴ The panel noted that it was unusual for the district court to appoint counsel for appeal, rather than trial. Op.167. Undersigned counsel moved for appointment before this Court, but this Court remanded and directed the district court to determine the motion. 3 R.7765.

upon HLF's best interests in the criminal appeal alone.⁵ The Court would charge the trustee with these limited duties, similar to special masters and receivers.

The status of HLF as a corporate criminal defendant makes the appointment of a trustee even more important. Although corporations are legal entities, they have numerous Constitutional rights. *See e.g. Citizens United v. Federal Election Comm'n*, 558 U.S. --, 130 S.Ct. 876 (2010) (confirming corporations' political speech protections under the First Amendment). With rare exception, corporate defendants enjoy the same procedural rights as individuals. *United States v. Thevis*, 665 F.2d 616, 645 n.35 (5th Cir. 1982); *United States v. Rad-O-Lite*, 612 F.2d 740, 743 (3d Cir, 1979). A corporation is entitled to participate in its criminal trial, and since it can appear only through counsel, *Rowland v. Calif. Men's Colony*, 506 U.S. 194 (1993), the deprivation of counsel is fatal to a corporate defendant's ability to obtain a fair trial.

When faced with a disabled corporate defendant, a court may and should take protective measures to ensure the fair administration of justice. This Court should appoint a trustee, or vacate the unconstitutionally obtained conviction and sentence, to ensure the proper administration of justice. It may do so using its supervisory mandamus power. *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60

⁵ Two Dallas-based attorneys who practice before the Northern District of Texas volunteered to fulfill this "trustee" role *pro bono*. 3 R.8126; 3 R.8202. Also, the Court could appoint as trustee a representative of the California or Texas attorney general's office. *See Bogert, Trusts and Trustees* §§411, 431-441 (*cy pres* actions brought by state attorneys general to enforce charitable purpose of failed charitable trusts); *see also*, Rest. 2d Trusts, §§348, 399.

(1957); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-110 (1964) (supervisory control over district courts is appropriate in cases of , *inter alia*, clear abuse of discretion or abdication of judicial function); *In Re E.E.O.C.*, 709 F.2d 392, 394-95 (5th Cir. 1983). The district court clearly abused its discretion and abdicated its judicial function by allowing HLF to be tried without counsel. If this Court lacks jurisdiction over the appeal, it should treat this appeal as a petition for mandamus and issue a writ to remedy the unconstitutional trial. *See* 28 U.S.C. §1651(a).

The panel declined to impose any such remedy without detailed reasoning. Op.168 n.57. Rather, it noted only that a writ of *coram nobis* may be available for HLF to collaterally attack its conviction. *Id.* But if the Court lacks jurisdiction over this appeal because no HLF representative explicitly authorized it, a court may lack jurisdiction over a *coram nobis* petition for the same reason. The government also recognized this. Gov.Br.34.⁶ Since the *coram nobis* remedy may not be available, and HLF is disabled from appealing through no fault of its own, the appointment of

⁶ The writ of *coram nobis* is used to correct fundamental factual and legal errors. *United States v. Morgan*, 346 U.S. 502, 510-11 (1954); *United States v. Denedo*, 556 U.S. 904, 129 S.Ct. 2213, 2220 (2009). Although the facts here warrant *coram nobis* relief, that relief can hardly be assumed. *See Denedo*, 129 S.Ct. at 2223 (*coram nobis* is an “extraordinary remedy” that issues only in “extreme cases.”). Moreover, if even the *coram nobis* vehicle were available despite the authorization issue, the petition might be moot once the forfeiture occurs.

a trustee is warranted. That appointment should be made retroactive to the date of the notice of appeal, in order to resolve any doubt about the validity of the appeal.⁷

If the panel found that HLF had chosen to “forgo” its appeal, that was incorrect. Op.167-68 (noting that counsel may not pursue appeal that client chooses to forgo). Three crucial and indisputable facts in the record show the exact opposite – that HLF was disabled from appealing because it lacked a corporate representative who was able to act on its behalf. First, co-defendant Ghassan Elashi, the sole person who had acted as HLF’s corporate representative in the criminal case from indictment until voir dire at the first trial, declined to continue acting on behalf of HLF on advice of his new counsel. 4 R.1399-1400; txnd-138723[1] R.350, 332, 353-54. Second, as the district court found, neither Elashi’s decision, nor the advice of his counsel, was based on bad faith, deceit, an intent to abandon the corporation, or other improper motive. txnd-138723[1] R.148 n.3. Third, the district court never obtained a waiver of HLF’s rights to counsel or to appeal from any HLF corporate representative, including Elashi or co-defendant Shukri Abu-Baker, both of whom were allegedly its principals and chief decision-makers.⁸ The district court explicitly found the first two facts, and the panel found

⁷ Nothing prevents the Court from making the appointment of the third party retroactive, since the notice of appeal was otherwise adequate, indicating the party appealing and the judgment to be appealed, and timely. Fed.R.App.P.4; App.Resp.&Rep.Br.28-34.

⁸ Since HLF had no counsel at either trial or sentencing, the district court did not advise HLF of its right to appeal, as required by Fed. R. Crim. P. 32(j)(1)(A).

no clear error in those findings. The record, which is devoid of any statement amounting to waiver of counsel or appeal, shows the third fact.

These facts show that HLF was disabled because it lacked a corporate representative to authorize the appeal, through no fault of its own (or indeed of its former principals). No facts indicate that HLF decided to forgo its appeal.⁹ The appointment of a trustee is therefore warranted to protect HLF's right to appeal.

The panel noted that provisions of California law relating to corporate non-payment of taxes suggest that HLF's corporate representatives may have continued in office after HLF was shut down. Op.165, n.53. First, whatever California law provides, it was preempted by the Treasury Department's blocking order, which forbid any transactions on behalf of HLF except those licensed by OFAC. 2 R.2485-2488. Second, in compliance with the blocking order, HLF did not transact any business after it was shut down. txnd-138723[1] R.330. Moreover, OFAC itself conceded that there was some "gray area" on whether corporate officers were required to formally relinquish their offices after the blocking order went into effect. txnd-138723[1] R.216. Finally, even if Elashi and others remained in office, the record does not show any knowing and intentional relinquishment of HLF's right to counsel or to appeal. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁹ HLF spent years in litigation denying the allegations of providing material support to HAMAS. It never indicated a willingness to forfeit its humanitarian aid donations to the government. Also, Elashi and Baker never objected to the appeal.

This Court should reverse the panel's dismissal and appoint a third party trustee, who would: 1) act as HLF's representative to decide whether to pursue this appeal;¹⁰ 2) direct undersigned counsel in the appeal, if appropriate; and 3) oversee a fair procedure to dispose of HLF's assets. HLF had thousands of charitable donors and a legitimate charitable purpose, and the appointment would effectuate that purpose.¹¹ Denying the appointment, or another mandamus remedy, denies HLF any and all relief from an unconstitutional trial. This Court should act to prevent such inequity. *LaBuy*, 352 U.S. at 259-60.

CONCLUSION

For the foregoing reasons, HLF respectfully requests that the petition for rehearing *en banc* be granted.

Date: December 21, 2011

Respectfully submitted,

s/ Ranjana Natarajan

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¹⁰ Upon appointing a trustee, this Court could stay HLF's appeal until the trustee reviews the case to decide whether to appeal. If the Court reverses the conviction, a new trial is not inevitable. The trustee may negotiate a settlement with the government regarding HLF's assets.

¹¹ In the alternative, this Court should equitably excuse the requirement that a natural person acting as HLF's representative authorize the appeal.

CERTIFICATE OF SERVICE

I, Ranjana Natarajan, certify that today, December 21, 2011, a copy of the **Petition For Rehearing *En Banc*** for defendant-appellant-cross-appellee Holy Land Foundation for Relief and Development was filed with the Clerk of the Court by using the Electronic Case Filing (CM/ECF) system, which will send a notice of the electronic filing to all counsel of record.

s/ Ranjana Natarajan
Ranjana Natarajan

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