No. 21-2180 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAUL GOLDMAN,

*Plaintiff-Appellee*,

v.

ROBERT H. BRINK, in his official capacity, *et al.*,

*Defendants-Appellants*

On Appeal from the United States District Court
for the Eastern District of Virginia

# SUPPLEMENTAL BRIEF OF ROBERT H. BRINK, *ET AL.*

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July 11, 2022

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The Court has instructed the parties to file supplemental briefs on the following questions: "Does this Court possess appellate jurisdiction to review the June 6, 2022, three-judge district court's order dismissing the case for lack of Article III standing to sue? If not, how should this Court proceed as to the initial appeal from the October 12, 2021, single-judge decision?" The Election Officials contend that this Court has appellate jurisdiction over the district court's June 6 order. If, however, the Court determines it lacks jurisdiction over the June 6 order, it should dismiss Goldman's appeal for want of jurisdiction, order supplemental briefing on standing in the Election Officials' appeal of the October 12 order, and vacate the October 12 order for lack of Article III jurisdiction.

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## BACKGROUND

On June 28, 2021, Paul Goldman filed a complaint alleging that various state officials were violating the U.S. and Virginia Constitutions by conducting the upcoming 2021 general election for the House of Delegates with legislative districts drawn on the basis of 2010 Census data. See *Goldman v. Brink*, No. 3:21-cv-00420-DJN-RAJ-SDT (E.D. Va.) (hereinafter, "District Court"), ECF No. 1. Goldman named as defendants then-Governor Ralph Northam, the Virginia State Board of Elections,

and various Election Officials in their official capacities—Christopher Piper (Commissioner of the Virginia Department of Elections); Jessica Bowman (Deputy Commissioner of the Virginia Department of Elections); Jamilah D. LeCruise (Secretary of the State Board of Elections); John O'Bannon (Vice Chair of the State Board of Elections); and Robert Brink (Chairman of the State Board of Elections). See *id.* at 1.[1] He argued that Virginia had an immutable constitutional obligation to reapportion its legislative districts using the 2020 Census data in time for new maps to be used in the first post-census general election. *Id.* ¶¶ 11–14, 42–55. He asked the district court to declare the upcoming elections unconstitutional, dissolve the House of Delegates, and order a statewide special election for the House of Delegates in November 2022. *Id.* at 14.

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But when Goldman filed suit, Virginia had yet to receive any of the 2020 Census data necessary to conduct reapportionment because the

[1] Goldman later dropped Bowman as a defendant in subsequent amendments. *Goldman v. Brink*, 566 F. Supp. 3d 490, 498 (E.D. Va. 2021) ("*Goldman I*"). Susan Beals has since replaced Piper as the Commissioner of the Virginia Department of Elections and was automatically substituted for Piper as a party. *Goldman v. Brink*, 2022 WL 2024745, at *2 n.3 (E.D. Va. June 6, 2022) ("*Goldman II*").

COVID-19 pandemic had substantially delayed the federal government's completion of the 2020 Census. Stipulation of Facts, District Court ECF No. 73, at ¶¶ 1–2. Virginia had already completed its House of Delegates primary elections by the time Goldman filed his suit, and had done so using maps based on the most recent census data—the 2010 Census. *Id.* ¶ 15. And Virginia would not receive the 2020 Census data until nearly two months after Goldman filed suit—only 23 days before early voting in the general election began. *Id.* ¶¶ 3, 5, 19.

Goldman twice amended his complaint, see First Amend. Compl., District Court ECF No. 3; Second Amend. Compl. ("SAC"), District Court ECF No. 18, and the defendants moved to dismiss his claims as barred by sovereign immunity, see Mot. to Dismiss, District Court ECF No. 23. On October 12, 2021, the single-judge district court—presided over by Judge David J. Novak—granted the defendants' motion as to Goldman's state-law claims and as to his federal claims against then-Governor Northam and the State Board of Elections. See *Goldman I*, 566 F. Supp. 3d at 502–05, 507–09. But Judge Novak denied the motion as to Goldman's federal claims against the Election Officials. *Id.* at 505–07, 509.

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At a hearing the day he issued his order, Judge Novak informed the parties that he harbored serious doubts about Goldman's standing to sue. Oct. 12, 2021 Hr'g Tr., District Court ECF No. 43, at 4:9–11, 7:18–20, 14:7–15:2. Judge Novak further informed the parties that he believed he may have to convene a three-judge panel of the district court to address the merits of Goldman's claims because Goldman had filed "an action . . . challenging the constitutionality of the . . . apportionment of any statewide legislative body," 28 U.S.C. § 2284(a). See Oct. 12, 2021 Hr'g Tr., District Court ECF No. 43, at 7:10–15, 7:22–24, 8:21–9:2. But Judge Novak told that parties that, although he had informed Chief Judge Gregory of the possibility of needing a three-judge district court down the line, he intended to deal with standing first. *Id.* at 16:20–24.

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The single-judge district court's denial of the Election Officials' motion triggered their statutory right to an interlocutory appeal to this Court. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The single-judge district court ordered the Election Officials to decide within six days whether they would exercise their right to appeal—notwithstanding that Congress has set the

deadline for such a decision at thirty days, see 28 U.S.C. § 2107(a). Order, District Court ECF No. 41, at 1.[2]

Later that same day, Chief Judge Gregory issued an order convening a three-judge district court to decide Goldman's case because Judge "Novak ha[d] requested appointment of a three-judge district court." Order, District Court ECF No. 44, at 1. The Chief Judge appointed Circuit Judge Stephanie Thacker and Senior District Judge Raymond Jackson to sit with Judge Novak on the three-judge panel. *Id.* at 1–2.

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[2] The defendants raised standing as a ground to dismiss an earlier version of Goldman's complaint, see Memo. in Support of Mot. to Dismiss, District Court ECF No. 13, at 4–8, but raised only sovereign immunity as a ground to dismiss the SAC, Memo. in Support of Mot. to Dismiss, District Court ECF No. 24, at 5–10. After the defendants filed their motion to dismiss the SAC, the district court ordered the defendants to file a brief on standing. Order Requiring Further Briefing, District Court ECF No. 34. The defendants promptly complied and filed a brief raising two standing arguments—that Goldman lacked standing because he failed to allege that he intended to vote in the upcoming 2021 election, and that he lacked standing because he failed to allege the requisites for candidate standing. Defs. Resp. to Oct. 8, 2021 Order, District Court ECF No. 38, at 3–4. The district court would later dismiss Goldman's complaint in part on the basis of both arguments. See *Goldman II*, 2022 WL 2024745, at *10 ("Plaintiff bears the burden of proving that he has standing, but he has not properly supported his assertion that he voted in November 2021."); *id.* at *13 ("Plaintiff has not alleged facts sufficient to demonstrate a cognizable injury, as he has not shown that he intends or intended to run for the House of Delegates.").

The Election Officials noticed their appeal by the deadline that Judge Novak purported to impose. Notice of Appeal, District Court ECF No. 47. Judge Novak—on behalf of the three-judge panel—then issued an order staying the case. Order Staying Case, District Court ECF No. 49. The Election Officials appealed the denial of sovereign immunity and raised Article III standing as a ground for reversal. *Goldman v. Brink*, No. 21-2180 (4th Cir.) (hereinafter, "Lead Case"), ECF Nos. 10, 35. In the alternative, the Election Officials urged this Court to remand the case to the district court to determine in the first instance whether Goldman had standing to press his claims. Reply Br. of Appellants, Lead Case ECF No. 35, at 12 n.5. After oral argument, this Court granted the Election Officials' request and remanded the appeal to the district court solely for the purpose of determining whether it had Article III jurisdiction. Order of Remand, Lead Case ECF No. 55, at 3–4.[3]

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[3] On the eve of argument, Goldman moved to dismiss the appeal on the ground that the Chief Judge's order convening a three-judge district court ousted this Court of its appellate jurisdiction. Mot. to Dismiss, Lead Case ECF No. 48. The Election Officials opposed the motion. Resp. to Mot. to Dismiss, Lead Case ECF No. 52. This Court has not decided the motion.

On remand, the district court ordered the parties to confer and prepare a joint stipulation of facts relevant to the court's jurisdiction, and ordered the Election Officials swiftly to file a motion to dismiss for lack of jurisdiction. Order Setting Deadlines, District Court ECF No. 69. Seventeen days after this Court remanded to the district court, the Election Officials moved to dismiss on the ground that Goldman lacked standing as a voter and as a candidate, and that the occurrence of the 2021 general election during the pendency of the litigation had mooted the claim. See Memo. in Support of Mot. to Dismiss, District Court ECF No. 77.

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The district court granted the motion on June 6, 2022. See *Goldman II*, 2022 WL 2024745, at *15. The opinion was written by Judge Novak on behalf of the unanimous three-judge panel. The district court held "[a]lthough a single judge alone clearly possesses the authority to address jurisdictional issues such as standing, we conclude that the three-judge panel collectively deciding the issue constitutes the most efficient process in the unique procedural posture that this case exists." *Id.* at *1. The court further held that Goldman lacked voter standing because he had failed to establish that he voted in the 2021 election. *Id.* at *9–10. Even

assuming he had voted, the court held that Goldman suffered no cognizable injury to his individual right to vote because the district in which he voted was less populated than the ideal district and therefore was not malapportioned. *Id.* at *10–11. The court similarly held that Goldman lacked standing as a candidate for office because (1) candidates lack a cognizable interest in the composition of the districts they represent, *id.* at *12–13; (2) even if a candidate could suffer an injury from alleged malapportionment, Goldman failed to allege facts sufficient to articulate any such injury, *id.* at *13–14; and (3) Goldman's putative interest in running in a hypothetical 2022 special election did not confer standing as a candidate to challenge the constitutionality of the 2021 general election, *id.* at *14. Goldman timely noticed an appeal, see Notice of Appeal, District Court ECF No. 91, and the Court consolidated his appeal with the Election Officials' pending interlocutory appeal, see Order, Lead Case ECF No. 56.

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## ARGUMENT

1. This Court has jurisdiction over this appeal because the three-judge district court below dismissed the case for lack of standing, which is a threshold jurisdictional issue that a single judge alone could have

decided. *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974).

Judge Novak alone could have ruled on the issue of Goldman's standing to sue—or, because a three-judge court had already been convened, the three-judge panel could have dissolved itself to allow Judge Novak to dismiss the case for lack of standing. Congress has provided that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the . . . apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). Section 2284 provides, however, that a single district judge has the power first to "determine[]" whether "three judges are not required," and to "conduct all proceedings except the trial" even in cases where a three-judge panel is required. *Id.* § 2284(b)(1), (3).

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A three-judge district court is "not required" where the federal question is "insubstantial." *Shapiro v. McManus*, 577 U.S. 39, 44 (2015). "Insubstantiality in the claim may appear because of the absence of federal jurisdiction, lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable." *Maryland Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606,

611 (4th Cir. 1970) (footnotes omitted); see also *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980) (same). The one-judge district court must first "carefully scrutinize the bill of complaint to ascertain whether a substantial question is presented." *Ex parte Poresky*, 290 U.S. 30, 32 (1933); see also *Crossen v. Breckenridge*, 446 F.2d 833, 837 (6th Cir. 1971) (Before convening a three-judge district court, "the district judge must initially find that plaintiffs with standing have presented a 'case or controversy.'").

If a court lacks subject-matter jurisdiction over a section 2284 claim, the district judge may "decline[ ] to convene a three-judge court," or, if the jurisdictional defect is discovered after the court is convened, the three-judge court may "dissolve[ ] itself, leaving final disposition of the complaint to a single judge." *Gonzalez*, 419 U.S. at 100; *Getty v. Reed*, 547 F.2d 971, 973 (6th Cir. 1977) (observing that the single district judge "can and should . . . screen the pleading filed and dismiss it if . . . the District Court has no jurisdiction over the action"); accord *Ex parte Poresky*, 290 U.S. at 32. Thus, "[t]he decisions have uniformly held that the single district judge to whom an action is originally presented may refuse to request a three-judge court and dismiss the action if he

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concludes that the general requisites of federal jurisdiction are not present." *Atlee v. Laird*, 339 F. Supp. 1347, 1350 (E.D. Pa. 1972), aff'd 411 U.S. 911 (1973); see, *e.g.*, *Jacobs v. Tawes*, 250 F.2d 611, 614 (4th Cir. 1957) (amount in controversy); *Sharrow v. Fish*, 501 F. Supp. 202, 204 (S.D.N.Y. 1980) (standing), aff'd 659 F.2d 1062 (2d Cir. 1981); *Sharrow v. Peyser*, 443 F. Supp. 321, 323, 325 (S.D.N.Y. 1977) (standing), aff'd 582 F.2d 1271 (2d Cir. 1978); *Puerto Rico Int'l Airlines, Inc. v. Colon*, 409 F. Supp. 960, 966 (D.P.R. 1975) (standing).

2. In this case, the Chief Judge convened a three-judge district court before Judge Novak had completed the process of screening Goldman's complaint for insubstantiality. Although it recognized that a single district judge could have decided the standing question, the three-judge district court here decided to dismiss the complaint for want of jurisdiction. *Goldman II*, 2022 WL 2024745, at *7. The jurisdictional question before this Court, then, turns on whether this Court has appellate jurisdiction over a three-judge district court's judgment dismissing a complaint for lack of Article III jurisdiction.

A three-judge district court in a section 2284 case is "not a different court from the District Court, but is the District Court composed of two

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additional judges sitting with the single District Judge before whom the application for injunction has been made." *Jacobs*, 250 F.2d at 614; see also *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1306 (M.D. Ala. 2013) ("A three-judge district court is still a district court within the ordinary hierarchical structure of the federal judiciary."). This Court's appellate jurisdiction over the district court's judgment is therefore governed by the same provisions that would govern its appellate review of the judgments of one-judge district courts. This Court has "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. The district court's judgment of dismissal in this case undoubtedly qualifies as a "final decision" under section 1291. See *Ali v. Hogan*, 26 F.4th 587, 595 (4th Cir. 2022).[4] The

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[4] The district court dismissed Goldman's claims "with prejudice." *Goldman II*, 2022 WL 2024745, at *15. Even if the dismissal should have been without prejudice, see *Southern Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013), the dismissal is nevertheless a "final decision" under section 1291 because (1) the district court forbade Goldman from further amending his complaint after granting his motion to file a second amended complaint, see Order, District Court ECF No. 17, and (2) the district court's

only question, then, is whether "a direct review" of the district court's decision "may be had in the Supreme Court." 28 U.S.C. § 1291.

Congress has diminished the Supreme Court's once broad direct-review jurisdiction and confined it largely to 28 U.S.C. § 1253. See 17 Fed. Prac. & Proc. Juris. § 4040 (3d ed. 2022) ("Even as Congress acted to abolish virtually all of the appeal jurisdiction of the Supreme Court in 1988, it left intact the provisions of § 1253 providing for appeal from decisions of three-judge district courts."). That section provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253. The purpose of this direct-review provision is to "safeguard important state interests" by "accelerating a final determination on the merits" of district-court judgments enjoining state statutes. *Swift & Co. v. Wickham*, 382 U.S. 111, 119, 127 (1965). But the

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reasoning makes clear that "that no amendment in the complaint could cure the defects in the plaintiff's case," *Bing v. Brivo*, 959 F.3d 605, 610 (4th Cir. 2020) (quotation marks omitted); see also *Buscemi v. Bell*, 964 F.3d 252, 261 (4th Cir. 2020) (affirming a judgment of dismissal with prejudice for lack of standing but modifying the judgment to "reflect a dismissal without prejudice").

Supreme Court has declined to give section 1253 a broad interpretation, reasoning that "any loose construction of the requirements of [the direct-review provision] would defeat the purposes of Congress . . . to keep within narrow confines [the Supreme Court's] appellate docket." *Phillips v. United States*, 312 U.S. 246, 250 (1941); see also *Mitchell v. Donovan*, 398 U.S. 427, 431 (1970) (applying narrow construction to exclude declaratory judgments entered by three-judge district courts from the ambit of Supreme Court's direct-review jurisdiction under section 1253).

3. The Supreme Court has "unanimously held that jurisdiction over an appeal from an order of a three-judge court dismissing a complaint for lack of standing [is] vested in the court of appeals." *Jagnandan v. Giles*, 538 F.2d 1166, 1170 (5th Cir. 1976) (citing *Gonzalez*, 419 U.S. at 100). In *Gonzalez*, the plaintiffs brought an action seeking to enjoin various Illinois statutes under a now-repealed federal statute requiring the convention of a three-judge court in cases requesting an "injunction restraining the enforcement, operation, or execution" of a state law, 28 U.S.C. § 2281 (1970). *Gonzalez*, 419 U.S. at 91–92. The three-judge district court dismissed the claims on the ground that the plaintiffs lacked standing. *Id.* at 93. The plaintiffs invoked the Supreme Court's

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appellate jurisdiction under section 1253, reasoning that the dismissal was "an order . . . denying . . . an interlocutory or permanent injunction in a[ ] civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." *Id.* at 94 (quoting 28 U.S.C. § 1253).

The Supreme Court dismissed the appeal for want of appellate jurisdiction. It reasoned that requiring direct review of three-judge-district-court judgments dismissing cases for lack of jurisdiction would be inconsistent with Congress's purpose of promoting swift review of judgments enjoining state laws while also "minimizing the mandatory docket of" the Supreme Court. *Id.* at 98. Dismissal for lack of jurisdiction, the Court noted, was a ground upon which a single district judge could have dismissed the claim. *Id.* at 100. "If the three-judge court in the present case had dissolved itself on grounds that 'standing' was absent," the Court reasoned, "and had left subsequent dismissal of the complaint to a single judge, th[e Supreme] Court would . . . clearly have lacked appellate jurisdiction over both orders." *Id.* at 100–01. "The locus of appellate review should not turn on" whether the single district judge or a three-judge court had issued the order that could have been issued by

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a single district judge. *Id.* at 101. Accordingly, the Court held that a judgment of dismissal for lack of standing—even if entered by a three-judge district court—falls outside the scope of section 1253 because the Supreme Court lacks appellate jurisdiction "when a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, or a refusal to request the convention of a three-judge court ab initio." *Ibid.*

A year later, the Court expanded the *Gonzalez* rule to hold that "a direct appeal will lie to th[e Supreme] Court under s[ection] 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (per curiam). In *MTM*, a three-judge district court abstained under *Younger v. Harris*, 401 U.S. 37 (1971), from issuing a permanent injunction of a state law challenged as unconstitutional. *MTM*, 420 U.S. at 800–01. The Supreme Court once again narrowly interpreted section 1253 to exclude the order from its direct review, reasoning that "the congressional policy behind the three-judge court and direct-review apparatus—the saving of state and federal

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statutes from improvident doom at the hands of a single judge—will not be impaired by a narrow construction of s[ection] 1253," while a "broad construction . . . would be at odds with the historic congressional policy of minimizing the mandatory docket of th[e Supreme] Court in the interest of sound judicial administration." *Id.* at 804.

*Gonzalez* and *MTM* control the jurisdictional question in this case. This Court would lack jurisdiction over the district court's order of dismissal under section 1291 only if Congress required the appeal to go directly to the Supreme Court. Because the district court's judgment of dismissal rested exclusively on its lack of subject-matter jurisdiction and had nothing to do with the merits of Goldman's claim, the Supreme Court lacks direct-appeal jurisdiction under section 1253. *Gonzalez*, 419 U.S. at 101; *MTM*, 420 U.S. at 804. Accordingly, this Court is the appropriate forum for Goldman's appeal. See, *e.g.*, *Concerned Cit. of Vicksburg v. Sills*, 567 F.2d 646, 648 n.1 (5th Cir. 1978) ("This Court, rather than the Supreme Court, has direct appellate jurisdiction because the [three-judge] district court's order in this case is not one which 'rests upon resolution of the merits of the constitutional claim presented below.'" (quoting *MTM*, 420 U.S. at 804)); *Valentino v. Howell*, 528 F.2d 975, 977–

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78 (7th Cir. 1976) (finding jurisdiction in the court of appeals where "the three-judge court did not address the 'merits of the constitutional claim presented below'" (quoting *MTM*, 420 U.S. at 804)); *Breed v. U.S. Dist. Court for N. Dist. of Cal.*, 542 F.2d 1114, 1115 (9th Cir. 1976) ("[W]e have jurisdiction over appeals from appealable orders of three-judge district courts that do not resolve the merits of the constitutional claim presented.").

4. If the Court concludes to the contrary that section 1253 ousts it of appellate jurisdiction, it must dismiss the appeal. See, *e.g.*, *Bogue v. Faircloth*, 441 F.2d 623 (5th Cir. 1971) (per curiam) (dismissing appeal for lack of appellate jurisdiction because direct review of three-judge court order lay with the Supreme Court). It should then order supplemental briefing on standing in the Election Officials' interlocutory appeal and vacate the district court's denial of sovereign immunity on the ground that it lacked jurisdiction to enter it. *Benham v. City of Charlotte*, 635 F.3d 129, 134 (4th Cir. 2011) ("If an appellate court determines that the district court lacked jurisdiction, vacatur of the district court's ruling, along with a remand with instructions to dismiss, is the appropriate disposition."); *Stephens v. County of Albemarle*, 524 F.3d 485, 490 (4th

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Cir. 2008) ("When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986))).

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century typeface.

*/s/ Andrew N. Ferguson*

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## CERTIFICATE OF SERVICE

I certify that on July 11, 2022, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. A true copy was also sent, via first class mail and electronically, to:

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