

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

MOST REVEREND DAVID A. ZUBIK, et al.,

Appellants,

v.

SECRETARY U.S. DEPARTMENT OF HEALTH
& HUMAN SERVICES., et al.

Appellees.

No. 13-1228

RESPONSE TO JURISDICTIONAL QUESTION

On January 25, 2013, this Court ordered the parties to address whether “the Court lacks jurisdiction because the order is not immediately appealable.” As we explain below, there is a final appealable judgment in this case, and the Court accordingly has jurisdiction under 28 U.S.C. § 1291.

1. Subject to limited exceptions, parties may only appeal from “final decisions of the district courts.” 28 U.S.C. § 1291. “A ‘final decisio[n]’ is typically one by which a district court disassociates itself from a case.” *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 604-05 (2009).

This Court has held that “[g]enerally, an order which dismisses a complaint without prejudice is neither final nor appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action.” *Borelli v. City of Reading*, 532 F.2d 950, 951 (3d Cir. 1976) (per curiam). “Only if the plaintiff cannot

amend or declares his intention to stand on his complaint does the order become final and appealable.” *Id.* at 951-52.

That general rule, however, “does not apply ‘where the district court has dismissed based on justiciability and it appears that the plaintiffs could do nothing to cure their complaint.’” *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156, 162 (3d Cir. 2007) (per curiam) (quoting *Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1461 n.6 (3d Cir. 1994)).

2. In this case, the district court dismissed plaintiffs’ claims based on justiciability grounds of standing and ripeness. This decision was not based on a defect in the pleadings, and the deficiency cannot be cured by pleading. Accordingly, the decision below is immediately appealable. See, e.g., *Pa. Family Inst.*, 489 F.3d at 159, 162 (dismissal without prejudice for lack of standing and ripeness is final, appealable judgment).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2013, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Adam Jed

ADAM C. JED