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Please Remain Standing: Using Fed. R. Civ. P. 15(d) Supplemental Pleading to Cure Defects in Standing

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PLEASE REMAIN STANDING: USING FED. R. CIV. P. 15(D) SUPPLEMENTAL PLEADING TO CURE DEFECTS IN STANDING

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I. INTRODUCTION

In 2017, civil filings in U.S. federal district courts grew six percent, up to 292,076 filings in total.[1] The growth in the federal caseload is not surprising; the total number of pending civil cases grew to 349,666.[2] This growth reinforces the courts' never-ending mandate "to secure the just, speedy, and inexpensive determination of every action and proceeding."[3] This mandate sprouts from the Federal Rules of Civil Procedure ("Fed. R. Civ. P." or the "Federal Rules"), which apply comprehensive, uniform procedural rules "to encourage courts to reach the merits of a case rather than dismissing it solely on minor procedural technicalities."[4]

With this in mind, the U.S. Court of Appeals for the D.C. Circuit joined the First, Second, Fourth, Ninth, and Federal Circuits in *Scahill v. District of Columbia*, holding that plaintiffs may cure standing defects through a Fed. R. Civ. P. 15(d) supplemental pleading that shows standing from events after the original complaint was filed and dismissed for lack of standing.[5] This holding reinforced a split in the federal circuit courts of appeals, as the Seventh, Eighth, and Tenth Circuits have required plaintiffs to establish standing at the time of original filing, and otherwise refile a new complaint should they want to include events that support standing subsequent to the initial complaint.[6]

This Article argues that the circuit split should be resolved in line with the D.C. Circuit's reasoning in *Scahill*, as the original standing requirement "harkens back to the type of technical obstacle" the Supreme Court and the Federal Rules have repeatedly rejected.[7] In Part II, this Article will discuss the history and use of the "curable defects exception"

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1. *Federal Judicial Caseload Statistics 2017*, U.S. COURTS (April 9, 2019), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017 [https://perma.cc/F85E-BAWP].

2. *Id.*

3. FED. R. CIV. P. 1.

4. Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1, 4 (1994).

5. Scahill v. District of Columbia, 909 F.3d 1177, 1184 (D.C. Cir. 2018).

6. *See, e.g.*, Park v. Forest Service of U.S., 205 F.3d 1034, 1040 (8th Cir. 2000).

7. *Scahill*, 909 F.3d at 1184.

to *res judicata* and collateral estoppel/issue preclusion to resolve insufficient pleading. Part II will also discuss Fed. R. Civ. P. 15(d) and the standing doctrine. Part II will review the circuit split and the major cases on each side. Finally, Part III will argue that Fed. R. Civ. P. 15(d) supplemental pleadings best allow federal courts to efficiently and accurately resolve standing defects that can be cured by subsequent events—in keeping with the overarching intent of the Federal Rules of Civil Procedure.

II. BACKGROUND

The curable defects exception to issue preclusion concerns the interaction of several issues. This section will discuss (1) issue preclusion generally, and the general use of the curable defects exception; (2) Fed. R. Civ. P. 15(d) and the wide discretion granted to courts therein to allow supplemental pleadings; and (3) the concept of standing in civil litigation. This section will next outline the two general ways in which federal circuit courts have resolved this issue at hand. First, this section will discuss what this Article calls the "permissive approach" adopted by the D.C. Circuit in *Scahill v. District of Columbia*,[8] and followed by the First, Second, Fourth, Ninth, and Federal Circuits. Second, this section will discuss what this Article calls the "original-standing approach," currently followed by the Seventh, Eighth, and Tenth Circuits. Because of its presence throughout the cases discussed, this section will begin with a discussion of issue preclusion, supplemental pleading, and standing.

A. Issue Preclusion and "Curable Defects"

Issue preclusion, or collateral estoppel, generally refers to a prior judgement's effect of preventing the relitigating of issues that have already been litigated in a previous action, regardless of whether it was based on the same cause of action in the second lawsuit.[9] In other words, the doctrine operates to prevent relitigation of an issue between the same parties (or parties in privity to the original parties) in any future lawsuit based on a different claim.[10] Generally, courts require the following

8. *Id.* at 1177.

9. *See, e.g.*, B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 140 (2015) ("Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.").

10. *See In re* Azeglio, 422 B.R. 490, 494 (Bankr. D.N.J. 2010) (applying collateral estoppel to "a party to or in privity with a party to the earlier proceeding").

elements be met to apply issue preclusion or collateral estoppel to a claim: (1) the issue originally decided was identical with the issue in the present action; (2) the prior adjudication resulted in a final judgment on the merits; (3) the party against whom collateral estoppel or issue preclusion is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.[11]

Issue preclusion is often, but not always, limited to factual findings rather than matters of law.[12] This is not the case in all jurisdictions, however—according to the Restatement (Second) of Judgments, an issue foreclosed on relitigation may be an evidentiary fact, the application of law to fact, or an issue of law applied to the parties in the prior proceeding.[13] "Issue preclusion usually applies to dismissal for lack of jurisdiction as well as for other grounds."[14] The judgment ordering dismissal will "have preclusive effect as to matters actually adjudicated; it will, for example, preclude relitigation of the precise issue of jurisdiction that led to the initial dismissal."[15]

However, many courts will not bar subsequent suits when the reason for initial dismissal is cured—as long as there has not been a final judgment on the merits and the underlying facts have sufficiently changed to allow for a second suit.[16] For instance, a dismissal for lack of subject matter jurisdiction is not an adjudication of the claim on the merits, and the litigant may refile in the appropriate forum.[17] Additionally, if the second-filed claim presents the same jurisdictional issue raised in the first suit, the suit is barred by issue preclusion unless the second-filed claim contains "new information which cures the jurisdictional defect fatal to the first-filed suit."[18] Essentially, this "curable defects doctrine" allows for relitigation of jurisdictional and other procedural dismissals when a "material occurrence subsequent to the original dismissal remedies the original deficiency."[19]

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11. *See, e.g.*, LSREF2 Barron, LLC v. Alexander SRP Apartments, LLC, 17 F. Supp. 3d 1289, 1310 (N.D. Ga. 2014).

12. *See* Eicher v. Mid America Fin. Inv. Corp., 702 N.W.2d 792, 809 (Neb. 2005) (finding that a determination by a federal bankruptcy court that a party lacked standing in a bankruptcy proceeding was not a judgment on the factual merits of the party's fraudulent misrepresentation claim also party to the attempted bankruptcy proceeding).

13. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW. INST. 2019).

14. Safadi v. Novak, 574 F. Supp. 2d 52, 55 (D.D.C. 2008) (citing Dozier v. Ford Motor Co., 702 F.2d 1189, 1181 (D.C. Cir. 1983)).

15. GAF Corp. v. United States, 818 F.2d 901, 912 (D.C. Cir. 1987).

16. *See* Lea v. United States, 126 Fed. Cl. 203, 214 (Fed. Cl. 2016).

17. *Id.* at 213 (quoting Lowe v. United States, 79 Fed. Cl. 218, 228-29 (Fed. Cl. 2007)).

18. *Id.* (quoting Goad v. U.S., 46 Fed. Cl. 395, 398 (Fed. Cl. 2000)).

19. Scahill v. District of Columbia, 909 F.3d 1177, 1182 (D.C. Cir. 2018) (citing Nat'l Ass'n of Home Builders v. EPA, 786 F.3d 34, 41 (D.C. Cir. 2015)).

Dozier v. Ford Motor Co. provides a good illustration of the curable defect doctrine analysis.[20] In *Dozier*, the plaintiff's first complaint was dismissed for lack of subject matter jurisdiction, based in part on a complete lack of diversity and in part on the absence of the requisite amount in controversy.[21] Plaintiff later refiled in the District Court for the District of Columbia, complaining of the same transaction but this time alleging a sufficient amount in controversy.[22] The plaintiff argued that the inadequate damage claim in the first suit was merely a pleading deficiency, but the court disagreed: "it does not qualify [as a curable defect exception to issue preclusion]."[23] The court reasoned that the exception applies when a "precondition requisite" to the court's proceeding with the original suit was not alleged or proven, but is later provided in the second suit.[24] The problem in the first suit is remedied by events that happened after the original dismissal.[25] The court reasoned that although it is desirable to give the plaintiff multiple chances to plead these newly occurred facts, it is a separate matter to allow the plaintiff to arbitrarily change previously pleaded facts about events that occurred prior to the initial filing.[26] Therefore, the court upheld the district court's dismissal of the second claim as a valid use of the issue preclusion doctrine.[27]

B. Federal Rule 15(d) and Supplemental Pleading

Fed. R. Civ. P. 15(d) provides:

> Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.[28]

The rule is intended "to give district courts broad discretion in allowing

20. *See* 702 F.2d 1189 (D.C. Cir. 1983) (Scalia, Circuit Judge).

21. *Id.* at 1190 ("[T]he suit sought '$7,000 compensatory and $1,000,000 in punitive damages for alleged breach of express and implied warranties pertaining to an automobile manufactured by Ford.'").

22. *Id.* ("alleging $16,400 in actual [damages]") (the diversity jurisdiction minimum amount in controversy at the time was $10,000).

23. *Id.* at 1192.

24. *Id.*

25. *Id.* ("[e.g.] filing of affidavit, service of process or present residence").

26. *Id.*

27. *Id.* at 1195 ("We decline to prolong the contest in the federal courts by allowing the plaintiff simply to change his mind as to the damages he has suffered.").

28. FED. R. CIV. P. 15(d).

supplemental pleadings[,]" and promote judicial economy and convenience.[29] Moreover, "[i]t is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted."[30] A supplemental pleading differs from an amended pleading: although an amended pleading concerns matters that happened prior to the original pleading and serves to completely replace the original pleading, a supplemental pleading concerns events that happened after the initial pleading and adds to the initial pleading.[31] A supplemental pleading *is an addition to*, rather than a replacement of, the original complaint.[32] Therefore, it is appropriate for parties to follow up their pleadings with supplemental pleadings should that be needed to bring a case up to date.[33]

Supplemental pleadings are particularly flexible—even when parties have mislabeled requests for supplemental pleadings, courts have granted leave to file the correct type of pleading.[34] Because the motions under the rule for amended pleading and supplemental pleading are both within the discretion of the court, the fact that parties may incorrectly plead one or the other is not fatal.[35] Thus, courts may treat amended pleadings which seek to add claims to the original pleadings as if they had been properly filed pursuant to Rule 15(d), even if incorrectly labeled.[36]

A supplemental pleading may be used for numerous purposes. Supplemental pleadings may be used to introduce facts which bring the original pleading up to date, including new facts which enlarge or change the relief first sought.[37]Additionally, supplemental pleadings may reflect events that occurred after the original pleading was first filed.[38] Although some courts have held that supplemental pleadings cannot assert new causes of action, other courts have allowed such pleadings so long as the new pleading is based on the events and facts raised in the original pleading and does not unduly prejudice the opposing party.[39]

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29. San Luis & Delta-Mendota Water Auth. v. U.S. Dept. of Int., 236 F.R.D. 491, 495-96 (E.D. Cal. 2006) (quoting Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988)).

30. *Id.* at 496.

31. Habitat Educ. Ctr., Inc. v. Kimbell, 250 F.R.D. 397, 401 (E.D. Wis. 2008).

32. Millay v. Surry Sch. Dept., 584 F. Supp. 2d 219, 226 (D. Maine 2008) (quoting United States v. Russell, 241 F.2d 879, 882 (1st Cir. 1957)).

33. *See* Francis *ex rel.* Estate of Francis v. Northumberland Cty., 636 F. Supp. 2d 368, 383 (M.D. Pa. 2009).

34. *See, e.g.*, Broadview Chem. Corp. v. Loctite Corp., No. 13104, 1970 WL 10113, *1 (D. Conn. Sept. 23, 1970).

35. Soler v. G & U, Inc., 103 F.R.D. 69, 73 (S.D.N.Y. 1984).

36. *Id*.

37. Kaiser-Frazier Corp. v. Otis & Co., 8 F.R.D. 364, 367 (S.D.N.Y. 1948).

38. *See* City of Texarkana, Tex. v. Arkansas, Louisiana Gas Co., 306 U.S. 188, 203 (1939).

39. *See* Health Ins. Ass'n of America v. Goddard Claussen Porter Novelli, 213 F.R.D. 63, 67

Under the 1963 amendments to the Federal Rules of Civil Procedure, courts have been given great discretion to allow for supplemental pleadings despite defective original pleadings.[40] The court may allow supplemental pleading even though the original pleading is defective in stating a claim or defense.[41] All of this is to say that Fed. R. Civ. P. 15(d) allows for broad and flexible supplemental pleading, which permits litigants to correct mistakes without the added cost and expense of dismissal and subsequent suits over the same set of issues.

C. Standing

Standing is the "legal or equitable right, title, or interest in the subject matter of the controversy that entitles a party to invoke the jurisdiction of the court."[42] Article III of the Constitution of the United States limits the jurisdiction of federal courts to cases and controversies, of which the "core component of standing is an essential and unchanging part[.]"[43] Standing is a prerequisite to subject-matter jurisdiction; a lack of standing bars consideration of a claim by the court.[44] Standing focuses on the party seeking relief and its relationship to the claim seeking to be adjudicated.[45] In evaluating standing, courts look to the substantive issues of law not to evaluate them on the merits, but instead to determine "whether there is a logical nexus between the status asserted and the claim[.]"[46]

Standing contains three elements.[47] First, a plaintiff must "have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[48] Second, there must be a causal connection between the injury and the conduct complained of: "the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ...

(D.D.C. 2003) (quoting Aftergood v. Central Intelligence Agency, 225 F. Supp. 2d 27, 30 (D.D.C. 2002)).

40. Notes of Advisory Committee on 1963 Amendment to FED. R. CIV. P. 15(d).

41. Harnett v. Barr, 538 F. Supp. 2d 511, 514 (N.D.N.Y. 2008).

42. State v. Lamb, 789 N.W.2d 918, 926 (Neb. 2010) (citing Myers v. Neb. Invest. Council, 724 N.W.2d 776 (2006)).

43. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also* U.S. Const. Art. III.

44. Frost Nat. Bank v. Fernandez, 315 S.W.3d 494, 502 (Tex. 2010) *cert. denied*, 562 U.S. 1180 (2011).

45. Warth v. Seldin, 422 U.S. 490, 525-26 (1975) (citing Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973)).

46. Flast v. Cohen, 392 U.S. 83, 101-02 (1968) ("For example, standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause.").

47. *Lujan*, 504 U.S. at 560.

48. *Id.* (internal quotations and citations omitted); *see also* Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1548 (2016) (finding that even an alleged statutory violation must still have a concrete injury to confer standing on the plaintiff).

th[e] result [of] the independent action of some third party not before the court.'"[49] Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[50] General injuries, such as the right to have the government act as the plaintiff would like under the law, are not sufficient to support standing.[51] This constitutional, injury-in-fact requirement for standing helps to ensure that a plaintiff has a personal stake in the outcome of the controversy.[52] And, even when litigants have been permitted to assert the rights of others, the "litigants themselves still 'must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute.'"[53]

To illustrate, in *Lujan v. Defenders of Wildlife*, the Supreme Court held that wildlife advocacy organizations did not have standing to seek judicial review of new administrative rules promulgated by the Secretaries of the Interior and Commerce pursuant to the Endangered Species Act of 1973.[54] The rule at issue limited enforcement of some of the Endangered Species Act to actions within the United States or the high seas, rather than internationally.[55] The advocacy groups filed suit, seeking declaratory judgment to reverse the new rules back to their prior, much broader jurisdictional scope, which would possibly restore funding for the advocacy groups' overseas efforts to restore endangered species.[56] The Court found the injury asserted—that the possible extinction of certain endangered species protected under the older rules—insufficient to give standing for federal judicial jurisdiction.[57] Further, despite the lack of clarity with regard to any injury suffered, the Court could not follow the advocacy group's reasoning as to how the litigation at hand could effectively provide relief for their alleged injury.[58] The Court concluded

49. *Lujan*, 504 U.S. at 560-61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

50. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

51. Seegers v. Gonzales, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (citing Allen v. Wright, 468 U.S. 737, 754 (1984)).

52. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157-58 (2014) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)) (reasoning that standing prevents the "judicial process from being used to usurp the powers of the political branches").

53. Hollingsworth v. Perry, 570 U.S. 693, 708 (2013) (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)).

54. *See Lujan*, 504 U.S. at 555.

55. *Id.*

56. *Id.* at 559.

57. *Id.* at 566-67 (While it is possible to think of an individual who works with an endangered species to possibly perceive a harm, "[i]t goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.").

58. *Id.* at 570-71 ("The short of the matter is that redress of the only injury in fact respondents

by noting the that the standing requirement centers on the idea that the "party seeking review must himself have suffered an injury."[59]

The standing doctrine is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions; the judicial system must resolve the issues and injuries for the parties before it.[60] Within this context, the ideas of standing and broad, supplemental pleadings sometimes come to a head—and the federal circuit courts are divided as to the proper resolution.

D. The Tenth, Seventh, and Eighth Circuits: The Original Standing Approach

In *Park v. Forest Service of U.S.*, the Eighth Circuit declared that "standing is to be determined at the commencement of the suit[.]"[61] Relying on this "commencement of the suit" language from *Lujan* and other Supreme Court decisions, the Tenth, Seventh, and Eighth Circuits have held that the standing analysis must only include what was pled at the moment the complaint was filed.[62] Relying on the traditional role of standing to ensure that only those with a real, injury-in-fact may sue (and

complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.").

59. *Id.* at 578. As a practical matter, challenges to standing are usually brought as FED. R. CIV. P. 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction, but this is not always the case. *See* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1376-77 (2014). Oddly enough, *Lujan* concerned a case dismissed for lack of standing on a FED. R. CIV. P. 56 motion for summary judgment, not a motion to dismiss for lack of subject-matter jurisdiction. *See id.* at 1374; *see also Lujan*, 504 U.S. at 559. For a more in-depth discussion of the practical concerns of litigating standing beyond the scope of this Article, Redish and Joshi implore the federal district courts to resolve standing issues at the earliest possible opportunity so as to avoid exercising its jurisdiction against parties without actual cases or controversies before them—including through preliminary discovery to allow for a determination on the merits (and to only allow determinations of standing on FED. R. CIV. P. 12(b)(1) motions to dismiss, separate from the actual merits of the case). *See* Redish & Joshi, *supra* note 59 at 1378.

60. *See* Law Project for Psych. Rights, Inc. v. State, 239 P.3d 1252 (Alaska 2010).

61. 205 F.3d 1034, 1038 (8th Cir. 2000) (citing *Lujan*, 504 U.S. at 570, n.5). Justice Scalia's plurality opinion in *Lujan* featured several footnotes that criticized the dissenting opinions' willingness to show the redressability of Plaintiff's alleged injuries through eventual arrival at the Supreme Court. Footnote five provides:

> Seizing on the fortuity that the case has made its way to this Court, Justice Stevens protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

Lujan, 504 U.S. at 570, n.5.

62. *See Park*, 205 F.3d at 1038-39.

to reduce instances of frivolous filings), "[i]t is not enough for [the plaintiff] to attempt to satisfy the requirements of standing as the case progresses."[63] This leads to a very simple analysis for these circuits when determining whether to allow supplemental pleadings to satisfy the standing requirement: they do not.[64] In *Park*, Plaintiff was a member of a group known as the "Rainbow Family" that alleged various constitutional violations against the forest service in the operation of a checkpoint on Forest Service land.[65] Plaintiff also alleged that the Forest Service would continue to use checkpoints against her group in the future.[66] The Forest Service did not contest that the checkpoint was impermissibly used, but countered that Plaintiff had not shown that she would be subject to unconstitutional checkpoints in the future, and therefore did not have standing to seek injunctive relief.[67]

Plaintiff, on appeal, filed affidavits stating that checkpoints had been used in subsequent years against her group, to show continuing and future injury-in-fact.[68] The Eighth Circuit, however, disagreed as to the relevance of the subsequent evidence:

> We do not think, however, that the actual use of checkpoints in 1997, 1998, and 1999 is relevant on the issue of standing because all of these events occurred after [Plaintiff] filed her original complaint. We believe that it is [Plaintiff]'s burden to show that, at the time she filed her suit in 1996, there was a real and immediate threat that she would again be subjected by the Forest Service to an unconstitutional checkpoint. *We do not think that she may use evidence of what happened after the commencement of the suit to make this showing*.[69]

After excluding evidence of subsequent checkpoints, the court held that there was insufficient probability that the Forest Service would violate Plaintiff's constitutional rights in the future—thus, the threatened injury was not "certainly impending."[70]

The Seventh Circuit followed a similar line of reasoning in *Pollack v. U.S. Dept. of Justice*.[71] In *Pollack*, Plaintiff lived near a U.S. Navy and Marine Corps shooting range, which Plaintiff alleged led to the discharge of lead bullets into Lake Michigan.[72] Plaintiff then alleged that the

63. *Id.* (quoting Perry v. Village of Arlington Heights, 186 F.3d 826, 830 (7th Cir. 1999)) ("The requirements of standing must be satisfied from the outset.").

64. *See id.* at 1040.

65. *Id.* at 1036.

66. *Id.*

67. *Id.* at 1037.

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.* at 1040.

71. 577 F.3d 737 (7th Cir. 2009).

72. *Id.* at 738.

"deterioration of the lead bullets in the water harmed the environment, in violation of the Clean Water Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and state nuisance law."[73] The court found that Plaintiff lacked standing to allege injury from his enjoyment of an "immense tract of territory,"[74] and refused to consider any injury alleged after the filing of the complaint specific to the shooting range at issue.[75]

Additionally, the Tenth Circuit follows the original-filing rule, which holds that: "standing is determined at the time the action is brought … ."[76] In *Southern Utah Wilderness Alliance v. Palma*, a wilderness advocacy group challenged the Bureau of Land Management ("BLM") granting hydrocarbon leases, which would have allowed for tar-sands oil extraction on federal lands.[77] Although the district court dismissed for lack of standing, the Tenth Circuit found the initial complaint to sufficiently state a particular injury to facially survive a standing challenge.[78] However, the court remanded with instructions to dismiss because the claims were not ripe—the injury alleged would potentially be sufficient to survive a standing challenge, but "[t]here is simply too much uncertainty as to "when and what type of drilling, if any, will occur on the thirty-nine contested leases."[79] Regardless of the disposition of the case, the Tenth Circuit reaffirmed its standing determination at the moment that the complaint is filed at the outset of the litigation.[80]

In sum, the Seventh, Eighth, and Tenth Circuits place great weight on analyzing standing at the moment that the complaint is filed. The analysis is simple, but well-supported—and, in some cases, even disposed of in a single footnote.[81] Such an analysis sits in stark contrasts to the liberal

73. *Id.*

74. *Id.* at 740 (quoting Lujan v. Nat. Wildlife Fed., 497 U.S. 871, 889 (1990) (a separate case from *Lujan v. Defenders of Wildlife*, *supra* note 43, with a very similar fact pattern and result)).

75. *Id.* at 742 n.2 ("Although Pollack visited Foss Park after he commenced suit, a plaintiff must establish standing at the time suit is filed and cannot manufacture standing afterwards.") (citing Friends of the Earth, Inc. v. Laidlaw Env. Serv. (TOC), Inc., 528 U.S. 167, 180 (2000)).

76. S. Utah Wilderness Alliance v. Palma, 707 F.3d 1143, 1152-53 (10th Cir. 2013) (quoting Mink v. Suthers, 482 F.3d 1244, 1253-54 (10th Cir. 2007)).

77. *Id.* at 1146-47.

78. *Id.* at 1156-57.

79. *Id.* at 1160-61. Understanding the distinction between ripeness and standing is not particularly necessary for purposes of this Article, but the Tenth Circuit largely rested on an assumption that, as alleged, the individual plaintiffs had sufficiently pled a tangible injury because of BLM's alleged variation from its standard leasing practices, yet no actual injury had occurred at the outset of the litigation, and without imminent hardship or an injunction the case was not ripe. *Id.*

80. *Id.* at 1153 ("[A]lthough we examine the allegations in SUWA's Amended Complaint, our inquiry focuses on whether SUWA had standing *when the original complaint was filed* in April 2007.") (emphasis added).

81. *See, e.g.*, Pollack v. U.S. Dept. of Justice, 577 F.3d 737, 742 n.2 (7th Cir. 2009) ("[A] plaintiff

supplementation allowed by other circuits—and adopted by the D.C. Circuit in *Scahill*.

E. First, Second, Fourth, Ninth, and Federal Circuits: The "Permissive Approach"

In contrast, the "permissive approach" applies Federal Rule 15(d) to standing defects to allow plaintiffs to cure dismissals for lack of standing with evidence of events or facts that occurred subsequent to the original complaint.[82] This approach is highly flexible and places a premium on judicial economy; instead of litigants being forced to refile their cases again, they can merely file a motion to reconsider the standing issue along with a Fed. R. Civ. P. 15(d) supplemented pleading to cure the standing defect in the initial pleading.[83] The Second Circuit adopted this approach in *Travelers Ins. Co. v. 633 Third Associates*,[84] in which it held that if a complaint, as supplemented, alleges sufficient facts to support the alleged injury, a plaintiff could establish standing despite earlier dismissal.[85] Other circuits have joined the Second Circuit's approach over the last twenty-five years.

The main distinction between the approaches centers on the permissive approach's acceptance of supplemental pleadings as a stand-in for the "time a complaint is filed."[86] The Ninth Circuit's decision in *Northstar Financial Advisors, Inc. v. Schwab Investments* illustrates this subtle difference.[87] In that case, an investment fund filed a class action against the trustees of a Massachusetts investment fund, alleging that the trustees deviated from the fund's policies, thus exposing investors to millions of dollars in losses.[88] The fund owned no shares on its own, and filed the initial suit without obtaining an assignment of claims from any fund investor.[89] The district court initially dismissed the complaint for lack of standing, yet the fund filed a supplemented complaint—and survived a renewed motion to dismiss.[90] The Ninth Circuit agreed: "[a] rule that

must establish standing at the time suit is filed and cannot manufacture standing afterwards.").

82. *See, e.g.*, U.S. *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 4 (1st Cir. 2015) ("Fed. R. Civ. P. 15(d) affords litigants a pathway for pleading any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The rule shares the core objective of the Civil Rules: to make pleadings a means to achieve an orderly and fair administration of justice.").

83. *See, e.g.*, Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036, 1043 (9th Cir. 2015).

84. 973 F.2d 82, 87-88 (2d Cir. 1992).

85. *Id.* at 88 (citing FED. R. CIV. P. 15(d)).

86. *See Northstar*, 779 F.3d at 1043.

87. *See id.*

88. *Id.* at 1042.

89. *Id.* at 1043.

90. *Id.* at 1043-44 (citing Northstar Fin. Advisors, Inc. v. Schwab Invs., 781 F.Supp.2d 926, 932-33 (N.D. Cal. 2011) (finding that dismissing the complaint for lack of standing based on the initial filing

would turn on the label attached to a pleading is difficult for us to accept."[91] Preferring the flexibility and broad application of the Federal Rules of Civil Procedure, the Ninth Circuit held that concerns of "the misuse of the pleading for strategic gamesmanship" were not warranted in comparison to the benefits provided by supplemental pleading.[92]

Similarly, the Federal Circuit focuses on the "facts existing at the time the complaint *under consideration* was filed" when determining jurisdictional matters like standing.[93] In *Prasco, LLC v. Medicis Pharm Corp.*, the Federal Circuit noted that the addition of Fed. R. Civ. P. 15(d) was critical to resolving the dispute; the rule grants district courts permission to allow plaintiffs to supplement a jurisdictionally defective original pleading—which the court applied to the standing doctrine.[94]

And, in stark contrast to the Seventh Circuit's dismissal of "manufactur[ed] standing" in *Pollack*,[95] the Fourth Circuit expressly approves of such a practice. In *Daniels v. Arcade, L.P.*, the Fourth Circuit rejected a defendant's contention that the plaintiff lacked standing.[96] The defendant argued that plaintiff had not alleged that the plaintiff had even been on the premises prior to filing the Americans with Disabilities Act ("ADA") complaint, and that plaintiff's history of pursuing ADA litigation somehow demonstrated a lack of sincere injury.[97] The court rejected this argument, finding that it was irrelevant whether plaintiff had been to the location at issue prior to filing the original complaint because the allegations in the supplemented complaint were at issue.[98] The court further rejected defendant's cited precedent from other circuits to hold that standing is a jurisdictional issue, to be determined on the basis of amended and supplemented pleadings.[99] Essentially, where the Seventh Circuit took offense to a plaintiff manufacturing standing once standing

would have "elevate[d] form over substance")).

91. *Id.* at 1047.

92. *Id.* at 1048.

93. Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008) (quoting GAF Bldg. Materials Corp. v. Elk Corp., 90 F.3d 479, 483 (Fed. Cir. 1996)) (emphasis in original).

94. *Id.* The court then found that plaintiff's supplemented complaint still failed to sufficiently allege an injury in fact, and upheld dismissal for lack of standing. *Id.* at 1339-40. *See also* 6A Charles Allan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1505 (2018) ("Rule 15(d) now expressly approves curative supplemental pleadings and the rule is neither unconstitutional nor beyond the bounds of Congress' rulemaking authority under the Rules Enabling Act.").

95. *See* Pollack v. U.S. Dept. of Justice, 577 F.3d 737, 742 n.2 (7th Cir. 2009).

96. Daniels v. Arcade, L.P., 477 F. App'x. 125, 130 (4th Cir. 2012).

97. *Id.* at 129-130.

98. *Id.* at 130 ("Although it is unclear whether Daniels' "regular[ ]" visits to the Market began before the date of the original complaint, March 3, 2010, or instead began merely before the date of the amended complaint, August 9, 2010, we conclude that the resolution of this question is not necessary to the result we reach. It is undisputed that Daniels visited the Market before he became a party to this lawsuit when the *amended* complaint was filed.") (emphasis added).

99. *Id.* at 131.

was questioned, the Fourth found such a factor irrelevant to the standing determination.

Continuing this trend, the First Circuit adopted the permissive approach on the basis of Rule 15's intent to provide fairness and access to justice.[100] In *United States ex rel. Gadbois v. PharMerica Corp.*, the defendant relied on a 2013 First Circuit decision that upheld a jurisdictional dismissal on the basis of facts alleged only in the original complaint.[101] As applied to standing in a Rule 15(d) supplemental pleading, the First Circuit rejected defendant's argument.[102] The court noted that Rule 15(d)'s adoption in 1963 requires courts to consider more than just the narrow, traditional approach to this issue:

> [t]he new language was designed to ensure that the amended rule would give the court broad discretion in allowing a supplemental pleading so that plaintiffs would not be needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.[103]

Additionally, the court looked to the Federal, Fourth, and Ninth Circuits that "have not hesitated to make this implication explicit."[104] The court thus held that the complaint was eligible for Rule 15(d) supplementation.[105]

The Circuit Courts that have adopted the permissive approach have found supplemented pleading impliedly authorized in standing disputes from the Supreme Court's decision in *Mathews v. Diaz*.[106] In *Mathews*, the Supreme Court addressed the issue of whether Rule 15(d) could be applied to supplement a complaint originally lacking in subject matter jurisdiction.[107] The plaintiff in *Matthews* was a Medicare applicant who failed to file his Medicare application until after a complaint had been filed to join him in a proposed class action lawsuit (as a Medicare recipient).[108] The Court held that the jurisdictional defect—that the plaintiff was not a Medicare recipient at the time of the original complaint and thus court did not have subject matter jurisdiction over his claim—

100. U.S. *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 4-5 (2015).

101. *Id.* at 4. Defendant cited *U.S. ex rel. Estate of Cunningham v. Millennium Laboratories of Cal., Inc.*, 713 F.3d 662, 664 (1st Cir. 2013) ("Jurisdiction is determined based on whether it existed at the time the plaintiff filed the original complaint.").

102. *PharMerica*, 809 F.3d at 4-5 ("After careful consideration, we find PharMerica's position untenable.").

103. *Id.* (internal citations and quotations omitted).

104. *Id.* at 5 (the implication in this case was that the use of Rule 15(d) to cure jurisdictional defects also applies to standing).

105. *Id.* at 6.

106. 426 U.S. 67, 74-75 (1974).

107. *Id.* at 71-72.

108. *Id.* at 75.

could be cured through supplementation.[109] Seeing little distinction between subject-matter jurisdiction and the standing requirement, many circuits felt authorized to "make this implication explicit."[110]

F. The D.C. Circuit Adopts the Permissive Approach: Scahill v. District of Columbia

The D.C. Circuit is the latest to adopt the permissive approach.[111] In *Scahill*, the court had to determine whether the curable defects exception to issue preclusion, as applied to a dismissal for lack of standing, allows a plaintiff to establish standing based on events "that arose after the initial complaint was filed" through a Rule 15(d) supplemental pleading.[112] Plaintiffs were the owners of a restaurant in Washington, D.C. who lost their liquor license for serving alcohol to minors.[113] As a result, they shut down the restaurant and reopened another restaurant in the same location.[114] When they applied for a license for the new restaurant, the D.C. Alcoholic Beverage Control Board ("Board") granted the license with several restrictions.[115] These conditions required the restaurant to "maintain a barring notice against [one of the owners] to prohibit him from entering or accessing the licensed premises for a period of five years" and to notify the Metropolitan Police Department ("MPD") of any violations.[116]

The owners attempted to have the license conditions set aside under D.C. law, but were rejected on the grounds that the Board acted within its discretion and the owners did not have standing because they did not have a tangible injury.[117] Thereafter, the owners filed a complaint in federal court alleging that the conditions violated their First and Fifth Amendment rights.[118] The district court dismissed the owners' complaint on the grounds that they were precluded in view of the D.C. Court of Appeals' determination that it did not have standing.[119] The owners then

109. *Id.* ("A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.").

110. *See, e.g.*, *PharMerica*, 809 F.3d at 6.

111. *See* Scahill v. District of Columbia, 909 F.3d 1177, 1179 (D.C. Cir. 2018).

112. *Id.*

113. *Id.* at 1179-80.

114. *Id.* at 1180.

115. *Id.*

116. *Id.* (internal citations omitted).

117. *Id.* (citing HRH Servs., LLC v. D.C. Alcoholic Beverage Control Bd., No. 16-AA-758, Order at 1 (D.C. Oct. 13, 2016)).

118. *Id.*

119. *Id.*

moved for reconsideration and leave to file an amended complaint—which when filed, alleged that the owners had been issued a $4,000 fine for violating the license's conditions.[120] The district court denied the motion to reconsider by applying the standing analysis at the time of the original complaint.[121]

On appeal, the owners contended that the district court erred in ruling that they lacked standing, and that the prior dismissal for lack of standing did not preclude an amended or supplemental complaint from establishing standing from events that occurred after the initial complaint.[122] The D.C. Circuit agreed.[123] The court first examined the curable defect exception to issue preclusion: "[t]he curable defect exception to issue preclusion allows relitigation of jurisdictional dismissals when a material occurrence subsequent to the original dismissal remedies the original deficiency."[124] The court then looked to *Matthews*, finding that the Supreme Court's use of Rule 15(d) to allow events subsequent the original complaint to help the plaintiff establish jurisdiction.[125] The court further looked to the Ninth, First, Fourth, Federal, and Second Circuits, which "have held that a plaintiff may cure a standing defect through a supplemental pleading alleging facts that arose after the original complaint was filed.[126] Finally, the court reasoned that dismissing a plaintiff's complaint for lack of standing when subsequent events would establish standing "harkens back to the type of technical obstacle that . . . Rule 15(d) was designed to avoid."[127] Because the alternative "forces a plaintiff to go through unnecessary hassle and expense of filing a new lawsuit," the court held that plaintiffs could establish standing through supplemental pleading of subsequent events.[128]

III. DISCUSSION

Should the Supreme Court ever decide to consider the issue, the Court should adopt the permissive approach and allow standing defects at the outset of litigation to be cured by subsequent events through Fed. R. Civ. P. 15(d) supplemental pleadings. This section will discuss the reasons for resolving the circuit split in this manner: (1) the purpose of Rule 15(d), as

120. *Id.* at 1181.

121. *Id.*

122. *Id.*

123. *Id.* at 1184.

124. *Id.* at 1182 (citing Nat'l Ass'n of Home Builders v. EPA, 786 F.3d 34 (D.C. Cir. 2015)).

125. *Id.* (citing Matthews v. Diaz, 426 U.S. 57, 75 (1976)).

126. *Id.* at 1183 (internal citations omitted).

127. *Id.* at 1184 (citing Rockwell Int. Corp. v. United States, 594 U.S. 457, 474 (2007)).

128. *Id.* Ironically, despite plaintiffs' winning on the supplemental pleading of standing issue, the D.C. Circuit upheld dismissal on the merits. *Id.* at 1185-86.

amended in 1963, expressly calls for courts to have great deference and flexibility to resolve minor technical problems in pleadings; (2) standing is comparable to jurisdictional defects, which the Supreme Court has allowed to be cured through Rule 15(d); and (3) the practical benefits of allowing litigants to cure standing defects with Rule 15(d) substantially outweigh any practical consequences of a strict interpretation of the standing doctrine. This section will next evaluate the arguments put forth by the Tenth, Seventh, and Eighth Circuits in support of the original standing approach, particularly in the context of the key cases discussed above.[129] This section concludes that the text and practical application of Fed. R. Civ. P. 15(d) to standing issues is best resolved through the permissive approach.

A. Allowing Standing Defects to be Cured Through Supplemental Pleadings is in Accordance with the Intent of Fed. R. Civ. P. 15(d).

The Advisory Committee notes to the 1963 amendment of Fed. R. Civ. P. 15(d) states that "Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading."[130] At the time of the amendment, the Advisory Committee harshly criticized courts that refused to allow subsequent events to come in as a supplemental complaint, calling these courts' views "rigid and formalistic."[131] The main concern at issue is that a plaintiff may be "needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief."[132] And, even though the Rules grant judges discretion in making the final determination, there is no doubting the Rules' endorsement of the practice.[133] Rule 15(d)'s history supports this flexible and broad application of supplemental proceedings; the rule is an adaptation of former Federal Equity Rule 34, which allowed courts to permit supplemental pleadings when the litigant was ignorant of certain facts at the time of filing.[134] Rule 15(d) adapted and expanded the old equity rule, providing for inclusion of "occurrences or events which have happened since the date of the pleading sought to be supplemented."[135]

129. These cases, notably *Park v. Forest Service of U.S.*, 205 F.3d 1034 (8th Cir. 2000) and *Pollack v. U.S. Dept. of Justice*, 577 F.3d 737 (7th Cir. 2009), dealt with the courts' particular concerns with plaintiffs manufacturing standing in activist litigation contexts.

130. FED. R. CIV. P. 15(d) (Advisory Committee Notes, 1963 Amendment).

131. *Id.* (citing, e.g., Bonner v. Elizabeth Arden, Inc., 177 F.2d 703 (2nd Cir. 1949)).

132. *Id.*

133. *Id.*

134. Federal Telephone & Radio Corp. v. Associated. Tel. & Tel. Co., 88 F. Supp. 375, 376-77 (D. Del. 1949).

135. *Id.*

Indeed, the entire reason for Rule 15(d)'s 1963 amendment was to combat a formalistic approach; the Rule's broad discretion led some courts to refuse to allow a complaint to be supplemented when the original complaint did not state a cause of action.[136] By rejecting this approach through the 1963 amendments, the Advisory Committee gave greater force to the Federal Rules' goal of speedy adjudication on the merits.[137]

There is no reason, under Rule 15(d)'s text and early history, to not include standing as a defect curable under the Rule. The Rule's scope is broad and flexible, and expanded upon the earlier equitable rules rather than merely importing them into modern practice. Further, the fact that the Rule was amended in 1963 to stop the formalistic prevention of supplemented complaints speaks to the issue as presently considered: standing should not be singled out as unable to be supplemented under Rule 15(d).

B. Standing is Comparable to Curable Jurisdictional Defects

Since the 1963 Amendment, the Supreme Court has repeatedly held that courts may look beyond the original complaint to determine jurisdiction.[138] Though these cases have dealt with jurisdiction, standing is not dissimilar. In *Mathews v. Diaz*, the Court had "little difficulty" finding that the plaintiff met his jurisdictional requirements to bring suit, even if those requirements were met after the original complaint.[139] Indeed, a "supplemental complaint in the District Court would have eliminated this jurisdictional issue."[140] This interpretation is also consistent with the Court's discussion of Rule 15(d) in *Rockwell Int'l Corp. v. United States*, a case in which the Court wrote that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."[141]

136. 28 A.L.R. FED. 129 § 10 (West 2019). The middle sentence of Fed. R. Civ. P. 15(d) ("The court may permit supplementation even though the original pleading is defective in stating a claim or defense") specifically addresses this issue so as to combat the overly formalistic interpretation offered after the rule's initial introduction. *Id.*

137. *See* Technical Tape Corp. v. Minn. Min. & Mfg. Co., 200 F.2d 876, 879 (2d Cir. 1952) (Clark, J., concurring) ("Defendants' claim that one cannot amend a non-existent action is purely formal in light of the wide and flexible content given to the concept of action under the new rules." (internal quotations omitted)). Judge Clark is considered "the principal architect of the Federal Rules of Civil Procedure." Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015) (quoting Zahn v. Int'l Paper Co., 414 U.S. 291, 297 (1973)).

138. *See* Mathews v. Diaz, 426 U.S 67, 75 (1976); *see also* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 460 (2007).

139. *Mathews*, 426 U.S. at 75.

140. *Id.*

141. *Rockwell*, 549 U.S. at 473-74.

Although technically distinct from subject-matter jurisdiction, standing is litigated in a substantially similar manner.[142] Even though Rule 15(d) is phrased "in terms of correcting a deficient statement of 'claim' or a 'defense,' a lack of subject-matter jurisdiction should be treated like any other defect for purposes of defining the proper scope of supplemental pleading."[143] The similarity does not end at the application of Rule 15(d); indeed, dismissing claims for lack of standing is procedurally identical to dismissing claims for lack of subject matter jurisdiction.[144] When a defendant moves to dismiss for lack of standing, it is usually done through a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[145] That is not to say that subject-matter jurisdiction and standing are necessarily identical, but it is certainly worth noting the procedural similarity. In short, the Supreme Court and other federal courts have allowed Rule 15(d) supplemental pleadings to cure jurisdictional and other defects, and there is no reason to not apply that same reasoning to standing defects.

C. As a Policy Matter, Allowing Supplemental Pleading to Cure Standing Defects Substantially Outweighs Formalistic Concerns

The Federal Rules of Civil Procedure are intended to be used to secure the just, speedy, and inexpensive resolution of every action.[146] To those ends, Rule 15(d) "is a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted."[147] Litigation is time consuming and expensive; litigants need efficient and fair resolutions for their disputes.[148] This desire to control costs has influenced recent revisions of the Federal Rules of Civil Procedure and Supreme Court pleading requirements.[149] And, despite

142. *See* Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015).

143. *Id.*

144. *See* Redish & Joshi, *supra* note 59 at 1376.

145. *Id.*

146. FED. R. CIV. P. 1.

147. New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 28-29 (4th Cir. 1963) ("So useful they are and of such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason for disallowing them appears, though the court has the unquestioned right to impose terms upon their allowance when fairness appears to require them.").

148. Hon. William G. Young and Jordan M. Singer, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 PENN. ST. L. REV. 55, 97-98 (2013) (arguing that a judge's presence in a courtroom may be a better indicator of litigant satisfaction than merely relying on the timeliness or efficiency of the resolution).

149. Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 857-58 (2015); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) ("proceeding to . . . discovery can be expensive."); Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (discussing a plausibility standard for complaints not expressly

these reform efforts, the evidence of their effectiveness in controlling litigation cost is debatable.[150] Some scholars even advocate that the Federal Rules should limit litigation budgets directly, rather than limit pleading and other standards to conform to a perceived need to increase judicial and litigation efficiency.[151] At the very least, the rules have been reformed in an effort to improve the litigants' experience within the courts.[152]

Procedure, and what could be characterized as unnecessary procedure, keeps potential litigants out of the courts and leaves disputes unresolved; the Federal Rules seek to improve this stark reality by balancing the broad concepts of due process with overburdensome rulemaking.[153] Indeed, the heightened pleading standard could be a different conclusion than the original Rule drafters intended and result in the dismissal of meritorious cases, "with only marginal gains in the speedy disposition of cases."[154] What has resulted is a dissonance between a judicial movement to more quickly resolve the disputes in federal court and a broad mandate in Rule 1 to reach a "just" conclusion.[155]

Applying Rule 15(d) supplemental pleading to cure standing defects addresses all of these policy concerns. First, by resolving these issues through a supplemental pleading, the litigants are spared the significant time and expense it would take to refile. The court would not have to reevaluate the case from scratch; it would be able to examine the supplemented pleading with the subsequent factual material and determine whether the standing issue is adequately resolved. This would either unequivocally dispose of the litigation or more quickly resolve the dispute on the merits if warranted. Unlike a heightened pleading requirement or narrowing views of class actions (as the Rules were amended to do on these policy grounds), a broader application of Rule

stated in the federal rules).

150. *See* Tidmarsh, *supra* note 149 at 858 ("As the frequent waves of reform suggest, the effort to date appears not to have been especially successful.").

151. *Id.* at 858 (arguing that the rules could require parties to submit a litigation budget, and have the court determine and issue an order requiring budgetary adherence).

152. George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 2-3 (2019). Rutherglen begins by noting that Learned Hand once compared litigation to a certain kind of hell: "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." *Id.* (quoting Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in LECTURES ON LEGAL TOPICS, 1921-1922, at 87, 105 (1926)).

153. Rutherlgen, *supra* note 152 at 3-4 ("[o]thers are screened out by the cost of litigation, consisting in no small part of the preliminary stages of procedure--pleading, discovery, and associated motions and objections . . . when efficiency is disaggregated into speed and expense, as they are in Rule 1, tradeoffs between these two values are inevitable.").

154. *Id.* at 27.

155. *Id.* at 28. Even if *Twombly* and *Iqbal* have yet to have a statistical effect on speed or efficiency of litigation, they can be read as a policy preference for the courts to reduce the amount of frivolous litigation.

15(d) has no "accuracy" tradeoff that could potentially reach a wrong result through a procedural shortcut built on the name of efficiency.[156] Through a simple motion for reconsideration or leave to supplement the complaint based on subsequent events, litigants can receive a more cost-effective resolution of the dispute that is also speedier and less of a burden on the court system—while also more accurate.[157]

D. The Original Filing Approach insufficiently addresses the Federal Rules' intent, and is best considered within the context of activist litigation.

The Seventh, Eighth, and Tenth Circuit's requirement that standing be established at the time of original filing stems from the fact that standing is beyond the federal courts' discretion as an express requirement of Article III's "cases and controversies" requirement.[158] This is the major distinction between a court's jurisdictional requirements and standing: jurisdiction may be based upon statute and can vary from case to case, but standing is a constitutional requirement for every single case in the federal courts.[159] This may help to explain why the Seventh, Eighth, and Tenth Circuit's analysis of a possible cure to initial standing defects has been so brief—without initial standing, the courts feel that they do not have constitutional authority to even consider plaintiffs' motions for reconsideration or supplementation via Rule 15(d).[160]

The trouble is, when plaintiffs seek to bring in subsequent events to supplement their original pleading, they are not asking the courts to adjudicate their dispute on the merits without standing. Rather, they are asking courts to reconsider a finding of no injury in fact when later events can help confirm that an injury actually occurred—events which can be resolved through adjudication of the originally filed suit. Courts are not

156. *See* Rutherglen, *supra* note 152 at 3-4 (discussing the competing mandates of Rule 1).

157. This argument is outlined by the Ninth and D.C. Circuits in *Scahill* and *Northstar*; the courts could not find a competing interest in the "original filing" rule that was not easily offset by Rule 15(d)'s practical benefits. *See*, e.g. Scahill v. District of Columbia, 909 F.3d 1177, 1184 (D.C. Cir. 2018) ("The alternative approach forces a plaintiff to go through the unnecessary hassle and expense of filing a new lawsuit when events subsequent to filing the original complaint have fixed the jurisdictional problem. The 'reasonable notice' and 'just terms' limitations in Rule 15(d) guard against undue expansion of a provision designed to eliminate 'needless[ ] remitt[ing]' of a plaintiff.") (quoting FED. R. CIV. P. 15(d) (Advisory Committee notes to 1963 amendment)).

158. *See* Tyler R. Stradling and Doyle S. Byers, Note, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 B.Y.U. L. REV. 419, 419 (2003) ("Federal courts ensure compliance with Article III in part by requiring the plaintiff bringing the lawsuit to possess standing.").

159. *See id.* (standing's application to and relationship with the Rules of Civil Procedure is "amorphous" and complex).

160. *Supra* Section II.D (discussing the brevity of analysis offered by the lead cases on this issue before the Seventh and Eighth Circuits).

being asked to consider facts that should have been plead in the first complaint; these facts are barred from coming in under the collateral estoppel/issue preclusion doctrine.[161] This is merely an easy way to quickly reconsider the standing issue based on facts that would be plead should the plaintiff file a new suit anyway—without any of the procedural, efficiency, and effectiveness downsides of a new lawsuit.

Perhaps the Seventh, Eighth, and Tenth Circuits are best considered within their factual contexts as environmental-activist litigation. Since the 1970s, federal judges have been wary of claims perceived as "frivolous," and have used elevated requirements for individual plaintiffs requesting drastic remedies.[162] Both *Park* and *Pollack* fit this description—particularly in *Pollack*'s case where an individual claimed injury from exposure to all of Lake Michigan, then subsequently tried to establish standing by taking a swim in a location closer to the alleged pollution.[163] These kinds of remedies stand in stark contrast to those sought in cases considered by the permissive circuits.[164] However, completely denying standing defects from being supplemented under Rule 15(d) is too severe a reaction for such a simple solution. Courts worried about a slippery slope of successive rounds of supplemental pleading can rest assured: "The 'reasonable notice' and 'just terms' limitations in Rule 15(d) guard against undue expansion of a provision designed to eliminate "needless[] remitt[ing]" of a plaintiff."[165]

IV. CONCLUSION

In *Scahill*, the D.C. Circuit joined the First, Second, Fourth, Ninth, and Federal Circuits recognizing the permissive approach: Plaintiffs may cure standing defects through a Rule 15(d) supplemental pleading to show standing from events that took place after the original complaint was filed and dismissed for lack of standing. This holding reinforced the split in the federal circuit courts; the Seventh, Eighth, and Tenth Circuits require plaintiffs to establish standing at the time of original filing, or otherwise file a new complaint if they want to plead subsequent events.

This Article discusses a relatively minute issue with seemingly circular logic: in Plaintiff's worst-case scenario, Plaintiff merely has to refile a new complaint alleging the subsequent facts and events in a way that

161. *Supra* Section II.A.

162. Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357, 361-62 (1994).

163. Pollack v. U.S. Dept. of Justice, 577 F.3d 737, 742 n.2 (7th Cir. 2009).

164. For example, in *Scahill*, plaintiffs sought relief from what they saw as onerous restrictions and penalties on their liquor license. Scahill v. District of Columbia, 909 F.3d 1177, 1180 (D.C. Cir. 2018).

165. *Scahill*, 909 F.3d at 1184 (quoting FED. R. CIV. P. 15(d) advisory committee notes to 1963 amendment).

establishes standing; the harm discussed here is limited. However, this is precisely the kind of "technical obstacle" that the Federal Rules are designed to alleviate.[166] By adopting the permissive approach, federal courts are able to, in a small way, achieve the Rule's purpose of efficient and just resolution of each dispute without taking a heavy-handed or otherwise "unfair approach."[167] Therefore, because of the significant practical benefits and minimal detriments to the important features of the standing doctrine, Rule 15(d) supplemental pleadings best allow federal courts to efficiently and accurately resolve standing defects that are easily cured.

166. *Id.*

167. *See* Rutherlgen, *supra* note 152 at 3-4 (discussing the tradeoffs inherent in the Supreme Court's *"Twiqbal*" heightened pleading requirement). There is no associated trade of values in resolving standing issues through Rule 15(d) where appropriate.