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Whether Events After the Filing of an Initial Complaint May Cure an Article III Standing Defect: The D.C. Circuit's Approach

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WHETHER EVENTS AFTER THE FILING OF AN INITIAL COMPLAINT MAY CURE AN ARTICLE III STANDING DEFECT: THE D.C. CIRCUIT'S APPROACH

Abstract: On December 7, 2018, in *Scahill v. District of Columbia*, the U.S. Court of Appeals for the District of Columbia Circuit held that a plaintiff may cure an Article III standing defect through an amended pleading alleging facts that arose after the filing of the original complaint. In so doing, the D.C. Circuit joined an expanding plurality of the federal appellate courts in rejecting the alternative approach that requires a plaintiff lacking standing at the outset of a lawsuit to file a new lawsuit when events subsequent to filing the original complaint have corrected any standing deficiency. This Comment assesses the D.C. Circuit's decision and argues that the inefficient and needlessly formalistic approach of a shrinking minority of the circuits, which *Scahill* discards, ought to be abandoned entirely.

INTRODUCTION

Standing is a legal doctrine that generally concerns the capacity of a party to bring suit in court.[1] If a plaintiff lacks standing, then, under Article III of the Constitution, federal courts lack subject matter jurisdiction.[2] Indeed, the U.S. Supreme Court has declared standing to be "perhaps the most important" of the justiciability doctrines[3] and "an essential and unchanging part of the case-or-controversy requirement of Article III."[4] In spite of the doctrine's primacy, a relatively elementary question concerning standing has gone unanswered by the nation's highest court: when a plaintiff lacks standing at the time an initial complaint is filed, can subsequent events, if alleged in supplemental pleadings,

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[1] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 45 (4th ed. 2013) (discussing standing). *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–62 (1992) (explaining the necessity of standing for federal jurisdiction and detailing its elements).

[2] *See* Summers v. Earth Island Inst., 555 U.S. 488, 499 (2009) (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)) (holding that courts have a duty to ensure that a plaintiff has standing under Article III, even when the issue is uncontested by the parties); *see also* STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, THOMAS O. MAIN & ALEXANDRA LAHAV, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 832 (5th ed. 2016) (defining "subject matter jurisdiction" as the power of courts to hear and adjudicate disputes).

[3] Allen v. Wright, 468 U.S. 737, 750 (1984). The justiciability doctrines are court-made limits on the exercise of the federal judicial power that determine whether a court may hear a given matter. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 47 (5th ed. 2015). Besides standing, the justiciability doctrines include ripeness, mootness, the political question doctrine, and the prohibition against advisory opinions. *Id.*

[4] *Lujan*, 504 U.S. at 560; *see infra* notes 15–16 and accompanying text (explaining Article III's case-or-controversy requirement).

cure the defect?[5] Considerable disagreement exists among the circuits regarding this narrow, albeit consequential, aspect of the standing doctrine.[6]

This Comment examines the circuit split concerning whether events subsequent to the filing of an initial complaint may cure an Article III standing deficiency and presents an argument against the alternative, formalistic approach that some circuits have embraced.[7] Part I provides an overview of the two competing approaches to the issue adopted by the circuit courts and introduces *Scahill v. District of Columbia*, a recent decision by the D.C. Circuit that emphatically embraced one of these approaches.[8] Part II considers *Scahill* in greater depth, analyzing the D.C. Circuit's rejection of the formalistic approach that would force a plaintiff who lacks standing at the commencement of litigation to file a new lawsuit even when the standing deficiency becomes cured during the course of the litigation.[9] Part III argues that the method adopted in *Scahill*, despite minor deficiencies, should be the standard approach for federal courts when confronted with a plaintiff who fails to allege facts in support of standing within the initial complaint.[10]

I. *SCAHILL* AND ITS LEGAL LANDSCAPE

Although the Supreme Court has emphasized that plaintiffs must have standing for federal courts to hear their claims, it has not given clear guidance to the circuits regarding the proper juncture during litigation at which standing must be assessed.[11] When confronted with the plaintiff who, although lacking standing at the outset of litigation, later alleges new facts in support of standing, the federal appeals courts have taken one of two approaches: (1) dismiss the lawsuit for lack of standing, thereby requiring the plaintiff to file a new action, or (2) allow the plaintiff to file a supplemental complaint, thereby cur-

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[5] *See* Scahill v. District of Columbia, 909 F.3d 1177, 1182 (D.C. Cir. 2018) (noting that the Supreme Court has not yet addressed whether the lack of Article III standing at the outset of litigation is—even when later events cure such standing deficiency—determinative of a court's subject matter jurisdiction); *see also* Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1072–74 (2011) (discussing uncertainty regarding the contours and rationale of the standing doctrine, despite its declared importance). An "initial complaint" refers to the first pleading a plaintiff files to initiate a lawsuit, that is, prior to any amendments. *See* FED. R. CIV. P. 15.

[6] *Compare, e.g.*, Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154 (10th Cir. 2005) ("Standing is determined as of the time the action is brought."), *with* Travelers Ins. Co. v. 633 Third Assocs., 973 F.2d 82, 88 (2d Cir. 1992) ("If the complaint *as amended* alleges sufficient facts to support the requisite injury . . . plaintiff will have established standing to sue . . . .") (emphasis added).

[7] *See infra* notes 12–88 and accompanying text.

[8] *See infra* notes 12–42 and accompanying text.

[9] *See infra* notes 43–65 and accompanying text.

[10] *See infra* notes 66–88 and accompanying text.

[11] *See supra* notes 5–6 and accompanying text.

ing the initial standing defect.[12] Section A of this Part provides an overview of these two approaches and discusses the reasoning that the federal courts have used to justify each.[13] Section B presents the factual and procedural background of *Scahill*, a recent D.C. Circuit decision that held that, instead of filing a new lawsuit, a plaintiff may cure an Article III standing defect simply by filing a supplemental complaint.[14]

A. The Current Circuit Split Concerning Standing

The requirement that parties have standing before a court can adjudicate their dispute derives from Article III, Section 2 of the U.S. Constitution, the provision that restricts the federal judicial power to the resolution of "Cases" and "Controversies."[15] The Supreme Court has made clear that no "case" or "controversy" exists unless a plaintiff adequately alleges the three elements of standing: (1) an injury-in-fact that is both (2) fairly traceable to the challenged conduct of the defendant and (3) likely to be redressed by a favorable judicial decision.[16]

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[12] *See infra* notes 17–20 and accompanying text; *see also infra* note 29 and accompanying text (distinguishing between supplemental pleadings and amended pleadings).

[13] *See infra* notes 15–29 and accompanying text.

[14] *See infra* notes 30–42 and accompanying text.

[15] U.S. CONST. art. III, § 2. Justice Stephen J. Field understood the "cases" and "controversies" to mean "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." Smith v. Adams, 130 U.S. 167, 173–74 (1889). According to Justice Field's definition, therefore, a case or controversy exists whenever the judicial power is capable of adjudicating a party's claim. *See id.* Although courts almost universally use "case" and "controversy" interchangeably, some scholars have suggested that the Framers understood the terms to bear separate and distinct meanings: "cases" introduced jurisdictional categories defined by legal subject, whereas "controversies" were understood with reference to the parties—the former concerned disputes about the law and the latter concerned disputes between the parties. *See generally* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994) (analyzing legislative notes and history of the United States Constitutional Convention).

[16] Allen v. Wright, 468 U.S. 737, 751 (1984); *see* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (defining "injury-in-fact" as "an invasion of a legally protected interest" that is both "concrete and particularized" and "imminent"); *see also* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 598 (2007) (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989)) (calling standing one of the "controlling elements" when determining whether the case-or-controversy requirement is satisfied); Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("Standing to sue or defend is an aspect of the case or controversy requirement."); CHEMERINSKY, *supra* note 3, at 47; Nicholas Green, Note, *Standing in the Future: The Case for a Substantial Risk Theory of "Injury in Fact" in Consumer Data Breach Class Actions*, 58 B.C. L. REV. 287, 292 (2017) (detailing the three requirements of constitutional standing: (1) injury-in-fact, (2) traceability, and (3) redressability. This Comment generally uses the terms "Article III standing" and "standing" interchangeably, although they are not strictly synonymous. *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471–76 (1982) (distinguishing the standing doctrine's constitutional requirements from its "prudential" or judge-made requirements).

Although there is no dispute that Article III standing is required for federal jurisdiction,[17] there are two competing approaches to the issue of whether events occurring after the filing of an original complaint may cure an Article III standing defect.[18] The first approach, followed by the Seventh, Eighth, and Tenth Circuits, holds that a plaintiff must file a new lawsuit if a standing defect exists at the time an action is brought, even when subsequent events could cure the defect.[19] The second, by contrast, adopted by the First, Second, Fourth, Ninth, and Federal Circuits—and now, the D.C. Circuit as well—holds that a plaintiff may cure a standing defect by filing a supplemental complaint alleging facts that arose after the filing of the original complaint.[20]

Circuits that have adopted the first approach have grounded their reasoning largely in two Supreme Court cases: *Friends of the Earth v. Laidlaw Environmental Services*,[21] decided in 2000, and *Lujan v. Defenders of Wildlife*, decided in 1992.[22] In *Laidlaw*, the Court, with neither citation nor explanation, noted that the focus of its standing inquiry was whether the plaintiff had Article III standing "at the outset of the litigation."[23] Likewise, in *Lujan*, the Court held that the plaintiff failed to plead facts supportive of standing in the initial complaint, citing its "longstanding rule" that courts must look to the facts at

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[17] *See* Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (stating that the standing doctrine requires courts to ensure that a plaintiff sufficiently alleges "a personal stake in the outcome" such that adjudication of the dispute is warranted).

[18] *See Scahill*, 909 F.3d at 1183 (indicating the existence of a circuit split and listing relevant cases).

[19] S. Utah Wilderness All. v. Palma, 707 F.3d 1143, 1153 (10th Cir. 2013); Pollack v. U.S. Dep't of Justice, 577 F.3d 736, 743 (7th Cir. 2009); Park v. Forest Serv., 205 F.3d 1034, 1037–38 (8th Cir. 2000).

[20] Northstar Fin. Advisors Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015); United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 6 (1st Cir. 2015); Daniels v. Arcade, L.P., 477 F. App'x 125, 131 (4th Cir. 2012); Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008); *Travelers*, 973 F.2d at 87–88. Thus, after the *Scahill* decision, the number of circuits adopting this approach constitutes at least a plurality of the courts of appeals. *See* 909 F.3d at 1183.

[21] 528 U.S. 167 (2000). In its 2007 decision, *Mink v. Suthers*, the Tenth Circuit cited to *Laidlaw* for the proposition that "standing is determined at the time the action is brought." 482 F.3d 1244, 1253 (10th Cir. 2007). Additionally, in the Seventh Circuit's 2009 decision, *Pollack*, the court expressly relied on *Laidlaw* in holding that standing may only be established at the time of the initial suit. 577 F.3d at 742 n.2.

[22] 504 U.S. 555 (1992). In its 2005 decision, *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, the Federal Circuit cited *Lujan* when holding that the "initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended." 402 F.3d 1198, 1203 n.3 (Fed. Cir. 2005); *see also Park*, 205 F.3d at 1037–38 (citing *Lujan* when reasoning that "if redressability may not be established by a development that occurs after the commencement of the litigation, neither may an injury-in-fact"). It is worth noting, however, that the Federal Circuit appears to have changed its approach to the issue since *Schreiber Foods*. *See Prasco*, 537 F.3d at 1337 (assessing standing based on facts alleged in plaintiff's amended complaint).

[23] *Laidlaw*, 528 U.S. at 180.

the time the initial complaint is filed when settling questions of jurisdiction.[24] Neither *Laidlaw* nor *Lujan* concerned post-complaint factual developments sufficient to constitute injury-in-fact to a plaintiff who had previously been determined to lack standing.[25]

On the other hand, circuits favoring the second approach have justified their stance based on a reading of Rule 15(d) of the Federal Rules of Civil Procedure (Rule 15(d)), which allows a plaintiff to correct certain defects in the complaint by filing a supplemental pleading.[26] In 2015, for instance, the Ninth Circuit held that, although Rule 15(d) mentions only the correction of deficient statements of "claim[s] or defense[s]," the rule is broad enough to allow for the correction of other jurisdictional defects, including defects of standing.[27] *Sca-*

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[24] *Lujan*, 504 U.S. at 569–70 n.4. (citing Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989)). Though approvingly citing the Court's 1989 decision in *Newman-Green v. Alfonzo-Larrain*, Justice Antonin Scalia's *Lujan* opinion notably neglects to mention *Newman-Green*'s concession that, "[l]ike most general principles," the principle that jurisdiction depends on the facts as they exist at the time of initial filing "is susceptible to exceptions . . . ." *Newman-Green*, 490 U.S. at 830. *See generally Lujan*, 504 U.S. at 555–578.

[25] *See Lujan*, 504 U.S. 555; *Laidlaw*, 528 U.S. 167. In *Lujan*, the issue was not that the plaintiffs alleged that new events after the time of filing cured a standing deficiency; rather, the issue was that the plaintiffs' allegation of injury-in-fact was based, in the view of the Court, on "pure speculation and fantasy." 504 U.S. at 567. In *Laidlaw*, the Court rejected the defendant's argument that the plaintiff, an environmental advocacy group, needed to demonstrate "harm to the environment" to maintain Article III standing, holding that the relevant showing for Article III standing is injury to the plaintiff alone, which the plaintiff had adequately pleaded. *See* 528 U.S. at 181–83. As such, both cases are quite dissimilar from *Scahill*. *See infra* notes 31–42 and accompanying text.

[26] *See Gadbois*, 809 F.3d at 5, 6 n.2 ("Rule 15(d) has been viewed as an appropriate mechanism for pleading newly arising facts necessary to demonstrate standing . . . . [W]e conclude that a supplemental pleading can be used to cure a jurisdictional defect . . . ."); *Northstar Fin. Advisors*, 779 F.3d at 1044–47 (holding that Rule 15(d) allows a plaintiff lacking standing at the start of litigation to cure the deficiency by filing a supplemental pleading); *Travelers*, 973 F.2d at 88 (citing FED. R. CIV. P. 15(d)) (permitting leave to amend for plaintiff to allege sufficient facts in support of injury-in-fact). In relevant part, Rule 15(d) states:

> 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.

FED. R. CIV. P. 15(d). Although arguments based directly on the text and Advisory Committee notes to Rule 15(d) appear to be the dominant tactic, some circuits that favor the second, more flexible, approach have also relied on Supreme Court precedent interpreting Rule 15(d) to bolster their position. *See, e.g.*, *Northstar Fin. Advisors*, 779 F.3d at 1044–47. In its 2015 decision, *Northstar Financial Advisors*, for example, the Ninth Circuit relied in part on the Supreme Court's allowance of a supplemental pleading to cure a defective claim in a not-yet-certified class action in the 1976 case, *Matthews v. Diaz*. *See id.* (citing Matthews v. Diaz, 426 U.S. 67, 96 (1976)); *see also Daniels*, 477 F. App'x at 125, 131 (quoting Rockwell Int'l Corp. v. United States, 549 U.S. 457, 473–74 (2007)) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction.") (internal quotations omitted).

[27] *Northstar Fin. Advisors*, 779 F.3d at 1044 (holding that a lack of subject matter jurisdiction is treated like a deficient statement of "claim" or defense" for purposes of Rule 15(d)) (citing 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1507 (3d ed. 2010)). Recently,

hill, following the trend, utilized this same rules-based strategy.[28] In doing so, the D.C. Circuit offered perhaps the most comprehensive and robust justification yet by a court of appeals for allowing a plaintiff to cure an Article III standing defect through a supplemental pleading.[29]

B. Factual and Procedural Background of Scahill

Although the particular facts of *Scahill* are not critical to an understanding of the D.C. Circuit's holding regarding standing, a brief overview of the factual and procedural background of the case is nonetheless valuable.[30] In January 2015, HRH Services, LLC (HRH) applied to the District of Columbia Alcoholic Beverage Control Board (ABC Board) for a liquor license for HRH's pub, the Alibi.[31] The ABC Board approved the license on May 18, 2016, subject to several conditions.[32] Among other restrictions, the ABC Board conditioned receipt of the license on HRH's promise to prohibit Martin Scahill, a former restaurant owner with a history of permitting underage alcohol consumption at his establishment, from having any involvement with, or even entering the premises of, the Alibi.[33] On July 28, 2016, after HRH's motion for administrative review was denied by the ABC Board, it appealed the decision to the D.C. Court of Appeals, pursuant to the District of Columbia Administrative Procedure Act's

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however, the Ninth Circuit has created some confusion about the holding of *Northstar Financial Advisors* with respect to standing. *See* Ree v. Zappos.com, Inc. (*In re* Zappos.com, Inc.) 888 F.3d 1020, 1028 n.10 (9th Cir. 2018) (citing *Northstar Fin. Advisors*, 779 F.3d at 1044) ("[T]hese cases do not actually address whether standing is measured at the time of an initial complaint or at the time of an amended complaint, as opposed to whether the allegations in an amended complaint may sometimes be considered in evaluating whether there was standing at the time the case was originally filed or whether an amended complaint may be considered a supplemental pleading under Federal Rule of Civil Procedure 15(d).").

[28] *See* 909 F.3d at 1184 (characterizing the approach that would assess a plaintiff's standing based only on the facts at the time of initial filing as "harken[ing] back to the type of technical obstacle . . . that the amendment to Rule 15(d) was designed to avoid").

[29] *See id.* The court in *Scahill* does, however, use the word "amended," not "supplemental," in its decision. *Id.* ("Therefore, we hold that a plaintiff may cure a standing defect under Article III through an *amended* pleading alleging facts that arose after filing the original complaint.") (emphasis added). Although often used interchangeably by parties and courts, amended and supplemental pleadings are indeed distinct: the former relates to matters that occurred prior to the filing of the original pleading and entirely replaces the original pleading, while the latter relates to events that took place after the original pleading was filed and preserves the original pleading. WRIGHT ET AL., *supra* note 27, § 1504.

[30] *See infra* notes 31–42 and accompanying text.

[31] Scahill v. District of Columbia, 271 F. Supp. 3d 216, 221 (D.D.C. 2017).

[32] *Id.*

[33] *Id.* The friction between the ABC Board and Scahill apparently dates back to when Scahill was part-owner of the Alibi's predecessor restaurant. *See id.* During his tenure, the restaurant's history of allowing underage drinking resulted in several fines from the ABC Board. *Id.* It appears that the conditions placed on HRH's liquor license reflected the ABC Board's concern that Scahill's involvement would encourage the Alibi to adopt Scahill's prior criminal practice. *See Scahill*, 909 F.3d at 1180.

judicial review provision.[34] Ultimately, the D.C. Court of Appeals dismissed the appeal for lack of standing, concluding that HRH failed to allege that the restrictions imposed by the ABC Board regarding Scahill's involvement with Alibi caused any injury-in-fact.[35]

On October 18, 2016, HRH and Scahill brought a 42 U.S.C. § 1983 action in the U.S. District Court for the District of Columbia against the ABC Board and the District of Columbia.[36] Thereafter, the district court granted the defendants' motion to dismiss for lack of standing, finding that, in light of the D.C. Court of Appeals' previous determination, collateral estoppel prevented HRH from re-litigating the issue of its standing.[37] Then, on October 16, 2017, HRH moved for reconsideration and leave to file a second amended complaint alleging that, on July 19, 2017, the ABC Board issued a $4,000 fine against HRH for a supposed violation of the liquor license conditions.[38] Although the district court found that the fine would potentially constitute an injury-in-fact, it held that such a fine, imposed nine months after the filing of the original complaint, came too late to confer standing upon HRH.[39] The district court reasoned that "the standing inquiry is focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed.*"[40] Accordingly, the district court found that, contrary to HRH's insistence, the alleged factual development did not trigger the so-called "curable defect exception" to collateral estoppel, and therefore denied HRH's motions for reconsideration and leave to file a second amended complaint.[41] Following appeal by HRH, the D.C. Circuit reviewed the district court's decision.[42]

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[34] *Scahill*, 271 F. Supp. 3d at 224; *see* D.C. CODE § 2-510(a) (2020) ("Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, *is entitled to a judicial review thereof* in accordance with this subchapter upon filing in the District of Columbia Court of Appeals a written petition for review.") (emphasis added).

[35] *Scahill*, 271 F. Supp. 3d at 225; *see also Spokeo*, 136 S. Ct. at 1548 (defining "injury-in-fact" as "an invasion of a legally protected interest" that is both "concrete and particularized" and "imminent"); *Allen*, 468 U.S. at 751 (holding that standing requires showing of injury-in-fact).

[36] *Scahill*, 271 F. Supp. 3d at 222. Section 1983 allows a plaintiff to bring a civil action against anyone who, under color of state law—or, as here, D.C. law—deprives the plaintiff of their constitutional rights. *See* 42 U.S.C. § 1983 (2018). Here, HRH and Scahill argued that the conditions placed on the receipt of the liquor license violated their First Amendment rights to freedom of speech and freedom of association. *Scahill*, 271 F. Supp. 3d at 222.

[37] *Scahill*, 909 F.3d at 1180. The doctrine of collateral estoppel diminishes a party's ability to litigate issues that were conclusively determined in prior actions. Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647, 649–50 (1952).

[38] *Scahill*, 909 F.3d at 1181.

[39] Scahill v. District of Columbia, 286 F. Supp. 3d 12, 18–19 (D.D.C. 2017) (quoting Davis v. FEC, 554 U.S. 724, 734 (2008)).

[40] *Id.* (internal quotations omitted).

[41] *Id.* at 19 (finding that the fine HRH received did not injure HRH "during the period of time when it would have made a difference"); *see also* Swanson Grp. Mfg. LLC v. Jewell, 195 F. Supp. 3d 66, 72 (D.D.C. 2016) (quoting Nat'l Ass'n of Home Builders v. EPA, 786 F.3d 34, 41 (D.C. Cir. 2015) (defining the curable defect exception as a "narrow exception [that] 'allows relitigation of juris-

II. *SCAHILL* PUSHES THE CIRCUITS EVEN FURTHER AWAY FROM FORMALISM

By the time *Scahill v. District of Columbia* was decided in 2018, a plurality of the circuits already expressed disfavor with the formalistic approach to the issue of whether post-complaint events may confer standing where none existed at the time of filing.[43] This Part discusses how, persuaded by certain policy considerations and a reading of Rule 15(d) of the Federal Rules of Civil Procedure, the U.S. Court of Appeals for the District of Columbia Circuit added to this plurality by holding that events subsequent to the initial filing of a complaint, if alleged in a supplemental pleading, can cure a standing defect, such that a plaintiff need not refile suit.[44]

On December 7, 2018, the D.C. Circuit decided *Scahill*, addressing for the first time whether the lack of Article III standing at the outset of litigation is determinative of a court's jurisdiction.[45] Given the somewhat unusual procedural history and posture of the case,[46] the court framed the issue as whether the doctrine of collateral estoppel's "curable defect exception" permits a plaintiff to demonstrate Article III standing based on events that occurred after the filing of the initial complaint.[47] More fundamentally, however, the court sought to settle a basic question of federal jurisdiction not yet addressed by the circuit: when assessing whether a plaintiff has Article III standing, is a court limited to the facts alleged in the original complaint, or may it consider additional allegations set forth by the plaintiff in a supplemental or amended complaint?[48]

The court began by elaborating the elements of collateral estoppel and determined that the district court correctly found that HRH satisfied all of the elements with respect to the issue of its standing.[49] Then, turning to the district

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dictional dismissals'" when "a material change following dismissal cured the original jurisdictional deficiency").

[42] *Scahill*, 909 F.3d at 1182.

[43] 909 F.3d 1177 (D.C. Cir. 2018); *see supra* notes 17–20 and accompanying text (noting that the First, Second, Fourth, Ninth, and Federal Circuits have held that a plaintiff may cure a standing defect through a supplemental complaint).

[44] FED. R. CIV. P. 15; *see infra notes* 45–65 and accompanying text.

[45] 909 F.3d at 1179. The court also reviewed, and affirmed, the district court's dismissal of HRH and Scahill's First Amendment claims. *See id.* at 1184–86. This aspect of the decision is outside the scope of this Comment.

[46] *See id.* at 1179–80. The plaintiffs initially sought review of the defendants' conduct by the D.C. Court of Appeals, after which they filed a new suit in federal district court and then subsequently moved for reconsideration. *Id.*

[47] *Id.* at 1179.

[48] *Id.* at 1182.

[49] *Id.* The court found that, in light of the D.C. Court of Appeals' dismissal, the issue of HRH's standing to challenge the Board's license conditions was (1) "contested," and (2) "actually and necessarily determined by a court of competent jurisdiction," and that, at the time HRH filed suit in federal district court, applying issue preclusion (3) "involve[d] no basic unfairness to HRH." *Id.* As such, according to the D.C. Circuit, the district court's conclusion that collateral estoppel applied to the

court's refusal to apply the curable defect exception to collateral estoppel,[50] the court found that the case law relied on by the district court, *Davis v. FEC*, was inapposite.[51] According to the *Scahill* court, although *Davis* held that standing is satisfied at the outset of litigation even if an anticipated injury fails to manifest, the decision did not speak to whether subsequent events can confer standing that was lacking at the time litigation commenced.[52] Concluding that neither the Supreme Court nor the D.C. Circuit had directly addressed the issue at hand, the court surveyed an eight-circuit split for guidance.[53] Notably, throughout its entire opinion, the court did not cite once to either *Friends of the Earth v. Laidlaw Environmental Services* or *Lujan v. Defenders of Wildlife*, the leading Supreme Court decisions on standing.[54]

The D.C. Circuit, following the Ninth Circuit's lead in 2015's *Northstar Financial Advisors, Inc. v. Schwab Investments*,[55] focused its discussion of the issue primarily around Rule 15(d).[56] Citing the Advisory Committee notes to Rule 15(d), the court concluded that the rule was intended to grant courts "broad discretion" for the sake of saving plaintiffs from filing a new lawsuit when events subsequent to the filing of the original action indicated a right to relief.[57] As such, the court reversed the district court's decision on the issue of

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issue of HRH's standing was correct. *Id.*; *see also* Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (listing the three conditions that must be met for collateral estoppel, or issue preclusion, to apply: contestation, necessity, and fairness).

[50] *See* Scahill v. District of Columbia, 286 F. Supp. 3d 12, 18–19 (D.D.C. 2017). Again, the district court's reasoning for declining to apply the exception was that "the standing inquiry is 'focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*.'" *Id.*

[51] Davis v. FEC, 554 U.S. 724, 729–34 (2008); *Scahill*, 909 F.3d at 1182. In its 2008 decision *Davis v. FEC*, the Supreme Court considered whether the plaintiff, a candidate for the U.S. House of Representatives, had alleged the requisite injury-in-fact in a constitutional challenge to the asymmetrical campaign contribution limits of the Bipartisan Campaign Reform Act of 2002 when his opponent had yet to qualify for higher campaign contribution limits at the commencement of the lawsuit. *See Davis*, 554 U.S. at 729–34. The Court found that the plaintiff alleged the requisite injury-in-fact when he indicated his intent to spend his personal funds. *Id.*; *Scahill*, 909 F.3d at 1182.

[52] *Scahill*, 909 F.3d at 1182.

[53] *Id.* at 1183 (noting that the First, Second, Fourth, Ninth and Federal Circuits have, in some cases, held that a plaintiff may cure defects of standing by alleging new facts in a supplemental pleading and that the Seventh, Eighth, and Tenth Circuits have restricted the standing inquiry strictly to the facts alleged in the original complaint); *see supra* notes 19–20 (citing circuit cases within split).

[54] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167 (2000); Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992). *See generally Scahill*, 909 F.3d at 1179–1186.

[55] Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015); *see supra* notes 26–27 and accompanying text (discussing *Northstar Financial Advisors*).

[56] *See Scahill*, 909 F.3d at 1183–84.

[57] *Id.* at 1183 (quoting FED. R. CIV. P. 15(d) advisory committee's note to 1963 amendment) (concluding that Rule 15(d) was meant to avoid "needlessly remitting plaintiffs 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"). The court acknowledged the potential peril of expanding the power of district courts to allow supplemental pleadings but dampened such concerns by concluding

standing, determining that the district court should have applied collateral estoppel's curable defect exception, and thus, should have allowed HRH to file its proposed second amended complaint—a supplemental pleading that would have cured the standing defect.[58]

In addition to Rule 15(d), two other factors motivated the D.C. Circuit's holding.[59] First, the court expressed the view that, as a matter of policy, forcing a plaintiff to file a new lawsuit instead of simply filing a new pleading is inefficient and overly formalistic.[60] Such an approach, according to the court, creates needless obstacles and expenses for plaintiffs, who, besides having to pay the costs of filing a new suit, would have to wait even longer for their claims to be resolved.[61] Second, the defendant District of Columbia's failure to provide the court with any argument that its proffered approach was superior gave the court little incentive to consider the alternative approach to assessing standing.[62] Indeed, although the District of Columbia cited the Tenth Circuit's 2013 decision in *Southern Utah Wilderness Alliance v. Palma*[63] in its brief, it merely stated that the case constituted "significant authority contrary to plaintiffs' position," without further explanation or argument.[64] Thus, compelling policy reasons and the failure of the defendant to advance any argument to the contrary made it even easier for the D.C. Circuit to hold that an assessment of a plaintiff's standing need not be limited to the facts as alleged in the plaintiff's initial complaint.[65]

III. ALTHOUGH NOT WITHOUT FLAWS, *SCAHILL* REPRESENTS A MODEL APPROACH FOR THE FEDERAL COURTS

Despite weaknesses in the D.C. Circuit's *Scahill v. District of Columbia* decision, it adopts the best approach to the issue of whether a plaintiff may cure an Article III standing deficiency through a supplemental pleading.[66] This

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that Rule 15(d)'s requirements of "reasonable notice" and "just terms" will adequately curb any overindulgence. *See id.* at 1184; FED. R. CIV. P. 15(d).

[58] *Scahill*, 909 F.3d at 1184. Nonetheless, the court ultimately affirmed the dismissal, on the merits, of the plaintiffs' claims, concluding that the District of Columbia had a strong interest in restricting the ability to sell liquor to those "of good character" and that the Supreme Court has not yet recognized a general First Amendment right to "social association." *Id.* at 1184–86 (citing City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989)).

[59] *Id.* at 1183–84.

[60] *Id.* at 1184.

[61] *Id.*

[62] *Id.* ("[T]he government offers no analysis of which approach this court should adopt.").

[63] 707 F.3d 1143, 1153 (10th Cir. 2013) (holding that the standing inquiry focuses on the facts and circumstances as they existed when the original complaint was filed).

[64] *Scahill*, 909 F.3d at 1184. By its reticence, the District of Colombia missed an opportunity to provide a much-needed justification for the formalistic approach to the standing inquiry. *See id.*

[65] *See id.*

[66] 909 F.3d 1177 (D.C. Cir. 2018); *see infra* notes 84–88 and accompanying text.

Part assesses the gravity of those weaknesses and presents a final argument in favor of *Scahill*.[67]

For proponents of the formalistic approach to the Article III standing inquiry that *Scahill* rejects, three weaknesses in the D.C. Circuit's treatment of the issue may appear glaring.[68] First, the court failed to address significant Supreme Court precedent contrary to its holding.[69] As discussed above, several circuits have cited *Laidlaw*[70] and *Lujan*[71] in support of the formalistic approach that measures a plaintiff's Article III standing based solely on the original complaint.[72] For whatever reason, the D.C. Circuit elected not to expressly distinguish this case law.[73] Nonetheless, this flaw is not as severe as it may first seem—both *Laidlaw* and *Lujan*, after all, dealt with facts quite distinct from *Scahill*.[74]

Second, the D.C. Circuit drifted considerably from the text of Federal Rule of Civil Procedure 15(d).[75] Rule 15(d) allows for supplementation of pleadings only when the initial pleading fails to properly state a "*claim or defense*;" it makes no allowance for supplementation to cure other deficiencies, namely, jurisdictional ones.[76] At the same time, however, the *Scahill* reading of Rule 15(d) is hardly novel, much less unorthodox.[77] Moreover, the Advisory Committee notes to the rule generally support a liberal construction of the rule's text.[78]

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[67] *See infra* notes 68–88 and accompanying text.

[68] *See Scahill*, 909 F.3d at 1182–84.

[69] *See supra* notes 53–54 and accompanying text.

[70] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

[71] Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

[72] *See supra* notes 21–25 and accompanying text.

[73] *See supra* notes 53–54 and accompanying text. Interestingly, the district court, too, did not mention *Laidlaw* or *Lujan* when it found that the standing inquiry is limited only to the facts and circumstances as alleged in the original complaint, expressly relying only on *Davis v. FEC*, 554 U.S. 724, 734 (2008). *See* Scahill v. District of Columbia, 286 F. Supp. 3d 12, 19 (D.D.C. 2017).

[74] *See supra* note 25 and accompanying text. In *Laidlaw*, the Court determined that the plaintiff had standing at the outset of litigation, thus, there was never any consideration of whether subsequent events could confer standing where none existed at the start of the suit. *See* 528 U.S. at 187. Although *Lujan* is somewhat more on point—the court broadly declares that "standing is to be determined as of the commencement of the suit"—it is nonetheless distinguishable from *Scahill* because the plaintiffs in *Lujan* had not moved to amend or supplement the complaint. *See Lujan*, 504 U.S. at 569–71.

[75] *See* FED. R. CIV. P. 15(d); *Scahill*, 909 F.3d at 1184 (citing with approval the Ninth Circuit's approach in *Northstar Financial Advisors, Inc. v. Schwab Investments*, 779 F.3d 1036, 1044 (9th Cir. 2015), which held that Rule 15(d)'s mention of deficiencies in "claim[s] or defense[s]" applied to jurisdictional deficiencies broadly).

[76] FED. R. CIV. P. 15(d) (emphasis added).

[77] *See* United States *ex rel.* Gadbois v. PharMerica Corp., 809 F.3d 1, 5, 6 n.2 (1st Cir. 2015) ("Rule 15(d) has been viewed as an appropriate mechanism for pleading newly arising facts necessary to demonstrate standing."); *see also* Feldman v. Law Enf't Assocs. Corp., 752 F.3d 339, 347 (4th Cir. 2014) (construing the complaint as a supplemental pleading under Rule 15(d) so as to cure a jurisdictional defect).

[78] *See* FED. R. CIV. P. 15(d) advisory committee's notes to 1963 amendment. ("Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading."); *see also* Harris v.

Finally, there is perhaps some irony in *Scahill*'s use of Rule 15(d) to justify its reversal of the district court's decision on the issue of standing.[79] Although the court declared that Rule 15(d) was intended to "place broad discretion" in a district court's decision to grant a plaintiff's request for supplementation, it simultaneously reversed the district court's exercise of such discretion.[80] In other words, the D.C. Circuit's decision may appear internally incongruent insofar as it declared that district courts have broad discretion to deny requests for supplementation, yet disapproved of the District of D.C.'s denial of HRH's request for supplementation.[81] Nevertheless, to the extent the district court denied HRH's motion to amend because it felt it had no other option, the D.C. Circuit's holding, alerting the lower courts to the wide span of their discretion, is scarcely contradictory.[82] Indeed, parsing its decision on reconsideration, the district court's denial of HRH's supplementation request appears far more reflexive than discretionary.[83]

These weaknesses, largely hollow, do not ultimately detract from *Scahill*'s merits.[84] After surveying the circuit split on the issue of whether new events may grant Article III standing to a plaintiff who lacked it at the time of filing, one finds little justification for the formalistic approach of the Seventh, Eighth, and Tenth Circuits, particularly in light of the liberal thrust of Rule 15(d).[85] Put simply, there is no compelling reason, policy-based or otherwise, to approach deficiencies of standing differently from deficiencies in stating a claim or defense.[86] By holding that subsequent pleadings may be granted to

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Garner, 216 F.3d 970, 992–93 (11th Cir. 2000) (stating that the Advisory Committee's notes emphasize that Rule 15(d) "is intended to allow both courts and litigants flexibility" in granting supplemental pleadings).

[79] *See Scahill*, 909 F.3d at 1184.

[80] *See id.* Thus, the D.C. Circuit may appear to be saying one thing while doing another. *See id.*

[81] *See id.*

[82] *See Scahill*, 286 F. Supp. 3d at 19. Indeed, the district court's decision on reconsideration does not evince an understanding that the denial of HRH's motion to amend was discretionary. *See id.* To the contrary, the decision suggests the district court felt constrained; although it held that the ABC Board's July 2017 fine would constitute a "material change" that "followed dismissal" for the purposes of applying the curable defect exception to collateral estoppel, the district court concluded that denial was nonetheless necessary because HRH lacked standing "at the time at which standing must be assessed for this case." *Id.* As such, it seems far-fetched to posit that the district court declined to exercise discretion on the issue of supplementation. *See id.* Rather, the district court's actions suggest an unawareness that discretion could even be exercised at all. *See id.*

[83] *See id.*

[84] *See infra* notes 85–88 and accompanying text.

[85] *See supra* notes 21–25 and accompanying text (noting that the approach of these circuits is based largely, if not exclusively, on Supreme Court dicta in cases that presented dissimilar facts).

[86] *See* Northstar Fin. Advisors, Inc. v. Schwab Invs., 779 F.3d 1036, 1044 (9th Cir. 2015) ("[A] lack of subject-matter jurisdiction should be treated like any other defect for purposes of defining the proper scope of supplemental pleading."). Notwithstanding this Comment's central thesis, it must be noted that there are undoubtedly compelling reasons to assess standing sooner, rather than later, in the litigation process. *See* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed*

correct jurisdictional defects, *Scahill* eliminates the absurd scenario where plaintiffs who possess standing have their suit dismissed for lack of standing.[87] Compared with beginning a new lawsuit from scratch, filing a supplemental complaint not only avoids added time and expense—it promotes justice.[88]

CONCLUSION

In its 2018 decision, *Scahill v. District of Columbia*, the D.C. Circuit held that instead of filing a new lawsuit, a plaintiff may cure an Article III standing defect simply by filing a supplemental complaint. Contributing to a growing circuit split on a hotly contested issue of federal civil practice and procedure, *Scahill* pushed the Courts of Appeals' approach to Article III standing further toward efficiency—and further from judicial rigidity and formalism. This decision, although arguably flawed at first glance, represents a model approach for the circuits to follow. Besides being a boon to plaintiffs, who will have greater leeway to cure jurisdictional deficiencies and avoid the hassle of refiling suit

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Solution to the Serious (but Unrecognized) Separation of Powers Problem, 162 U. PA. L. REV. 1373, 1402–04 (2014) (arguing that, by postponing determinations of standing, courts may coercively impact litigant behavior (e.g., by motivating a settlement agreement) despite having no authority to do so under Article III). For instance, if a court waits until the trial stage to consider a plaintiff's standing, only to determine that no injury-in-fact has been alleged, then both parties will have wasted time and expense litigating a claim that was not valid in the first place. *See id.* Further, deferring resolution of standing to the later stages of litigation may raise grave constitutional concerns. *Id.* Nonetheless, to say that standing ought to be assessed early in, or at the outset of, the litigation process is quite different from saying, as some circuits have, that the presence or absence of standing at the outset of litigation is conclusive as to the court's subject matter jurisdiction. *See, e.g.*, Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005) (limiting the standing inquiry to the facts as alleged in the original complaint, even though supplemental complaints had been filed). The former position would not, in principle, rule out an amended complaint setting forth new facts that cure defects of standing. *See* Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1337 (Fed. Cir. 2008) ("[W]hile [l]ater events may not create jurisdiction where none existed at the time of filing, the proper focus in determining jurisdiction are the facts existing at the time the complaint *under consideration* was filed.") (internal citations omitted). The latter position, on the other hand, which would dismiss an action for lack of standing even when new events subsequent to filing would confer standing, is the approach that the *Scahill* district court felt it was required to adopt—and the approach that this Comment argues ought to be discarded. *See* 286 F. Supp. 3d at 19 (determining that the plaintiff's standing deficiency remained uncured despite the plaintiff's allegation of an injury-in-fact, because such injury failed to occur "during the period of time when it would have made a difference").

[87] *See Scahill*, 909 F.3d at 1183–84.

[88] *Cf.* Chedid v. Boardwalk Regency Corp., 756 F. Supp. 941, 944–45 (E.D. Va. 1991) (noting that transfer of a case from a district where venue is improper to a district where venue is proper, by avoiding unnecessary delay to resolution of parties' claims, is more likely than dismissal to serve the interests of justice). Furthermore, if parties are forced to refile suits rather than simply amend their complaints, then, in addition to the disadvantages mentioned above, their claims may also suffer other ills, such as becoming barred by the applicable statute of limitations. *See* Adam Wolek & Rashad Simmons, *A District Court Split on Curing Copyright Timing Defects*, LAW360 (Aug. 15, 2019), www.law360.com/articles/1188726/a-district-court-split-on-curing-copyright-timing-defects [https://perma.cc/J8KS-UT7X] (arguing that plaintiffs' attempts to cure copyright registration timing defects through new lawsuits could nonetheless implicate statutes of limitations concerns).

when they have demonstrated a clear right to relief, *Scahill* is a win for the federal courts. Given that federal dockets will likely remain congested for the foreseeable future, measures that expedite the final resolution of claims, so long as they do not come at the expense of fairness to litigants, ought to be embraced.

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