JACQUES L. WIENER, JR., *Circuit Judge*, dissenting in part:

I concur with JUDGE DENNIS's Opinion, except for its holding on standing to challenge 25 U.S.C. § 1915(a) and (b) on equal protection grounds. I also concur with JUDGE COSTA in his partial dissent on standing. For the reasons more explicitly stated below, I write separately because the Plaintiffs' second amended complaint is deficient and should be dismissed for lack of standing.

JUDGES DUNCAN and DENNIS each conclude that the Individual Plaintiffs, through the Brackeens and Cliffords, have Article III standing to challenge § 1915(a) and (b) of ICWA on equal protection grounds.[1] This conveniently allows the Opinions to proceed to the merits of the Plaintiffs' equal protection arguments. Like JUDGE COSTA, I disagree with JUDGES DUNCAN's and DENNIS's conclusions that the Plaintiffs have Article III standing to challenge § 1915(a) and (b), so I would not reach the merits of the Plaintiffs' equal protection claim. In addition to the redressability problems cited in JUDGE COSTA's dissent, JUDGES DUNCAN and DENNIS choose to ignore three important facts: (1) the date that the most recent complaint was filed, (2) the Brackeens' delayed supplementation of the record, and (3) the fact that the Cliffords could have appealed their case to the Minnesota Supreme Court but did not do so. Those facts are dispositive of the Plaintiffs' ability to show standing: The Brackeens and Cliffords (and, by extension, all of the Individual Plaintiffs) do not have standing to challenge § 1915(a) and (b), so we do not have jurisdiction to decide whether these parts of ICWA pass constitutional muster.

[1] JUDGE DENNIS concludes that the Plaintiffs do not have standing to challenge § 1913(d) and 1914, and I concur for the reasons provided in that opinion.

I. Background

The Plaintiffs filed their initial complaint in October 2017, seeking declaratory and injunctive relief, claiming that ICWA and the Final Rule are unconstitutional and violate the Administrative Procedure Act.[2] At that time, the Brackeens were attempting to adopt A.L.M., who qualified as an "Indian child" under ICWA. A.L.M.'s biological parents voluntarily terminated their parental rights in May 2017, and the Brackeens completed their adoption of A.L.M. in January 2018. The Plaintiffs filed a second amended complaint two months later. Presumably because they knew that standing would be an issue, the Brackeens stated that they "also intend to provide foster care for, and possibly adopt, additional children in need. Because of their experience with the Final Rule and ICWA, however, [they] are reluctant to provide a foster home for other Indian children in the future." Despite their reluctance, however, the Brackeens attempted to adopt A.L.M.'s sister, Y.R.J., who was born in June 2018—three months *after* the second amended complaint was filed. The Plaintiffs supplemented the district court record in October 2018 (after it had entered final judgment), notifying the court that the Brackeens were attempting to adopt Y.R.J. The Brackeens intervened in a state court adoption proceeding in November 2018, seeking to terminate the parental rights of Y.R.J.'s mother—eight months after the second amended complaint was filed.[3]

The Plaintiffs also stated in their second amended complaint that the Cliffords wished to adopt Child P., a six-year-old girl whom the Cliffords had fostered since July 2016. With the support of Child P.'s guardian ad litem,

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[2] *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 526–46 (N.D. Tex. 2018), *rev'd sub nom.* 937 F.3d 406 (5th Cir. 2019), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019).

[3] *See In re Y.J.*, 2019 WL 6904728, at *3 (Tex. App. Dec. 19, 2019).

the Cliffords moved to adopt Child P. The Minnesota court denied their petition in January 2019 because Child P.'s tribe intervened in her case and invoked ICWA's placement preferences.[4] The Cliffords appealed the Minnesota court's order, but the Minnesota court of appeals affirmed.[5] It does not appear that the Cliffords timely appealed that court's judgment.

II. Article III Standing

Under Article III of the United States Constitution, federal courts only have jurisdiction over a "case" or "controversy."[6] "To establish a 'case or controversy,' a plaintiff must establish that it has standing."[7] Standing requires that a plaintiff show (1) "an injury in fact" that is (2) fairly traceable to the challenged action of the defendant, and that is (3) likely to be "redressed by a favorable decision."[8] JUDGES DUNCAN and DENNIS only analyze standing to challenge § 1915(a) and (b) on equal protection grounds as to the Brackeens and the Cliffords. No other Individual or State Plaintiff can show standing to challenge these provisions of ICWA.

Fatal to the Brackeens' assertion of standing are the facts that (1) they had already adopted A.L.M. prior to the Plaintiffs' filing of the second amended complaint, and (2) their stated desires to adopt or provide foster care for other Indian children were too vague to constitute an injury in fact. The Brackeens must show Article III standing both at the time of the filing of

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[4] *See In re Welfare of the Child in the Custody of: Comm'r of Human Servs.*, No. 27-JV-15-483 (4th Dist. Minn. Jan. 17, 2019).

[5] *In re S.B.*, No. A19-0225, 2019 WL 6698079, at *6 (Minn. Ct. App. Dec. 9, 2019).

[6] *See* U.S. CONST. art. III, § 2, cl. 1.

[7] *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[8] *Lujan*, 504 U.S. at 560–61.

the complaint and throughout the lawsuit.[9] The court must analyze standing at the time that the latest complaint is filed.[10]

The first requirement of standing is that a plaintiff must have suffered an "injury in fact."[11] An injury in fact must be (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical.[12] Some courts have held that when "plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury."[13] "A request for injunctive relief remains live only so long as there is some present harm left to enjoin."[14] "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[15]

The Brackeens could not show an actual injury in fact at the time the Plaintiffs filed the second amended complaint because the Brackeens had already adopted A.L.M. Actual injury requires the Plaintiffs to show that they

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[9] *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007) (noting that standing is assessed at the time the complaint is filed); *Arizonans for Off. Eng. v. Ariz.*, 520 U.S. 43, 45 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

[10] *See Rockwell*, 549 U.S. at 473–74 ("[W]hen a plaintiff . . . voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (analyzing standing at the time the second amended complaint was filed).

[11] *Lujan*, 504 U.S. at 560–61.

[12] *Id.* at 560.

[13] *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

[14] *Taylor v. Resol. Tr. Corp.*, 56 F.3d 1497, 1502 (D.C. Cir. 1995).

[15] *O'Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995) (omission in original) (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983)).

are *presently* affected by ICWA and the Final Rule.[16] The Brackeens' injury was a "past injury," which "is insufficient for them to demonstrate" the injury in fact necessary to obtain injunctive or declaratory relief.[17]

Neither could the Brackeens show an imminent injury in fact.[18] Their stated desire to adopt or provide foster care for other Indian children was too vague because they had not specified a date or time that they would attempt to adopt Y.R.J. or other Indian children.[19] The Brackeens did not attempt to show that they planned to adopt another Indian child until October 2018—seven months after the second amended complaint had been filed and after final judgment had been entered. At the time that the second amended complaint was filed, the Brackeens' "intent" to provide foster care for Indian children, or the "possibility" that they would adopt any, was insufficient to show injury in fact. As the Supreme Court has explicitly held, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even

[16] *See N.J. Physicians, Inc. v. Obama*, 653 F.3d 234, 239 (3d Cir. 2011) (noting that a plaintiff must be "presently impacted" by the defendant's actions).

[17] *Reno*, 98 F.3d at 1126.

[18] JUDGE DUNCAN notes that he would reach the same conclusion as to the Brackeens' adoption of A.L.M. because it fits within the "capable of repetition, yet evading review" exception to mootness. This exception is inapposite, so the case would be moot were it not lacking an injury in fact, because (1) the adoption proceedings were not too short in duration to be fully litigated, and (2) there is no reasonable expectation that the Brackeens would be subject to the same injury again. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). As to the first prong, the Brackeens could have litigated their ICWA challenges in state court during A.L.M.'s July 2017 adoption proceedings, long before October 2018 when the district court entered judgment against the Defendants. As to the second prong, the Brackeens' stated reluctance to adopt more Indian children was too vague, as discussed above. *See Lujan*, 504 U.S. at 564 (holding that a sufficient specification of when the injury in fact will occur is necessary).

[19] *See Reno*, 98 F.3d at 1127 (holding that plaintiffs could not show injury in fact, because "[t]he complaint does not specify any particular time or date on which plaintiffs intend to violate the Act").

any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[20]

The Brackeens' standing issue in this case is similar to those found in cases—some of which are cited in JUDGE DENNIS's Opinion—wherein the Supreme Court has held that plaintiffs lack standing because their injuries were not "imminent." For example, in *O'Shea v. Littleton*, the Court held that the plaintiffs lacked standing because, even though they had suffered past unconstitutional practices they could not prove a present or future impact as a result of those practices.[21] The Court noted that the alleged imminent threat was not "sufficiently real and immediate to show an existing controversy simply because [the plaintiffs] anticipate violating lawful criminal statutes and being tried for their offenses."[22] Similarly, in *City of Los Angeles v. Lyons*, the Court rejected the plaintiff's standing argument, noting that the complaint "depended on whether [the plaintiff] was likely to suffer future injury from the use of the chokeholds by police officers."[23]

Further, JUDGES DUNCAN and DENNIS err by considering Y.R.J.'s proceedings for purposes of standing because the Plaintiffs did not move to supplement the record with information relating to the Brackeens' attempted adoption of Y.R.J. until October 10, 2018. Final judgment had been entered,

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[20] *Lujan*, 504 U.S. at 564.

[21] 414 U.S. 488, 493, 495–96 (1974).

[22] *Id.* at 496.

[23] 461 U.S. at 105. Although these cases arose in the context of unconstitutional police practices, which are unlike allegedly unconstitutional adoptive proceedings, they are instructive. Here, like the plaintiffs in *O'Shea* and *Lyons*, the Plaintiffs are seeking future remedies based on past exposures to harm, which JUDGES DUNCAN and DENNIS incorrectly classify as a regulatory burden. On the contrary, there can be no regulatory burden in a completed adoption proceeding, *viz.*, the completed adoption of A.L.M.

however, on October 4, 2018. The Supreme Court has explicitly held that a lack of standing cannot be cured by evidence entered into the record after final judgment.[24] Unlike *Mathews v. Diaz*, in which the Supreme Court held that a supplemental pleading cured the jurisdictional defect, the Brackeens' supplementation of the district court record occurred *after* judgment had been entered.[25]

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[24] *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009) ("After the District Court had entered judgment, and after the Government had filed its notice of appeal, respondents submitted additional affidavits to the District Court. We do not consider these. If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively.").

[25] *Cf.* 426 U.S. 67, 75 (1976). In *Mathews*, cited by JUDGE DENNIS, the Court noted that "[a] supplemental *complaint* 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." *Id.* (emphasis added). *Mathews* involved Federal Rule of Civil Procedure 15(d), which allows a party to file a supplemental *pleading*. *See id.* at 75 n.8; *accord Northstar Fin. Advisors Inc. v. Schwab Inv.*, 779 F.3d 1036, 1044 (9th Cir. 2015). The Brackeens did not file a supplemental pleading. Instead, they filed a supplement to the record. Further, *Mathews* involved the issue of exhaustion, not standing. *See* 426 U.S. at 75-76. Finally, *Mathews*' language that "even now," filing a supplemental pleading would not be "too late," is dictum. In *Mathews*, the plaintiffs filed a supplemental pleading after the complaint had been filed but *before* final judgment had been entered. *Id.* at 75 (noting that the pleading was supplemented "while the case was pending in the District Court"). There was no issue of filing a supplemental pleading at the Supreme Court level; thus, this language is dictum. Here, as stated, the Brackeens did not supplement the record until *after* final judgment was entered, and this cannot cure the defective complaint. *See Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) (noting that "while 'later events may not create jurisdiction where none existed at the time of filing, the proper focus in determining jurisdiction are the facts at the time the complaint under consideration was filed'" (brackets and emphasis omitted) (quoting *GAF Bldg. Materials Corp. v. Elk Corp.*, 90 F.3d 479, 483 (Fed. Cir. 1996)).

Finally, the Cliffords do not have standing to challenge § 1915(b) because their claim is not redressable.[26] They could have appealed their challenges to ICWA in Minnesota state court but likely missed the deadline to appeal.[27] The state of Minnesota is also not a party to this lawsuit, so any ruling we make on the constitutionality of ICWA would have no effect on the Cliffords' adoption proceedings.[28]

III. Conclusion

It would be convenient if we could ignore facts that are dispositive of Article III standing—as do JUDGES DUNCAN and DENNIS—and proceed to the merits in important constitutional cases such as this. We are, however, governed by the rule of law. And a federal court cannot weigh in on an issue over which it lacks jurisdiction, however appealing doing so might be. I concur with JUDGE COSTA that the Plaintiffs lack standing because their case is not redressable. And even though I join JUDGES DENNIS's well-reasoned and thorough Opinion on the merits, I would reverse the district court's order that the Plaintiffs have Article III standing to challenge 25 U.S.C. § 1915(a) and (b) on equal protection grounds.

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[26] *See Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014) (noting that redressability is a requirement for standing)

[27] *See In re S.B.*, No. A19-0225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019) (showing no notice of appeal to the January 2020 judgment); *see also* Minn. R. Civ. App. P. 117 subd 1 (requiring filing of notice of appeal within 30 days of the filing of the Court of Appeals' decision).

[28] *See Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc) (concluding that the plaintiffs' claim was not redressable because the defendants were "powerless to enforce [the Act] against the plaintiffs (or to prevent any threatened injury from its enforcement")).