IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATE OF OHIO and STATE OF TENNESSEE, *Plaintiffs*,	:	Case No. 2:15-cv-2467 Judge Sargus
v.	:	Magistrate Judge King
UNITED STATES ARMY CORPS OF ENGINEERS, et al. *Defendants*.	:	

COMBINED MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION

Plaintiffs, the States of Ohio and Tennessee, respectfully request that the Court grant them summary judgment and permanently enjoin the 2015 Rule defining "the waters of the United States." 80 Fed. Reg. 37054–37127 (2015). As explained more fully below, summary judgment is appropriate as a matter of law because the 2015 Rule violates the Clean Water Act, the Administrative Procedure Act, and the Constitution. The 2015 Rule's application to Ohio and Tennessee has caused the States irreparable harm during the pendency of this case. And, though the 2015 Rule is not currently in effect, there remains a significant threat of the 2015 Rule's return in light of the nationwide litigation surrounding "the waters of the United States." *See Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020). For these reasons, the plaintiffs request that this Court permanently enjoin any future application of the 2015 Rule within Ohio or Tennessee.

Respectfully submitted,

HERBERT H. SLATERY III
Tennessee Attorney General and Reporter

SOHNIA HONG
Deputy Attorney General

/s/ Elizabeth P. McCarter
ELIZABETH P. McCARTER (10531)
Senior Counsel
Office of the Attorney General and Reporter
Environmental Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-2582 – Telephone
(615) 741-8724 – Facsimile
lisa.mccarter@ag.tn.gov

Counsel for Plaintiff State of Tennessee

DAVE YOST
Ohio Attorney General

/s/ Jonathan Blanton
JONATHAN BLANTON* (0070035)
*Trial Attorney
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH, 43215
(614) 466-2766 – Telephone
Jonathan.blanton@OhioAGO.gov

Counsel for the State of Ohio

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The 2015 Rule, 80 Fed. Reg. 37076 (2015), violates the Clean Water Act. In *Rapanos v. United States*, 547 U.S. 715 (2006), the plurality and concurring opinions set forth different tests for defining "the waters of the United States." The 2015 Rule fails both tests. The *Rapanos* plurality held that "the waters of the United States" include only those waters that are "relatively permanent" and have a "continuous surface connection" to another jurisdictional water. *Id.* at 757. The 2015 Rule violates that test by regulating many waters, including ephemeral streams, that *lack* a continuous surface connection to jurisdictional waters. The Rule fares no better under Justice Kennedy's test, which he announced in a concurring opinion. Under that test, "the waters of the United States" include only:

(1) waters that are "navigable" in the traditional sense; and (2) waters that "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" determined on a case-by-case basis. *Id*. at 780 (Kennedy, J., concurring in judgment). The 2015 Rule exceeds these limits in many ways, including by sweeping in "waters or land that, at present, in the field, bear no evidence of regularity or volume of flow—factors demonstrating a significant nexus under [Justice] Kennedy's opinion." *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1361 (S.D. Ga. 2019).

If the 2015 Rule were a valid interpretation of the Clean Water Act, it would make the Act unconstitutional. The agencies' expansive claims of federal jurisdiction, alone and in combination, capture many waters with no significant nexus to traditional navigable waters. It follows that the 2015 Rule asserts jurisdiction over state waters—such as dry streams and isolated ponds—that do not substantially affect interstate commerce. *See Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). But the enumerated power Congress relied on when passing the Clean Water Act—the Commerce Clause—permits Congress to regulate *interstate* commerce, not purely intrastate lands. To the extent the Act regulates waters that *do not* affect interstate commerce, it exceeds Congress's power and intrudes upon powers reserved to the States by the Tenth Amendment.

The 2015 Rule also violates the Administrative Procedure Act. The final rule is not a "'logical outgrowth' of the rule proposed," as the Act requires. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (citation omitted). For example, the final rule defines certain categories of "waters of the United States" with reference to distance thresholds that the proposed rule never mentioned. The agencies also violated the Act because the Rule is arbitrary and capricious. 5 U.S.C. §706(2)(A). Agencies act arbitrarily and capriciously when they fail to "examine the relevant data and articulate a satisfactory explanation for [their] action[s]." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). The agencies in this case acted arbitrarily and capriciously by choosing to substitute "bright-line boundaries" for case-specific analysis, 80 Fed. Reg. 37055, without justifying the bright-line boundaries they selected.

The 2015 Rule has irreparably harmed the States in at least four ways. *First*, the rule interfered with the States' constitutional authority to regulate purely

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INTRODUCTION

The Clean Water Act was enacted to protect "the Nation's waters." 33 U.S.C. §1251(a). But Congress recognized that, in our government of separate and coordinate powers, the *States* bear primary responsibility to regulate the country's "land and water resources." §1251(b); *see also* U.S. Const. amend. X. It thus limited the Act's reach to "navigable waters," which it defined as "the waters of the United States." 33 U.S.C. §1362(7). It then vested the executive branch with authority to promulgate regulations protecting these waters, leaving to the States the power to regulate non-federal waters.

The Supreme Court has never definitively interpreted "the waters of the United States." But it has made clear that the phrase has limits. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). At most, the phrase encompasses only waters that are either "navigable," in the traditional sense, or that "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in judgment).

In 2015, the EPA and the Army Corps of Engineers finalized a rule defining "the waters of the United States." The Rule interprets "the waters of the United States" to include just about any water with some indirect connection, no matter how insignificant, to traditional navigable waters. For example, the Rule announces that all "tributaries" constitute "the waters of the United States," and then de-

fines "tributaries" to include, among other things, dry channels that usually carry no water at all. *See* 80 Fed. Reg. 37076 (2015). The Rule further states that all "adjacent water" categorically qualifies as "the waters of the United States." And "adjacent water," the Rule says, categorically includes *all* water that eventually connects (whether directly or through other waters) to other "waters of the United States." *Id*. at 37105. Thus, the Rule purports to give the federal government jurisdiction to regulate the water purity of a piece of earth that forms a pond during heavy rain, so long as part of that pond happens to be near a typically dry stream that indirectly connects—through any number of other waters—to traditional navigable waters. *See id*. at 37076, 37080. Indeed, the 2015 Rule defines "the waters of the United States" so broadly that it expressly excludes swimming pools and puddles because, without an exclusion, they might otherwise qualify as "the waters of the United States."

In sum, the 2015 Rule does not enforce existing law, it makes new law. In so doing, it ignores the limits of the Clean Water Act, usurping the power of Congress and the States by unlawfully seizing primary responsibility for regulating land that the Constitution gives the federal government no authority to regulate. If that were not bad enough, the agencies violated the *procedural* restraints on their authority by promulgating the Rule in violation of the Administrative Procedure Act.

Because of the Rule's many defects, the Sixth Circuit, within a stay analysis, concluded that States challenging the Rule had "a substantial possibility of success on the merits of their claims." *Ohio v. United States Army Corps of Eng'rs (In re.*

EPA & Dep't of Def. Final Order), 803 F.3d 804, 807 (6th Cir. 2015). Consistent with the Sixth Circuit's initial analysis, many States have since received injunctions and summary judgment in other courts—relief that blocks the 2015 Rule's application in those States. *See, e.g.*, *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).

True, in light of the federal agencies' actions in 2019 and 2020, the 2015 Rule is not *presently* in effect. But that state of affairs remains in limbo: given nationwide litigation challenging those recent actions, there remains a significant threat that the 2015 Rule will go back into effect for any State without an injunction. *See Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020). Because the 2015 Rule is illegal, Ohio and Tennessee are entitled to protection from any future application of the Rule within their boundaries. The Court should grant the States summary judgment and enjoin the Rule's enforcement within Ohio and Tennessee.

STATEMENT OF THE CASE

I. The Clean Water Act applies to "the waters of the United States," but defining the scope of those waters has proven difficult.

Congress passed the Clean Water Act in 1972. *See* Pub. L. No. 92-500, 86 Stat. 816 (1972). It did so "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). At the same time, however, Congress sought "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." §1251(b).

The Act pursues these twin goals—water purity, and protecting the States' role in environmental regulation—by enacting various anti-pollution measures, while at the same time limiting the Act's reach to exclude many intrastate bodies of water. Relevant here, the Act prohibits "the discharge of any pollutant," 33 U.S.C. §1311(a), including "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. §1362(12)(A). And what are "navigable waters"? The Act defines that term to mean "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Thus, the Act covers only "the waters of the United States," as opposed to *all* waters.

The Act conscripts the States to assist the federal government in regulating "the waters of the United States." States, for example, must have federally approved quality standards for such waters. 33 U.S.C. §1313. They must also submit biennial reports on water quality. 33 U.S.C. §1315. And, most important of all, they assist with the issuance of federal permits by certifying that proposed projects impacting "the waters of the United States" comply with the Clean Water Act. Anyone who wants to do anything that "may result in any discharge into the navigable waters," must first get a permit. 33 U.S.C. §1341(a). And to get a permit, they must first obtain a state certification. *Id.* Given the Act's broad definition of "discharge"—it includes any addition to navigable waters of not only toxins, but also "pollutants" such as "rock, sand, [and] cellar dirt," §1362(6)—many seemingly harmless activities may give rise to a "discharge" requiring a state certification.

As the foregoing suggests, quite a bit turns on the meaning of "the waters of the United States." The Act does not define that term. So the federal agencies have taken it upon themselves to do so, announcing broader and broader definitions over the years. Before the Clean Water Act, the Supreme Court "had interpreted the phrase 'navigable waters of the United States'" to mean "interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1871)). Shortly after the Act's passage, the U.S. Army Corps of Engineers adopted that traditional definition. *See id.* (citing 39 Fed. Reg. 12119 (1974)). But the Corps soon expanded the definition, seeking to regulate to the outer limits of federal commerce power. *See id.* at 724 (citing 42 Fed. Reg. 37144 n.2 (1977)).

The first test of the Corps' broad definitions came in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). There, the Court held (applying *Chevron* deference) that the Corps reasonably interpreted "the waters of the United States" to include "a wetland adjacent to a navigable waterway," where the wetland's soil conditions and vegetation extended to a navigable water. *See id.* at 131. The Court explained that "the transition from water to solid ground is not necessarily or even typically an abrupt one." *Id.* at 132. Thus, where precisely to draw the line requires some degree of judgment. And given the Clean Water Act's purpose of protecting water quality in navigable waterways, it made sense to regulate the quality of water in adjacent wetlands. *Id.* at 133–34.

After *Riverside Bayview*, the Corps decided to try its luck with still-broader definitions. *See Rapanos*, 547 U.S. at 725 (plurality). For example, it instituted the "Migratory Bird Rule," which purported to extend federal jurisdiction to all waters "'[w]hich are or would be used as habitat by'" migratory birds. *See id.* (quoting 51 Fed. Reg. 41217 (1986)). The Corps also expanded its interpretation of "the waters of the United States" to include "'ephemeral streams'" and "'drainage ditches'" that have an "'ordinary high-water mark.'" *See id.* (quoting 65 Fed. Reg. 12823 (2000)). In practical effect, "[t]his interpretation extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Id.*

These broad interpretations fared poorly at the Supreme Court. *See Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"); *Rapanos*, 547 U.S. 715. In *SWANCC*, the Supreme Court held that the Migratory Bird Rule exceeded federal authority. More precisely, it held that the Clean Water Act did not reach "ponds that are *not* adjacent to open water." 531 U.S. at 168. And it rejected any interpretation of the Clean Water Act that would read the phrase "'navigable waters' out of the statute." *Id.* at 172. The word "navigable," the Court explained, "has at least the import of showing" that Congress remained cognizant of "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* Reading the Act to reach ponds with no direct connection to bodies of water that were (or could easily be made) navigable-in-fact would deprive "navigable" of any meaning.

In *Rapanos*, the Court took up the question whether Michigan wetlands located miles away from a navigable waterway could lawfully be categorized as "the waters of the United States." *Rapanos*, 547 U.S. at 720 (plurality). The Court held that the Clean Water Act could not be read to *categorically* cover such wetlands. But the case produced no majority opinion.

A four-justice plurality would have held that the Act categorically *does not* cover such wetlands. The plurality interpreted the phrase "the waters of the United States" to include "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes.'" *Id.* at 739 (quoting *The Waters*, Webster's New International Dictionary (2d ed. 1954)). In contrast, "[t]he phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* The plurality further concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

Justice Kennedy filed a separate opinion concurring in the judgment. *Id.* at 759–87. He argued for a case-specific, totality-of-the-circumstances approach to defining "the waters of the United States." Under this approach, all traditional navigable waters are "the waters of the United States." But the government may not take a broad categorical approach and administratively convert waters that are *not*

"navigable" into "the waters of the United States." Instead, the government must undertake a fact-specific inquiry, asking whether the particular water or wetland at issue possesses "a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in judgment). Applying this approach, Justice Kennedy criticized the Corps' interpretation of "the waters of the United States," which left "wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *Id.* He further criticized the Corps for including within its definitions so-called "adjacent" wetlands, which in reality had little relationship "to navigable-in-fact waters." *Id.* at 781–82.

Following *Rapanos*, the Corps and the EPA issued guidance to limit the scope of their authority. EPA & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (Dec. 2, 2008), *available at* https://bit.ly/2TrJMkH. That guidance identified just four types of "waters" that categorically qualified as "the waters of the United States": (1) traditional navigable waters; (2) wetlands adjacent to traditional navigable waters; (3) relatively permanent tributaries of traditional navigable waters; and (4) wetlands that directly abut relatively permanent tributaries. *Id.* at 1. The agencies stated that they would decide jurisdiction over other types of waters, such as non-permanent tributaries, on a case-by-case basis. *Id.*

II. In 2015, the EPA and Army Corps of Engineers promulgated a rule expanding the Clean Water Act's reach.

That is how things stood until early 2014, when the Corps and the EPA issued a proposed rule redefining "the waters of the United States." 79 Fed. Reg. 22188 (2014). A year later, after making various changes to the initially proposed definition, the agencies published the final rule. 80 Fed. Reg. 37054–37127 (2015) ("the 2015 Rule" or "the Rule" or "the final rule"). Because this case turns on the Rule's substance and the process by which it was adopted, it is important to detail both points in some depth.

A. The 2015 Rule vastly expanded the meaning of "the waters of the United States."

The 2015 Rule begins by saying that "the waters of the United States" include traditional navigable waters, interstate waters, and the territorial seas. *Id.* at 37104 (codified at 33 C.F.R. §328.3(a)(1)–(3)). But it then expands the pre-existing meaning of "the waters of the United States" in several significant ways.

Tributaries. "All tributaries" qualify as "the waters of the United States" under the 2015 Rule. *Id.* at 37104. This definition is even broader than it might seem, because the Rule defines "tributaries" to include any water that "contributes flow" to interstate or navigable waters and "is characterized by the presence of the physical indicators of a bed and banks and an ordinary high-water mark." *Id.* at 37105. An "ordinary high-water mark" means "a line on the shore" and can be established by shelving, changes in soil, the presence of debris, or "other appropriate means." *Id.* at 37106.

According to the Rule, a tributary's features need not be physically observable. The agencies can instead infer the requisite "physical characteristics"—a bed, banks, and an ordinary high-water mark—from "desktop tools" when other "indicators … are absent in the field." *Id.* at 37077. Similarly, when required physical characteristics "no longer exist, they may be determined by using other appropriate means that consider the characteristics of surrounding areas." *Id.* Permissible means of detection, the agencies said, "include, but are not limited to, lake and stream gage data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, the use of reference conditions, or through … remote sensing." *Id.*; *see also id.* at 37076–77 (describing the different "types of remote sensing or mapping information that can assist in establishing the presence of water").

The Rule further provides that a tributary can "contribute flow" to navigable waters either directly or indirectly through other waters. In the agencies' words, a tributary "may contribute flow through *any number* of downstream waters, including non-jurisdictional features," as long as it connects to a "system that eventually flows to a traditional navigable water, an interstate water, or the territorial seas." *Id.* at 37076 (emphasis added).

This definition of "tributaries" is so broad that it includes land that is normally dry. That is, a tributary's flow "may be perennial, intermittent, or ephemeral." *Id.* at 37076. For example, tributaries include ephemeral streams, "regardless of flow duration," which may "have flowing water only in response to precipitation

events" such as rain or melting snow. *Id.* at 37076. Put less scientifically, a slight depression on the side of a small hill in western Ohio is part of "the waters of the United States" if that slight depression forms a runoff during heavy rains which flows into a drainage ditch that leads to a mud flat that, when flooded, drains into a small creek that can (in heavy rains) flow into a small river that eventually joins up with the Scioto River and then the Ohio River.

Adjacency. "All waters adjacent to" other jurisdictional waters, including tributaries, would now qualify as "the waters of the United States," too. 80 Fed. Reg. 37104 (codified at 33 C.F.R. §328.3(a)(6)). Such waters include "wetlands, ponds, lakes, oxbows, impoundments, and similar waters." *Id.*

This might not sound like much of an expansion. But it is, because the Rule defines "adjacent" to encompass non-adjacent water. The definitions work like this. First, the Rule defines "adjacent" as "bordering, contiguous, or neighboring." *Id.* at 37105 (codified at 33 C.F.R. §328.3(c)(1)). It then defines "neighboring" to include waters that fall within one of multiple distance thresholds. For example, *all* of the following waters categorically qualify as "water adjacent to" other jurisdictional waters:

- "All waters located within 100 feet of the ordinary high-water mark of" other jurisdictional waters, including tributaries;
- "All waters located within the 100-year floodplain of" other jurisdictional water, including tributaries, and "not more than 1,500 feet from the ordinary high-water mark of such water";
- "All waters located within 1,500 feet of the high tide line of" traditional navigable waters, interstate waters, or the territorial seas; and

- "all waters within 1,500 feet of the ordinary high-water mark of the Great Lakes."

Id.

In calculating these distance determinations, an "entire water" is covered if any part of the water is "neighboring." *Id.* The Rule, therefore, confers jurisdiction over "any single water or wetland" so long as "the water is at least partially within the distance threshold." *Id.* at 37081. "For example, if a tributary has a 1,000-foot wide 100-year floodplain, then a water that is located within 1,000 feet of the ordinary high-water mark of a covered tributary and extends to 2,000 feet in the other direction is jurisdictional in its entirety as 'neighboring.'" *Id.* at 37080.

And, in deciding what is "neighboring," the 2015 Rule treats diverse landscapes as "a single water." *Id.* at 37081. The agencies explained that they will consider land with "intermingled wetland and non-wetland components" as one "water" when they decide the land is "physically and functionally integrated." *Id.* Thus, a Tennessee resident who thinks he owns 30 acres of land with an additional acre of wetlands in the middle of it may come to find that he in fact owns 31 acres of "the waters of the United States." And if that is true, he will need a federal permit to do *any* construction, no matter how limited, on completely dry parts of his property. *See* §1341(a).

Case-by-case evaluation. In addition to the above categories, which are automatically included as "the waters of the United States," the 2015 Rule extends federal jurisdiction to other waters on a case-by-case basis. The Rule requires a

case-specific analysis for "[a]ll waters located within the 100-year floodplain of" navigable waters, interstate waters, or the territorial seas. 80 Fed. Reg. 37105 (codified at 33 C.F.R. §328.3(a)(8)). It also requires a case-specific analysis for "[a]ll waters located within 4,000 feet of the high tide line or ordinary high-water mark of" jurisdictional waters, including tributaries. *Id.* For this case-specific analysis, waters qualify as "the waters of the United States" if they "are determined … to have a significant nexus to" navigable waters, interstate waters, or the territorial seas. *Id.*

What is a "significant nexus"? According to the Rule, potential waters have a significant nexus if they, "either alone or in combination with other similarly situated waters in the region, significantly affect[] the chemical, physical, or biological integrity of" navigable waters, interstate waters, or the territorial seas. *Id.* at 37106. Waters are "similarly situated" when they "function alike and are sufficiently close to function together in affecting downstream waters." *Id.* The agencies assess waters' effects "by evaluating … aquatic functions." *Id.* The 2015 Rule provides a long list of relevant "functions," including "contribution of flow," "export of food resources," and "provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, and use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas." *Id.* at 37067. If the agencies find a significant effect for "even just one" of these functions, then it satisfies the nexus requirement. *Id.*

Exclusions. The 2015 Rule does exclude some "waters" from "the waters of the United States." 80 Fed. Reg. 37105. But these exclusions illustrate the Rule's

breadth. For example, the Rule excludes swimming pools, reflecting pools, some ditches, gravel and sand pits, groundwater, and puddles. *Id.* The Rule states that it is necessary to expressly exclude these bodies of water because they might "otherwise meet" the definitions for tributaries, adjacent waters, or waters having a substantial nexus to other waters of the United States. *Id.*; *see also id.* at 37099 (noting that "numerous commenters" requested that the agencies "expressly exclude" puddles from their "waters of the United States" definition). In other words, the Rule's other definitions are so broad that they would encompass swimming pools and puddles (at least sometimes) if those "waters" were not expressly excluded.

B. During the rulemaking process, the agencies changed the substance of their proposed rule and they projected the 2015 Rule's sizeable effect.

Changes in substance. The final rule differed from the one the agencies proposed in a few key ways. For the purposes of the "adjacent water" definition, the proposed rule defined "neighboring" to mean "waters located within the riparian area or floodplain of a" jurisdictional water, along with "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." 79 Fed. Reg. 22263 (proposed 33 C.F.R. §328.3(c)(2)). The final rule changed to bright-line thresholds, abandoning hydrologic connections, based on a given water's distances from ordinary high-water marks, floodplains, and high-tide lines of jurisdictional waters. 80 Fed. Reg. 37105.

The final rule similarly departed from the proposed rule with respect to the case-by-case analysis. The proposed rule indicated that "other waters" not categorically included as "the waters of the United States" would be evaluated on "a case-specific basis." 79 Fed. Reg. 22263 (proposed 33 C.F.R. §328.3(a)(7)). In contrast, the final rule set distance thresholds that, if satisfied, would mandate a case-specific analysis. For example, the final rule requires a "sufficient nexus" analysis for all waters within 4,000 feet of other jurisdictional waters. 80 Fed. Reg. 37105. The proposed rule contained no such threshold.

The final rule also made a change with respect to the approach for identifying tributaries. The proposed rule indicated that the agencies could make jurisdictional determinations without conducting a field observation if "'desktop' analysis furnishes sufficient information to make the requisite findings." 79 Fed. Reg. 22195. And the proposed rule suggested the agencies could use "remote sensing" when "considering whether the tributary … eventually flows" to a jurisdictional water. *Id.* at 22202. The final rule, however, expanded the role of "desktop analysis." It said that agencies could rely on "remote sensing and desktop tools" not only as a substitute for direct observation, but also as a workaround when "physical characteristics of bed and banks and another indicator of ordinary high-water mark *are absent in the field*." 80 Fed. Reg. 37077 (emphasis added).

Impact analysis. Shortly before publishing their 2015 Rule, the agencies released an impact analysis of the new "waters of the United States" definition. EPA & U.S. Army Corps of Eng'rs, *Economic Analysis of the EPA-Army Clean Water*

Rule (May 20, 2015), *available at* https://bit.ly/2Kw5q4a. The analysis projected the 2015 Rule's impact by comparing it to federal practices after *Rapanos*. *Id.* at iv.

The analysis concluded that the 2015 Rule would increase federal jurisdiction compared to post-*Rapanos* practices. *Id.* at vii. Considering past jurisdictional determinations, it conservatively estimated an overall "increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually compared to recent field practice." *Id.* at vii. More specifically, it estimated a 17.1 percent increase in waters satisfying the "adjacent" definition. *Id.* For both Ohio and Tennessee, the analysis projected increases in federal jurisdiction over wetlands and streams. *See id.* at 64–65 (Figure 18). Comparing the States, it projected that Ohio would have the second highest increase in wetlands under federal jurisdiction. *Id.* Ohio ranked fourth highest for streams. *Id.*

The analysis also recognized that States play "a significant role in administering many [Clean Water Act] programs." *Id.* at 4. It predicted that the 2015 Rule would increase the "incremental costs to states" for assisting in the issuance or denial of permits. *Id.* at 19. Due to the projected increase in federal jurisdiction, the analysis estimated that such costs would increase by somewhere between $798,000 and $1.3 million annually. *Id.* The analysis also projected that separate administrative costs would "accrue to states" for other programming under the Clean Water Act. *Id.* at 25, 27.

III. Litigation and uncertainty have remained constant since the agencies published the 2015 Rule.

A. This case began in the summer of 2015 when Ohio, Tennessee, and Michigan sued to enjoin the new rule shortly after the agencies promulgated it. *See* First Amended Complaint, R.20, PageID#62. (Michigan later withdrew from the suit.) The States argued that the 2015 Rule violated the Administrative Procedure Act and the Clean Water Act, and that reading the Clean Water Act to permit the 2015 Rule would cause the Act to exceed Congress's power under the Commerce Clause and violate the Tenth Amendment. *Id.* at PageID#76–78.

The States moved for a preliminary injunction, but a jurisdictional dispute soon sidetracked those proceedings. This Court and the Sixth Circuit held that the States needed to challenge the 2015 Rule in the courts of appeals. *See* Order, R.54, PageID#599; *Murray Energy Corp. v. United States Dep't of Def. (In re United States Dep't of Def.)*, 817 F.3d 261 (6th Cir. 2016). The Supreme Court ultimately disagreed. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). But, before the Supreme Court's ruling, the Sixth Circuit stayed the 2015 Rule's application pending resolution of the jurisdictional dispute. *See Ohio v. United States Army Corps of Eng'rs (In re. EPA & Dep't of Def. Final Order)*, 803 F.3d 804, 806 (6th Cir. 2015). It concluded that it was "far from clear" that the Rule was "harmonious with" Justice Kennedy's *Rapanos* concurrence, *id.,* since the Rule purported to regulate waters lacking any significant nexus to waters that are, or could easily be made, navigable in fact. And it reasoned that "the rulemaking process" was "facially suspect" because of differences between the 2015 Rule and the proposed rule. *Id.* Balancing

the harms, the Court expressed concern about "the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters." *Id.* at 808. It thus entered a stay to "temporarily silence[] the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing." *Id.* After the Supreme Court's jurisdictional ruling, the Sixth Circuit vacated its stay and dismissed the case so that this Court could address the merits in the first instance. *Murray Energy Corp. v. United States Dep't of Def. (In re. United States Dep't of Def.)*, 713 F. App'x 489 (6th Cir. 2018).

Back in this Court, the States renewed their request for a preliminary injunction. Supplemental Memorandum in Support of Preliminary Injunction, R.64, PageID#774. Meanwhile, the agencies attempted to undo the 2015 Rule. Among other things, in 2018, the agencies published the "Suspension Rule," suspending the 2015 Rule's application until February 2020. 83 Fed. Reg. 5200 (2018). The Suspension rule sparked even more litigation. Environmental groups challenged the agencies' rulemaking process, seeking to enjoin the Suspension Rule and give the 2015 Rule immediate effect. *See, e.g.*, *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); *Puget Soundkeeper All. v. Wheeler*, No. C15-1342, 2018 U.S. Dist. LEXIS 199358 (W.D. Wash. Nov. 26, 2018). In August 2018, the District of South Carolina granted those groups relief, enjoining the Suspension Rule nationwide. *S.C. Coastal Conservation League*, 318 F. Supp. 3d at 969–70. That order thus put the 2015 Rule back into effect for every State where it had not been enjoined.

In the wake of that nationwide injunction, a "confusing patchwork of federal regulations" existed across the country. U.S. Army, *Definition of "Waters of the United States": Rule Status and Litigation Update* (Mar. 14, 2019), https://bit.ly/3xOWOet. Courts enjoined the 2015 Rule's application in twenty-seven States. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *Texas v. EPA*, No. 3:15-CV-00162, 2018 U.S. Dist. LEXIS 160443 (S.D. Tex. Sept. 12, 2018); *North Dakota v. EPA*, 127 F. Supp.3d 1047 (D.N.D. 2015). (Some of those States later won summary judgment. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019); *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019).) For the remaining States, including Ohio and Tennessee, the 2015 Rule became effective in August 2018 when the District of South Carolina enjoined the Suspension Rule. *See S.C. Coastal Conservation League*, 318 F. Supp. 3d 959.

This Court denied Ohio and Tennessee a preliminary injunction in March 2019. Opinion & Order, R.86, PageID#1175. It reasoned that, because the agencies were trying to undo the 2015 Rule, the States had failed to show that they would suffer "any particularized harm … while this matter remain[ed] pending." *Id.*, PageID#1180–81.

B. Ohio and Tennessee appealed the Court's preliminary-injunction ruling. And for many months while that appeal was pending, the States remained subject to the 2015 Rule. But in October 2019, the agencies finally repealed the 2015 Rule. 84 Fed. Reg. 56626 (2019) (the "2019 Repeal"). Then, the next spring, the agencies

finalized a new definition of "waters of the United States." 85 Fed. Reg. 22 (2020) (the "2020 Rule").

Much like the 2018 Suspension Rule, the 2019 Repeal and the 2020 Rule were attacked in lawsuits across the country. *Ohio v. EPA*, 969 F.3d 306, 309 (6th Cir. 2020) (noting at least fifteen lawsuits). And, though some of those lawsuits are temporarily on hold, nationwide litigation continues to call into question whether the 2019 Repeal and 2020 Rule will remain in effect. *See, e.g.*, *Pueblo of Laguna v. Regan*, No. 21-cv-00277 (D.N.M.); *California v. Wheeler,* No. 3:20-cv-03005 (N.D. Cal.); *Colorado v. EPA*, 1:20-cv-01461 (D. Colo.); *Chesapeake Bay Found., Inc. v. Wheeler*, 1:20-cv-01064 (D. Md.); *Pasqua Yaqui Tribe v. EPA*, 4:20-cv-00266 (D. Ariz.); *Navajo Nation v. Wheeler*, 2:20-cv-00602 (D.N.M.); *Env't Integrity Project v. EPA*, 1:20-cv-01734 (D.D.C.); *Or. Cattlemen's Ass'n v. EPA*, 3:19-cv-00564 (D. Or.); *Wash. Cattlemen's Ass'n v. EPA*, 2:19-cv-00569 (W.D. Wash.); *N.M. Cattle Growers' Ass'n v. EPA*, 1:19-cv-00988 (D.N.M.); *S.C. Coastal Conservation League v. Wheeler*, Case Nos. 2:19-cv-03006 (D.S.C.); *Waterkeeper All. v. Wheeler*, No. 3:18-cv-03521 (N.D. Cal.). Currently, several States and Cities are asking the Northern District of California to vacate the 2020 Rule while the agencies work on a new definition (more on that momentarily). Pls. Partial Opp'n to Remand (Aug. 9, 2021), R.256, *California v. Wheeler,* No. 3:20-cv-03005 (N.D. Cal.). If that domino falls, several environmental groups are waiting in line—"not least the intervenors in this case," *Ohio*, 969 F.3d at 309—to try and enjoin the 2019 Repeal (as they were able to enjoin the 2018 Suspension). *E.g.*, *S.C. Coastal Conservation League v. Wheeler*, Case

Nos. 2:19-cv-03006 (D.S.C.); *compare S.C. Coastal Conservation League*, 318 F. Supp. 3d 959. And if that domino falls, the 2015 Rule goes back into effect for any State lacking an injunction.

Last year, the Sixth Circuit dismissed the States' appeal as moot with respect to *preliminary* relief. *Ohio v. EPA*, 969 F.3d 306. The Court held that a preliminary injunction was unnecessary because, with the 2015 Rule repealed and replaced, it was unlikely that the States would be harmed "during the pendency of their case." *Id.* at 310. At the same time, the Court recognized that "the case as a whole … remains a live one." *Id.* That was because there remained a reasonable likelihood of the 2015 Rule's revival, "given the recent proliferation of nationwide injunctions and the pendency of 15 cases challenging the Repeal or [2020] Rules." *Id.* at 310. As a result, the Sixth Circuit remanded the case back to this Court so that it could "make its decision regarding a permanent injunction before a court in one of the other cases potentially restores the 2015 Rule nationwide." *Id.*

C. President Biden, on his first day in office, issued an executive order previewing that his Administration would take additional action as to "the waters of the United States." *See* Executive Order 13990 §7 (Jan. 20, 2021), https://bit.ly/372Nucl. Consistent with that order, the agencies recently announced their intention to revise the definition of "the waters of the United States," first by restoring "protections in place prior to" the 2015 Rule and then by "developing a new rule." Press Release, EPA & U.S. Army (June 9, 2021), https://bit.ly/3m4N3Xs. The agencies, however, have not set any timeline for completing those tasks, and their review

process remains in its early, pre-proposal stages. *See* EPA, *Intention to Revise the Definition of "Waters of the United States,"* EPA, https://bit.ly/3smDx2W. And, of course, anything they do is bound to be challenged in court, and potentially enjoined nationwide.

STANDARD OF REVIEW

In line with the Sixth Circuit's guidance, the States now seek summary judgment and a permanent injunction from this Court before a different court "potentially restores the 2015 Rule nationwide." *Ohio v. EPA*, 969 F.3d at 310.

"Summary judgment is proper if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Nathan v. Great Lakes Water Auth.*, 992 F.3d 557 (6th Cir. 2021). To be entitled to a permanent injunction, a plaintiff must first establish actual success on the merits. *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 445 (6th Cir. 2010). A plaintiff must further show that (1) "it has suffered an irreparable injury"; (2) the "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (3) the "balance of hardships between the plaintiff and the defendant" justify an equitable remedy; and (4) "the public interest would not be disserved be a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A plaintiff may satisfy the irreparable-injury prong by showing "a significant threat that irreparable injury will result if relief is not granted." *Spingola v. Vill. of Granville*, 39 F. App'x 978, 981 (6th Cir. 2002); *accord United*

States v. Miami Univ., 294 F.3d 797, 816 (6th Cir. 2002); *Tee Turtle, LLC v. Swartz*, No. 2:21-CV-01771, 2021 U.S. Dist. LEXIS 107745 at *5 (S.D. Ohio June 9, 2021).

ARGUMENT

Ohio and Tennessee satisfy the requirements for a permanent injunction as a matter of law. This motion explains why in three steps.

First, the States prevail on the merits of their claims. The 2015 Rule is unlawful because it violates the Clean Water Act and the Constitution. Separate from that, the agencies' rulemaking process violated the Administrative Procedure Act for both procedural and substantive reasons.

Second, the States are threatened with irreparable harm as a result of the 2015 Rule's illegality. For over a year, stretching from August 2018 until October 2019, the State were subject to an illegal—and indeed unconstitutional—federal rule that reduced the States' sovereign authority over their lands and waters. And the States still face a substantial risk of the 2015 Rule's return, since litigants across the country are attacking the 2019 Repeal and the 2020 Rule.

Third, the remaining injunction factors also weigh in favor of relief. For example, the balance of equities favors an injunction because the agencies have already moved on from the 2015 Rule and have shown little if any interest in defending its merits. They cannot plausibly claim to suffer any harm from the enjoining of a rule they have abandoned. Finally, the public interest supports the issuance of an injunction, because it will keep Ohio, Tennessee, and their citizens from being exposed to an illegal rule that has already been enjoined in much of the country.

I. The States prevail on the merits of their challenges.

Ohio and Tennessee bring claims under the Administrative Procedure Act, the Clean Water Act, and the Constitution. Am. Compl., R.20, PageID#77–78. The Administrative Procedure Act, for its part, authorizes this Court to review final agency actions. 5 U.S.C. §704. That Act requires this Court to set aside unlawful agency action. 5 U.S.C. §706(2). Here, the 2015 Rule is unlawful because it violates the Clean Water Act and the Constitution *and* because the agencies independently violated the Administrative Procedure Act when they promulgated the Rule.

A. The 2015 Rule's aggressive expansion of federal jurisdiction violates the Clean Water Act and the Constitution.

The Clean Water Act empowers the federal government to regulate "navigable waters," which it defines to include "the waters of the United States." 33 U.S.C. §1362(7). The 2015 Rule violates the Act by regulating waters that are not "waters of the United States."

Interpreting the Clean Water Act. The Clean Water Act, and the Supreme Court's cases interpreting it, establish three principles relevant to the question whether the Rule properly interprets "the waters of the United States."

First, the Clean Water Act must be interpreted to leave significant room for the States to regulate water quality free from federal interference. In general, courts require a "'clear statement'" before they will read a federal statute to give the federal government significant new power at the expense of the States. *See Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). But Congress declined to give the sort of "clear statement" needed

to dramatically readjust the balance between federal and state authority over water quality. *Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). To the contrary, it codified the "policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. §1251(b). With this policy statement, Congress left no doubt that it did not wish to vastly expand federal power at the expense of state authority. Thus, the phrase "the waters of the United States" cannot be read so capaciously that it leaves few waters over which the State may serve as the primary regulator.

Second, and relatedly, the Act's terms really do limit its scope. For example, the Act gives the federal government authority to regulate "navigable waters," 33 U.S.C. §1362(12), as opposed to "*all* waters." Thus, the term "navigable" cannot be read out of the statute; it must receive its due. *SWANCC*, 531 U.S. at 172; *Rapanos v. United States*, 547 U.S. 715, 778–79 (2006) (Kennedy, J., concurring in judgment). What does it mean to give the word its due? The Supreme Court has never definitively answered that question. Indeed, its last case addressing the issue—*Rapanos*—produced no majority opinion. But five justices agreed that the word "navigable" imposed limits. The *Rapanos* plurality read "navigable waters"—in other words, "the waters of the United States"—as referring exclusively to those bodies of water that are "relatively permanent" and have a "continuous surface connection" to another jurisdictional water. 547 U.S. at 757. Under Justice Kenne-

dy's more-flexible test, the phrase includes waters that "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in judgment). But even under that test, it is not enough for a wetland to "lie alongside" some "remote or insubstantial" ditch "that eventually may flow into traditional navigable waters." *Id.* at 778. Nor are "streams remote from any navigable-in-fact water and carrying only minor water volumes toward it" proper subjects of federal regulation. *Id.* at 781. So while Justice Kennedy's flexible, case-specific test admits of more discretion than the plurality's, every possible approach recognizes the Act's limited reach.

Third, while "the waters of the United States" requires statutory interpretation, aggressive claims of federal jurisdiction cause a constitutional problem. Congress enacted the Clean Water Act under its Commerce Clause authority. And the Commerce Clause, "though broad, is not unlimited." *SWANCC*, 531 U.S. at 173. To fall within the permissible scope of Commerce Clause regulation, the regulated object or activity must "substantially affect[] interstate commerce." *Id.* And, if the federal government oversteps its *delegated* commerce power by regulating intrastate waters, it correspondingly infringes on the States' *reserved* powers under the Tenth Amendment. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

These constitutional principles matter to the interpretive task because of the constitutional-avoidance canon. Under that canon, a statute should, if fairly possible, be read in a manner that preserves its constitutionality. *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018). The Supreme Court's case law pays heed to the constitu-

tional-avoidance canon in the context of the Clean Water Act. In *SWANCC*, for example, the Court explained that claiming "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. It was unwilling "to readjust the federal-state balance in this manner," and thus face "significant constitutional and federalism questions," without a clear statement from Congress. *Id.* Both the plurality and concurring opinions in *Rapanos* echoed these concerns, recognizing that the constitutional concerns justified reading "the waters of the United States" to have meaningful limits. 547 U.S. at 738 (plurality); *id.* at 776 (Kennedy, J., concurring in judgment).

The 2015 Rule exceeds the Clean Water Act's scope. To assess whether the 2015 Rule fits within the Clean Water Act, the Court must first consider which *Rapanos* test controls. And the Sixth Circuit has admitted "bafflement" when it comes to that issue. *United States v. Cundiff*, 555 F.3d 200, 208–10 (6th Cir. 2009). Determining which *Rapanos* opinion is "narrowest" and what exactly "narrowest" means, is difficult because "little common ground" exists between the different opinions' "conceptions of jurisdiction." *Id.* In *Cundiff*, therefore, this Court applied both tests, which led to the same outcome in that case. *Id.* at 210.

The Court can do the same thing here: the 2015 Rule's broad definition of "the waters of the United States" violates the Clean Water Act regardless of which *Rapanos* opinion the Court deems controlling. That is why States across the country have successfully challenged the 2015 Rule's legality. *See, e.g.*, *Ohio v. United*

States Army Corps of Eng'rs (In re. EPA & Dep't of Def. Final Order), 803 F.3d 804, 807 (6th Cir. 2015) ("*Ohio*"); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1364–65 (S.D. Ga. 2018) ("*Georgia I*"); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1055–58 (D.N.D. 2015); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1351–72 (S.D. Ga. 2019) ("*Georgia II*").

Begin with the plurality approach, under which "the waters of the United States" include only those waters that are "relatively permanent" and have a "continuous surface connection" to another jurisdictional water. *Rapanos*, 547 U.S. at 757. The 2015 Rule openly disregards these limits, and no one seriously contends otherwise. It extends federal jurisdiction beyond waters with "relatively permanent flow," *id.*, to land where water only intermittently or ephemerally flows, 80 Fed. Reg. 37076 (2015). Similarly, the Rule's definitions reach waters with no "continuous surface connection" to navigable-in-fact waters, *Rapanos*, 547 U.S. at 757 (plurality), since the Rule defines "the waters of the United States" to comprise (for example) "*[a]ll* waters located within 100 feet of the ordinary high water mark of," and "*[a]ll* waters located within the 100-year floodplain of," other jurisdictional waters, including tributaries, 80 Fed. Reg. at 37105 (emphasis added). As one court summarized, "[i]f the plurality" in *Rapanos* "thought the Agencies' definition of waters of the United States in that case would regulate 'immense stretches of intrastate land,' then they would be even more concerned about the breadth of [the 2015 Rule's] jurisdiction." *Georgia II*, 418 F. Supp. 3d at 1371.

The Rule fares no better under the more-flexible approach announced in Justice Kennedy's concurring opinion. Again, Justice Kennedy's opinion sets out a two-tiered approach to determining whether something is a "navigable water." First, traditional navigable waters are *categorically* "waters of the United States" and thus navigable waters. Second, other waters are *not* categorically "waters of the United States," but might nonetheless qualify if a case-specific, fact-intensive inquiry reveals that the particular waters at issue have the required "significant nexus" to traditional navigable waters. *Rapanos*, 547 U.S. at 779-780 (Kennedy, J., concurring in judgment). A body of water has this required nexus only if it "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. This is in concert with § 1251(a) of the Clean Water Act that only permits regulation of "navigable waters."

The 2015 Rule flunks Justice Kennedy's test. As an initial matter, the Rule defines "the waters of the United States" to *categorically* include waters that are not traditionally navigable, a notion that cannot be harmonized with the Act. Specifically, its broad definitions of "tributaries" and waters "adjacent to" other jurisdictional waters buck Justice Kennedy's case-specific approach. The Rule defines "tributaries," for example, to include "waters" that are normally dry and connect indirectly to navigable-in-fact waters (no matter how many other waters lie in between). *See* 80 Fed. Reg. 37076. Thus, an in-state stream bed that flows only during heavy rainfall and requires a chain of five other waters to link it to a

navigable water *categorically* comes within the Rule's definition of "waters of the United States." As this shows, the Rule impermissibly asserts federal jurisdiction over "streams remote from any navigable-in-fact water and carrying only minor water volumes toward it." *See Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring in judgment). By categorically including waters with such remote, speculative, and insubstantial effects on navigable-in-fact waters, the Rule does exactly what Justice Kennedy's concurrence forbids. *See id.* at 780.

The "method of determining tributaries" also reveals a departure from Justice Kennedy's test. *See Georgia II*, 418 F. Supp. 3d at 1361. On its face, the Rule's definition of "tributaries" requires observable features; specifically, a bed, bank, and an ordinary high-water mark. 80 Fed. Reg. 37105 (codified at 33 C.F.R. §328.3(c)(3)). But recall that the agencies get to include tributaries with no observable "physical characteristics." 80 Fed. Reg. 37077. Such features can be *inferred* (even if they are "absent in the field" or "no longer exist") using "desktop tools" including "remote sensing." 80 Fed. Reg. 37076–77. Including such "waters" means that federal jurisdiction expands "to cover waters or land that, at present, in the field, bear no evidence of regularity or volume of flow—factors demonstrating a significant nexus under [Justice] Kennedy's opinion." *Georgia II*, 418 F. Supp. 3d at 1361.

The Rule's definition of "waters adjacent" fares no better. Adjacent, the Rule says, means "neighboring." 80 Fed. Reg. 37105. And a water that would not otherwise be covered by the Act qualifies as "neighboring" so long as it falls within one of

the Rule's many distance thresholds. For example, *all* bodies of water that fall within 1,500 feet of traditional navigable waters and the territorial seas, and within a jurisdictional water's 100-year floodplain, qualify as "neighboring" waters and thus "waters of the United States." *Id.*. The same goes for *all* waters "located within 100 feet of" a jurisdictional water's "ordinary high water mark." *Id.* These (and other) waters qualify categorically, *without regard* to whether they "substantially affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in judgment). The Rule thus contradicts Justice Kennedy's instruction that the only waters which *categorically* qualify as "waters of the United States" are traditional navigable waters—all others must be assessed on a case-by-case basis.

To make this already-broad provision even broader, the Rule clarifies that an entire water is neighboring if any part, no matter how small, meets the Rule's distance thresholds. 80 Fed. Reg. 37081. And "neighboring" includes not only waters near a navigable-in-fact water, but also those near a "tributary." *See id.* at 37080, 37081. Thus, "neighboring" inherits the "tributary" definition's problems. *See Georgia II*, 418 F. Supp. 3d at 1363–64.

In practical effect, the Rule's "waters adjacent" definition claims federal jurisdiction "in many cases" where ponds or wetlands "adjacent to tributaries" are "little more related to navigable-in-fact waters than were the isolated ponds" in *SWANCC*. *Rapanos*, 547 U.S. at 781–82 (Kennedy, J., concurring). And reading "the waters of the United States" to categorically reach waters so insubstantially

related to traditional navigable waters was exactly what Justice Kennedy read the Act to prohibit. *Id.*; *cf. also Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (recognizing that "adjacent," even if ambiguous in some contexts, means something more than "merely 'nearby'").

In addition to its categorical definitions, the Rule includes a catch-all category that purports to cover all other waters with a "significant nexus" to traditional navigable waters. While this looks like Justice Kennedy's test at first blush, it is not. The Rule defines "significant nexus" so broadly that it captures waters that do not "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in judgment). For example, the Rule requires a "significant nexus" analysis every time a water is within roughly three-quarters of a mile (4,000 feet) of other jurisdictional waters, including tributaries. 80 Fed. Reg. 37105. Under the Rule's version of "significant nexus," the agencies may consider many things, including "biological" effects on "aquatic habitat[s]." *Id.* at 37106. An effect on "even just one" of these things "can be significant." *Id.* at 37067. The Rule allows the agencies to consider the effects of "similarly situated" waters too, which it broadly defines to include waters that "function alike and are sufficiently close to function together in affecting downstream waters." *Id.* at 37106. Combine the loose definition of "significant nexus" with the broad understanding of the other waters on which a water's "effects" are deemed relevant, and the Rule gives agencies discretion to find a "significant effect" over bodies of water that *do not* "substantially

affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in judgment). The agencies themselves seem to recognize that, when "[t]aken together," the Rule's sufficient-nexus standards allow for federal jurisdiction over "the vast majority of water features in the United States." 83 Fed. Reg. 32229 (2018). The Rule's catch-all category thus contradicts Justice Kennedy's approach while purporting to honor it.

The 2015 Rule exceeds the scope of federal constitutional power. If there were any doubt about the validity of the 2015 Rule, the constitutional-avoidance canon would resolve it. The agencies' expansive claims of federal jurisdiction, alone and in combination, capture many waters with no significant nexus to traditional navigable waters. It follows that the 2015 Rule asserts jurisdiction over state waters—such as dry streams and isolated ponds—that do not substantially affect interstate commerce. *See SWANCC*, 531 U.S. at 174. And it follows that, were the Clean Water Act read to permit the 2015 Rule, the Act would be an unconstitutional intrusion upon the State's reserved powers under the Tenth Amendment. After all, the enumerated power that Congress relied upon in drafting the Clean Water Act was the Commerce Clause. But it can regulate, under that clause, only those waters having a significant effect on interstate commerce. Therefore, if the Clean Water Act covers waters *without* a significant effect on interstate commerce, Congress exceeded its constitutional authority when it passed the Act. Hap-

pily, the Court can avoid this constitutional problem by following the *Rapanos* opinions and holding that the 2015 Rule violates the Clean Water Act.

*

For these reasons, the 2015 Rule is unlawful. The Rule's aggressive view of federal jurisdiction "extend[s]" well past any debatable "deference owed to the" agencies' interpretation of the Clean Water Act. *See Rapanos*, 547 U.S. at 778–79 (Kennedy, J., concurring in judgment). In other words, because the Clean Water Act unambiguously *does not* permit the agencies' reading of "the waters of the United States," the agencies' reasoning is unreasonable. That defeats any claim to *Chevron* deference, which applies only to agency interpretations that reasonably interpret a statutory ambiguity. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). So, there is no reason to consider whether the agencies are entitled to *Chevron* deference—and no conceivable basis for holding that they are.

B. The 2015 Rule violates the Administrative Procedure Act for both procedural and substantive reasons.

As many courts have held or suggested, the 2015 Rule independently violates the Administrative Procedure Act. *See, e.g., Ohio*, 803 F.3d at 807–08; *Georgia I*, 326 F. Supp. 3d at 1365–66; *North Dakota*, 127 F. Supp. 3d at 1056–58; *Georgia II*, 418 F. Supp. 3d at 1372–81; *Texas v. EPA*, 389 F. Supp. 3d 497, 503–06 (S.D. Texas 2019). That is so for both procedural and substantive reasons.

Procedural problems with the 2015 Rule. The Administrative Procedure Act requires agencies, before promulgating rules, to give notice of "either the terms or substance of the proposed rule or a description of the subject and issues in-

volved." 5 U.S.C. §553(b)(3). The agency must also give interested people "an opportunity to participate in the rule making through submission of written data, views, or arguments." §553(c). The goal is to improve rulemaking by encouraging the solicitation and consideration of views from a diverse array of interested parties.

Of course, agencies cannot achieve this goal unless the rule they propose (and thus receive comments on) resembles the one they promulgate. Accordingly, a final rule must be "a 'logical outgrowth' of the rule proposed." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quotations and citations omitted). In other words, agencies must give "fair notice," which allows interested persons to anticipate the parameters of the final rule. *See id.* Such notice "must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making." *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (quoting *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (quotations omitted)). If a final rule fails to provide fair notice, then the rule violates the Administrative Procedure Act. *See Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 461–63 (D.C. Cir. 2012).

The 2015 Rule violates the Administrative Procedure Act because it is not a logical outgrowth of the proposed rule. To begin, the final rule differs significantly from the proposed rule regarding the process for determining adjacent waters. Recall that the 2015 Rule sets various, bright-line distance thresholds that make a water "neighboring," and thus, "adjacent." 80 Fed. Reg. 37105. For example, neigh-

boring waters categorically include both (1) waters within 100 feet of a jurisdictional water's ordinary high-water mark and (2) waters within a jurisdictional water's 100-year floodplain and within 1,500 feet of that jurisdictional water's ordinary high-water mark. 80 Fed. Reg. 37105.

But the proposed rule nowhere foreshadowed this approach. It defined "neighboring" in ecological terms, as "waters located within the riparian area or floodplain of" jurisdictional waters or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water." 79 Fed. Reg. 22263 (2014). In discussing this proposed definition, the agencies abstractly discussed whether distance might play a role for some topics, like "establishing specific geographic limits for using shallow subsurface or confined surface hydrological connections as a basis for determining adjacency." *Id.* at 22208. This limited discussion, however, did "nothing to put interested parties on notice of a total shift in the adjacency definition scheme." *Georgia II*, 418 F. Supp. 3d at 1374. Thus, interested parties had "no reason to comment with well-developed and scientifically supported suggestions for specific geographic distance limits." *Id.* at 1373; *accord Texas*, 389 F. Supp. 3d at 505–06.

The agencies made other improper changes as well. For instance, the proposed rule failed to signal that the final rule would use distance thresholds—capturing waters up to 4,000 feet away from jurisdictional waters, including tributaries—to determine when case-by-case analysis is appropriate for "other waters." *Compare* 79 Fed. Reg. 22263 (proposed 33 C.F.R. §328.3(a)(7)), *with* 80 Fed. Reg.

37105 (codified 33 C.F.R. §328.3(a)(8)). This meant that interested parties were unable to submit the distance-related input that "a proposal of specific distances or a potential range of distances would have prompted." *Georgia II*, 418 F. Supp. 3d at 1377.

Finally, the agencies made a subtle-but-significant change with respect to identifying tributaries. In the proposed rule, the agencies' discussion indicated that "'desktop' analysis" and "remote sensing" might play *some* role in assessing whether waters qualify as tributaries. 79 Fed. Reg. 22195, 22202. Yet, it was not until the final rule that the agencies noted that "desktop tools" and "remote sensing" can *definitively* establish the "physical characteristics" of a tributary even when direct field observation *contradicts* the desktop analysis. 80 Fed Reg. 37077.

Courts have already recognized these problematic shifts between the proposed and final rules. The Sixth Circuit, pointing to the agencies' failure to preview the 2015 Rule's distance thresholds, has described the agencies' "rulemaking process" as "facially suspect." *Ohio*, 803 F.3d at 807. The District of North Dakota similarly criticized the material shift from "ecological and hydrological concepts" in the proposed rule to bright-line "geographical distances" in the final rule. *North Dakota*, 127 F. Supp. 3d at 1058. And both the Southern District of Georgia and the Southern District of Texas have granted plaintiff states summary judgment based, in part, on the 2015 Rule's failure to satisfy the logical-outgrowth test. *Georgia II*, 418 F. Supp. 3d at 1372–78; *Texas*, 389 F. Supp. 3d at 503–06.

These courts were right to find that the 2015 Rule violates the Administrative Procedure Act. The States and other interested parties never had any chance to comment on the 2015 Rule's changes, including the many new distance thresholds, because they never had any reason to suspect there would *be* such changes. The agencies' final rule is, therefore, not "a 'logical outgrowth' of the rule proposed." *Long Island Care*, 551 U.S. at 174 (citation omitted). The Rule thus violates the Administrative Procedure Act.

Arbitrary and capricious. In terms of substance, the Administrative Procedure Act requires courts to set aside a final rule that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). As already discussed, *see above* 24–34, the 2015 Rule is "not in accordance with law," given its departure from the Clean Water Act and the Constitution. The 2015 Rule is arbitrary and capricious, too. *See, e.g.*, *Ohio*, 803 F.3d at 807–08; *Georgia I*, 326 F. Supp. 3d 1365; *North Dakota*, 127 F. Supp. 3d at 1056–57; *Georgia II*, 418 F. Supp. 3d at 1379–81.

A rule will be found arbitrary and capricious if the issuing agency failed to "examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). For example, in 2017, the Sixth Circuit vacated an FCC rule governing cable regulation because the agency "offer[ed] no valid basis—statutory or otherwise"—for its ban on local regulation. *Montgomery Cty. v. FCC*, 863 F.3d 485, 493 (6th Cir. 2017).

The 2015 Rule seeks to substitute "bright-line boundaries" for "case-specific analysis." 80 Fed. Reg. 37055. For example, waters falling within certain distance thresholds are "waters of the United States" *without regard* to their effect on traditional navigable waters. 80 Fed. Reg. 37105. But, as the Sixth Circuit has already signaled—and as Justice Kennedy's eschewing of a categorical approach in *Rapanos* confirms—the agencies cannot place their desire for bright-line standards ahead of the scientific evidence. *See Ohio*, 803 F.3d at 807. Yet, the 2015 Rule fails to cite sufficient support for its broad, bight-line definitions. It does not, for example, highlight specific scientific evidence showing that "remote and intermittent waters" of the sort it covers bear a significant relationship to "navigable-in-fact water[s]." *See North Dakota*, 127 F. Supp. 3d at 1057. Nor does it "give reasons for why" it chose "a 100-year floodplain" as critical to adjacency. *Georgia II*, 418 F. Supp. 3d at 1381. This leaves it unclear why the agencies selected this distance as "the proper limit with regard to connection to downstream waters and significant effects on those waters based on scientific findings and evidence compared to other possible intervals." *Id.* The Rule likewise fails to justify, beyond "conclusory statements," why it sets a "1,500-foot limit for adjacent water." *Id.*

Indeed, the relevant science counsels *against* bright-line distance thresholds. The Rule's scientific report, for example, noted that adjacency should be based on "functional relationships," not "geographic proximity or distance to jurisdictional waters." 80 Fed. Reg. 37064. What, then, could possibly justify the many distance thresholds set out in the Rule's "waters adjacent" definition? What justifies the re-

quirement of a significant-nexus analysis with respect to all waters within 4,000 feet of any other jurisdictional water, including a tributary? Nothing, it appears. The agencies' unreasoned adoption of these bright-line rules was arbitrary and capricious. *See North Dakota*, 127 F. Supp. 3d at 1057.

II. Ohio and Tennessee have suffered irreparable harm during this case and they face a significant risk of future harm.

In addition to prevailing on the merits, parties seeking permanent injunctions must show that they have suffered irreparable harm or that they face a significant threat of irreparable harm absent an injunction. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *United States v. Miami Univ.*, 294 F.3d 797, 816 (6th Cir. 2002); *Spingola v. Vill. of Granville*, 39 F. App'x 978, 980 (6th Cir. 2002); *Tee Turtle, LLC v. Swartz*, No. 2:21-CV-01771, 2021 U.S. Dist. LEXIS 107745 at *5 (S.D. Ohio June 9, 2021). Along the same lines, parties can "obtain permanent injunctive relief" by showing past legal violations paired with a reasonable likelihood of future violations. *SEC v. Apostelos*, No. 1:15-cv-00699, 2019 U.S. Dist. LEXIS 141637 at *37 (S.D. Ohio Aug. 21, 2019) (citing *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984)); *accord Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 492 (6th Cir. 2007); *Tee Turtle, LLC*, 2021 U.S. Dist. LEXIS 107745 at *6.

Critically, when assessing whether a party has met its burden to show injury, the key question is the *existence* of at least some irreparable harm, not the "precise scope" of the harm. *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25–26 (D.D.C. 2009). That makes sense because irreparable harms, by their nature, are often "difficult to compute." *Basicomputer Corp. v. Scott*, 973 F.2d

507, 512 (6th Cir. 1992); *see also CFE Racing Prods. v. BMF Wheels, Inc.*, 793 F.3d 571, 596 (6th Cir. 2015) ("The reality of this harm is not negated by the absence of damages."); *AK Steel Corp. v. Pittsburgh Logistics Sys.*, No. 1:16cv1032, 2017 U.S. Dist. LEXIS 6875 at *20 (Jan. 18, 2017); *Eller Media Co. v. City of Cleveland*, 161 F. Supp. 2d 796, 807 n.4 (N.D. Ohio 2001).

Here, because they were subject to the 2015 Rule, Ohio and Tennessee suffered irreparable harm during this case. And a significant threat of future harm remains because litigants across the country are attempting to put the 2015 Rule back into place. *See Ohio v. EPA*, 969 F.3d 306, 310 (6th Cir. 2020).

A. The 2015 Rule irreparably harmed the States.

For over a year—from August 2018, *see S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018), until October 2019, *see* 84 Fed. Reg. 56626 (2019)—the 2015 Rule applied to Ohio and Tennessee. That Rule's application was unlawful, for the reasons discussed above. And the Rule's application irreparably harmed the States in several ways.

Irreparable harm via constitutional violation. As a starting point, the issue of harm in this case is inextricably linked to the merits of this case. The reason being that a "successful showing" of a constitutional violation "mandates a successful showing" of irreparable harm. *ACLU v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003); *accord Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). In the Supreme Court's words, a constitutional violation, "for even minimal periods

of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As explained above, the 2015 Rule is unconstitutional. The Rule oversteps Congress's commerce power and, by doing so, it infringes on the States' *reserved* powers under the Tenth Amendment to regulate their own territory. *See Murphy*, 138 S. Ct. at 1476. That constitutional violation "unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. It is true that *Elrod*, and the Sixth Circuit cases cited a moment ago, involved violations of individual rights rather than violations of state rights. That distinction, however, makes no difference to the irreparable-harm analysis. The Constitution protects individuals *and* the States from federal encroachment. And, just like individuals, the States are harmed when the federal government violates their rights. This Court quite recently said as much. *See Ohio v. Yellen*, __ F.Supp.3d __, 2021 U.S. Dist. LEXIS 123008 at *62 (S.D. Ohio July 1, 2021). In *Yellen*, the Court held that, by "being bound to an unconstitutionally ambiguous" federal statute, Ohio was "suffering irreparable harm to the exercise of its 'indispensable' sovereign power to tax." *Id.* Thus, the constitutional violation of Ohio's sovereign power, in itself, was enough to show irreparable injury.

Interference with sovereignty. Relatedly, the federal government causes irreparable harm when it intrudes on state sovereignty. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 153 (5th Cir. 2015); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001); *Georgia I*, 326 F. Supp. 3d at 1367; *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 17 (D.D.C. 2014), *vacated on other grounds by* 827 F.3d

100 (D.C. Cir. 2016); *cf. also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 601 (1982); *Ohio ex rel. Celebrezze v. United States Dep't of Transp.*, 766 F.2d 228, 232–33 (6th Cir. 1985). That follows from the very nature of our federal system, which frees each State to "make its own reasoned judgment about what conduct is permitted or proscribed within its borders," provided its judgment does not conflict with validly enacted federal law. *Baze v. Parker*, 632 F.3d 338, 341 (6th Cir. 2011) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)). Each State, as a result, has an inherent "sovereign interest in being in control of" its own territory. *See Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 476 (2d Cir. 2013). Thus, a State suffers irreparable injury every time it is prevented from giving effect to lawful state policy. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *accord Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). States likewise suffer irreparable harm when they are subjected to unlawful federal rules that interfere with their "orderly management" of their own affairs. *Barnes v. E-Systems*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers); *accord Kansas*, 249 F.3d at 1228.

In this case, the practical effect of the 2015 Rule's expansive definition is to give the federal government primary control over even more of the States' land and intrastate waters. Indeed, shortly before publishing the Rule, the EPA itself projected that the Rule would increase the amount of water subject to federal regulation. EPA & U.S. Army Corps of Eng'rs, *Economic Analysis of the EPA-Army Clean Water Rule*, vi–vii (May 20, 2015), https://bit.ly/2Kw5q4a. Since then, the agencies

have more bluntly admitted that the 2015 Rule's definitions "expand[] the meaning of tributaries and adjacent wetlands to include waters well beyond those regulated by the agencies under the preexisting regulations," thus "alter[ing] the balance of authorities between the federal and State governments." 83 Fed. Reg. 32228.

The federal government's unlawful exercise of jurisdiction over waters that ought to be regulated by the States necessarily *reduces* the States' authority over the same waters. Under precedents giving preemptive effect to regulations, *see Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 328 (2011), the 2015 Rule preempts States' attempting any different approach. To illustrate that last point, Ohio's General Assembly is contemplating proposed legislation concerning certain ephemeral water features. *See* H.B. 175, 134th General Assembly, https://bit.ly/3sv7sWI. Whether the policy underlying HB 175 is good or bad is irrelevant here. If the 2015 Rule went back into effect, it would interfere with the State's power to pass that legislation and regulate its own internal affairs. The 2015 Rule irreparably harms Ohio and Tennessee by improperly intruding on their sovereignty. What is more, harm to state sovereignty is a harm that is "purely legal" in nature. *Yellen*, 2021 U.S. Dist. LEXIS 123008 at *18–19. It thus requires no additional evidence beyond the fact that the 2015 Rule unquestionably applied to Ohio and Tennessee from August 2018 until October 2019.

Competitive disadvantage. Irreparable harm can also come about when a legal violation puts a party at a competitive disadvantage when compared to its peers. *Grutter v. Bollinger*, 247 F.3d 631, 633 (6th Cir. 2001); *Countrywide Home*

Loans, Inc. v. McDermott, No. 5:09MC82, 2009 U.S. Dist. LEXIS 93456 at *10–11 (N.D. Ohio Oct. 7, 2009) (citing *Basicomputer Corp.*, 973 F.2d at 512).

The 2015 Rule also caused this type of harm. Nearly every State that challenged the 2015 Rule in court was able to obtain an injunction preventing the 2015 Rule from taking effect. *See Georgia I*, 326 F. Supp. 3d 1356; *North Dakota*, 127 F. Supp.3d 1047; *Texas v. EPA*, No. 3:15-CV-00162, 2018 U.S. Dist. LEXIS 160443 (S.D. Tex. Sept. 12, 2018). Those States included neighbors of Ohio and Tennessee like Indiana, Kentucky, and West Virginia. *See* U.S. Army, *Definition of "Waters of the United States": Rule Status and Litigation Update* (Mar. 14, 2019), https://bit.ly/3xOWOet. That put Ohio and Tennessee at a competitive disadvantage. For instance, by expanding the scope of federal regulation, the 2015 Rule gave the States no choice but to reduce the ease of development within each State, thus depriving the States of tax revenue from such development. *See North Dakota*, 127 F. Supp.3d at 1059.

Inability to comment. One final harm is worth noting, which relates to the agencies' rulemaking process. As laid out already, the agencies violated the Administrative Procedure Act because the 2015 Rule was not a logical outgrowth of the proposed rule. That procedural violation "prejudiced the ability of interested parties," including the States, "to (1) provide meaningful comments regarding the Final Rule's continuum-based approach to connectivity and (2) mount a credible challenge to the Final Rule." *Texas*, 389 F. Supp. 3d at 506 (quotation marks omitted). And that prejudice was "especially severe given the substantive changes" the agencies

made during the drafting process. *Id.* The agencies' actions thus "deprived the States of the opportunity to propose" modifications. *Georgia II*, 418 F. Supp. 3d at 1378. Notably, Ohio's former Attorney General was one of many state officials who submitted comments critical of the agencies' proposed rule. *See* Ex. A (November 13, 2014 comment letter). But he was obviously unable to comment—at least in any meaningful way—on aspects of the 2015 Rule that had not yet been disclosed. As a result of all this, the States were harmed when they were subject to a federal rule that they did not receive a fair chance to comment on.

B. Given nationwide litigation challenging the 2019 Repeal and the 2020 Rule, there is a significant threat that the 2015 Rule will go back into effect for States without an injunction.

In light of the 2019 Repeal and the 2020 Rule, Ohio and Tennessee are no longer experiencing the harms just described. But that does not decide the matter. First, a plaintiff can win a permanent injunction by showing that "it has suffered an irreparable injury" from the challenged conduct. *eBay Inc.*, 547 U.S. at 391. And as just discussed, the States have suffered irreparable harm from the 2015 Rule. Second, the States will suffer those harms all over again if the 2015 Rule goes back into effect. The 2015 Rule's return, moreover, is at least "'reasonably' likely" when one considers the ever-changing landscape in this area. *See Ohio*, 969 F.3d at 310.

The Sixth Circuit explained why already. (Though the Sixth Circuit was addressing mootness at the time, the irreparable-harm inquiry leads to the same issue. That is, a party "can obtain permanent injunctive relief" if it can show there is a reasonable likelihood of a future violation. *Apostelos,* 2019 U.S. Dist. LEXIS

141637 at *37.) At the time of the Sixth Circuit's decision, there were "15 lawsuits … pending in federal district courts across the country," where parties sought to enjoin the 2019 Repeal, the 2020 Rule, "or both." *Ohio*, 969 F.3d at 309. The Court reasoned that "in some of those cases the plaintiffs will presumably seek a nationwide injunction." *Id.* That meant, "by the orders of two judges or even one," "the 2015 Rule might again take effect nationwide." *Id.* at 310. Presumably, that is "why the plaintiffs in many of those cases are litigating them." *Id.*

The circumstances today are materially the same, if not more ominous for the States. At least a dozen (now-older) lawsuits remain in which parties challenge the 2019 Repeal, the 2020 Rule, or both. *See* above 20–21 (listing cases). So it remains likely that at least some of the plaintiffs in those cases will seek nationwide relief, *Ohio*, 969 F.3d at 309, which has become an increasingly popular tactic in recent years, *see* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 418, 418 (2017). In fact, a request to vacate the 2020 Rule—in its entirety, nationwide—is currently pending in the Northern District of California. *See* Pls.' Partial Opp'n to Mot. for Remand (Aug. 9, 2021), R.256, *California v. Regan*, No. 3:20-cv-03005 (N.D. Cal.). Adding all this up, it is still "'reasonably' likely" that the 2015 Rule "might again take effect" in Ohio and Tennessee absent an injunction. *Ohio*, 969 F.3d at 310. That "justifies issuance of a permanent injunction." *Bridgeport Music, Inc.*, 507 F.3d at 492.

III. The remaining permanent-injunction factors strongly favor the States.

On top of success on the merits and irreparable harm, a party seeking a permanent injunction must show (1) the "remedies available at law, such as monetary damages, are inadequate to compensate for that injury"; (2) the "balance of hardships between the plaintiff and the defendant" justify an equitable remedy; and (3) "the public interest would not be disserved be a permanent injunction." *eBay Inc.*, 547 U.S. at 391. Ohio and Tennessee satisfy these remaining factors.

No adequate legal remedy. Injunctive relief is needed to protect Ohio and Tennessee from any future application of the 2015 Rule. Money damages are not available because "the federal government has sovereign immunity against claims for money damages." *Yellen*, 2021 U.S. Dist. LEXIS 123008 at *62 (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994)). Regardless, "such damages would do nothing to cure" many of the harms at stake here, including the loss of state sovereignty. *Id.* Finally, even if money damages were available, and even if those damages could in theory cure the States' harms, the financial damages the States have suffered and still might suffer (including increased administrative burdens, competitive disadvantages, and potential losses of tax revenue) would prove too "difficult to compute." *Basicomputer Corp.*, 973 F.2d at 512.

Balance of hardships. The equitable balance likewise tips decisively in the States' favor. The States have a strong interest in protecting themselves from an illegal regulation that intrudes on their authority. The federal agencies, in stark contrast, lack any legitimate interest in preserving an illegal regulation. And their

own actions show that they have abandoned the 2015 Rule. The agencies, under the former Administration, admitted that "the 2015 Rule exceeded the agencies' authority under the" Clean Water Act. 84 Fed. Reg. 56626. They then adopted a new definition of "the waters of the United States" in 2020. 85 Fed. Reg. 22. Under the current Administration, the agencies, while seeking to replace the 2020 Rule, have not changed course with respect to the 2015 Rule. The stated goal of the current rulemaking process is instead to restore "protections in place *prior to*" the 2015 Rule and then to develop a new definition. Press Release, EPA & U.S. Army (June 9, 2021), https://bit.ly/3m4N3Xs (emphasis added). In sum, no harm will come to the agencies from enjoining a rule that they are not fighting to keep in place.

The public interest. The final public-interest factor points in the same direction. Because the 2015 Rule is unlawful, an injunction will promote the public interest by ensuring "a correct application" of the law and that "the will of the people" will be "effected in accordance with [the] law." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) (quotation omitted). An injunction, moreover, will promote uniformity in the law. Once again, nearly all other States that have sought an injunction from the 2015 Rule have received one. *See Texas*, 2018 U.S. Dist. LEXIS 160443; *Georgia I*, 326 F. Supp. 3d 1356; *North Dakota*, 127 F. Supp. 3d 1047. Thus, if the 2015 Rule returns, that will leave Ohio and Tennessee among the few unlucky States that are unwillingly subject to the 2015 Rule. The public interest—and the balance of equities for that matter—favor reliev-

ing Ohio, Tennessee, and their residents of federal burdens that other States do not have to bear.

CONCLUSION

The Court should grant Ohio and Tennessee summary judgment and permanently enjoin any future application of the 2015 Rule within their boundaries.

Respectfully submitted,

HERBERT H. SLATERY III
Tennessee Attorney General and Reporter

SOHNIA HONG
Deputy Attorney General

/s/ Elizabeth P. McCarter
ELIZABETH P. McCARTER (10531)
Senior Counsel
Office of the Attorney General and Reporter
Environmental Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-2582 – Telephone
(615) 741-8724 – Facsimile
lisa.mccarter@ag.tn.gov

Counsel for Plaintiff State of Tennessee

DAVE YOST
Ohio Attorney General

/s/ Jonathan Blanton
JONATHAN BLANTON* (0070035)
*Trial Attorney
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH, 43215
(614) 466-2766 – Telephone
Jonathan.blanton@OhioAGO.gov

Counsel for the State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021 a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system.

Respectfully submitted,

HERBERT H. SLATERY III
Tennessee Attorney General and Reporter

SOHNIA HONG
Deputy Attorney General

/s/ Elizabeth P. McCarter
ELIZABETH P. McCARTER (10531)
Senior Counsel
Office of the Attorney General and Reporter
Environmental Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 532-2582 – Telephone
(615) 741-8724 – Facsimile
lisa.mccarter@ag.tn.gov

Counsel for Plaintiff State of Tennessee

DAVE YOST
Ohio Attorney General

/s/ Jonathan Blanton
JONATHAN BLANTON* (0070035)
*Trial Attorney
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH, 43215
(614) 466-2766 – Telephone
Jonathan.blanton@OhioAGO.gov

Counsel for the State of Ohio