No. 23-5343 (consolidated with No. 23-5345)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY

Appellant

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, United States Environmental Protection Agency

Appellees

On Appeal from the United States District Court for the Eastern District of Kentucky No. 3:23-cv-0007

MERITS BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth requests oral argument. The district court dismissed Kentucky's complaint challenging the *Revised Definition of "Waters of the United States*," 88 Fed. Reg. 3,004 (Jan. 18, 2023) (Final Rule), sua sponte and without notice. The district court erred in this respect, as it later recognized. In addition, the district court wrongly concluded that Kentucky did not prove its standing for purposes of seeking a preliminary injunction. As to this latter issue in particular, Kentucky believes that oral argument would assist the Court in resolving it given the intervening decision in *Sackett v. EPA*, 598 U.S. 651 (2023).

STATEMENT OF JURISDICTION

In this challenge to the Final Rule, Kentucky invoked the district court's jurisdiction under 28 U.S.C. § 1331 and the Administrative Procedure Act. Compl., R.1, PageID#5. On March 31, 2023, the district court denied Kentucky's motion for a preliminary injunction. Op. & Order, R.51, PageID#2120–41. It also dismissed Kentucky's complaint without prejudice. *Id.* Kentucky filed a timely notice of appeal on April 18, 2023. *See* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

The issues for the Court to decide are:

1. Whether the district court erred in sua sponte dismissing Kentucky's challenge to the Final Rule without notice.
2. Whether the proper remedy for Kentucky's perceived lack of standing to seek a preliminary injunction is dismissal of the complaint.
3. Whether the district court correctly concluded that Kentucky did not prove its standing.

INTRODUCTION

The Clean Water Act (CWA) establishes a cooperative-federalism scheme for water regulation, with distinct lanes for the Environmental Protection Agency and the Army Corps of Engineers (together, the Agencies) and for the States. The Agencies have jurisdiction over "navigable waters"—*i.e.*, "waters of the United States." 33 U.S.C. § 1362(7). And because the States have "traditional and primary power over land and water use," they have jurisdiction over all other waters within their borders. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (*SWANCC*).

Defining "waters of the United States" has vexed courts and the Agencies for decades. That confusion led the Supreme Court to grant certiorari last term in *Sackett v. EPA*, 598 U.S. 651 (2023). Rather than wait on that imminent guidance, the Agencies rushed out their own expansive and malleable definition of the phrase. That rule is unlawful in numerous respects, including by granting the Agencies jurisdiction over waters that are the exclusive domain of Kentucky.

The Commonwealth therefore challenged the Agencies' rule and requested a preliminary injunction against its enforcement. The district court never reached the merits of that request. It instead incorrectly found that the Commonwealth lacked standing to challenge the rule. The district court then took its error a step further by dismissing Kentucky's complaint sua sponte and without notice. The district court has since

acknowledged that this dismissal was a mistake. As a result, there is little question that the district court's dismissal of the Commonwealth's complaint should be vacated.

That leaves the district court's denial of Kentucky's motion for a preliminary injunction. The district court's holding that the Commonwealth lacked standing failed to account for the Agencies' acknowledgement that the Final Rule covers more waters than the Agencies had previously regulated. This Court's motion panel has already essentially held as much. The Court should likewise hold that the Commonwealth proved its standing to seek a preliminary injunction against enforcement of the Final Rule.

As to the merits of Kentucky's challenge to the Final Rule, the ground has shifted in two respects since Kentucky took its appeal. Most notably, the Supreme Court decided *Sackett*, making clear that the Agencies' definition of "waters of the United States" in the Final Rule was unlawful. *See* 598 U.S. at 679–83. In light of *Sackett*, the Agencies amended the Final Rule to try to fix the flaws *Sackett* highlighted. *Revised Definition of "Waters of the United States"; Conforming*, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (Amended Rule). But the Agencies didn't go nearly far enough. Much of the Final Rule, including parts that unlawfully expand federal control over Kentucky's waters, remains in place.

In light of the Amended Rule, the Commonwealth submits that the district court should address the merits of Kentucky's challenge in the first instance. For reference, that is how the other State-led challenges to the Amended Rule are proceeding. As a result, the Court should vacate the denial of the Commonwealth's motion for a preliminary injunction and remand for further proceedings.

STATEMENT OF THE CASE

A. The Clean Water Act

In 1972, Congress passed the CWA, which establishes a cooperative-federalism approach to water regulation. 33 U.S.C. § 1251(a). Key here, the CWA affirms that the States have "*primary* responsibilities and rights" over their "land and water resources." *Id.* § 1251(b) (emphasis added). To this end, Kentucky has adopted, and enforces, a comprehensive scheme for regulating "waters of the Commonwealth." *See, e.g.*, Ky. Rev. Stat. § 224.1-010(32).

The CWA, by comparison, gives the Agencies more limited authority to regulate discharges and dredging in only "navigable waters." *See, e.g.*, 33 U.S.C. §§ 1251(a), 1342(a), 1344(a). Congress defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). It follows that the phrase "waters of the United States" establishes the scope of "navigable waters" that the Agencies may regulate.

B. Pre-2023 attempts at defining "waters of the United States"

In the 1980s, the Agencies defined their CWA jurisdiction to include waters used in interstate commerce, which included waters that served as a habitat for migratory birds. *See Final Rule for Regulatory Programs of the Corps of Eng'rs*, 51 Fed. Reg. 41,206 (Nov. 13, 1986); *Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations*, 53 Fed. Reg. 20,764 (June 6, 1988). But the Supreme Court found that went too far. *SWANCC*, 531 U.S. at 164–66. The Agencies had "read[] the

term 'navigable waters' out of the statute" by asserting jurisdiction over "nonnavigable, isolated, intrastate waters." *Id.* at 172. And accepting the Agencies' position would have raised "significant" constitutional concerns and allowed "federal encroachment upon a traditional state power." *Id.* at 172–74.

Five years later, the Supreme Court handed the Agencies another loss by rejecting their jurisdictional claim over intrastate wetlands that were too far removed from traditional jurisdictional waters. *Rapanos v. United States*, 547 U.S. 715 (2006). Justice Scalia's plurality opinion limited "navigable waters" to only "relatively permanent, standing or continuously flowing bodies of water" and those waters with a "continuous surface connection" to such relatively permanent waters. *Id.* at 739–42 (plurality op.). "Wetlands with only an intermittent, physically remote hydrologic connection" are not jurisdictional. *Id.* at 742.

Writing only for himself, Justice Kennedy determined that the Agencies' jurisdiction extends only to navigable-in-fact waters "or [waters] that could reasonably be so made" and to wetlands with a "significant nexus" to these traditional navigable waters. *Id.* at 759 (Kennedy, J., concurring in the judgment). To satisfy that nexus, wetlands must "significantly affect the chemical, physical, and biological integrity of" navigable-in-fact waters. *Id.* at 780. But the effects on navigable waters of the wetlands at issue in *Rapanos* were too speculative or insubstantial to be "fairly encompassed by the term 'navigable waters.'" *Id.*

After *Rapanos*, the Agencies issued non-binding guidance. 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), https://perma.cc/U6CM-FRRM. In it, the Agencies asserted per se jurisdiction over certain categories of waters, like traditional navigable waters and relatively permanent, non-navigable tributaries of such waters. *Id.* at 1. For certain other waters, like non-navigable tributaries that are not relatively permanent, the Agencies asserted case-by-case jurisdiction if those waters have a "significant nexus with a traditional navigable water." *Id.*

In 2015, the Agencies issued a rule redefining "waters of the United States." *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule). The 2015 Rule was expansive. 33 C.F.R. § 328.3 (a), (c) (2015); 40 C.F.R. § 230.3(o) (2015). Indeed, too expansive, as multiple courts enjoined it and this Court stayed its implementation. *In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015), *order vacated by In re U.S. Dep't of Def.*, 713 F. App'x 489, 490 (6th Cir. 2018), *in light of Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109 (2018); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). The Agencies eventually rescinded the 2015 Rule. *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

As a result, the pre-2015 regime remained in effect until the Agencies issued *Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg.

22,250 (Apr. 21, 2020) (NWPR). But the NWPR also drew legal challenges and was eventually vacated. *See, e.g.*, *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 957 (D. Ariz. 2021). The Agencies then returned (again) to the pre-2015 regime.

C. 2023: Two more changes and even more litigation

1. On January 18, 2023, the Agencies issued a new rule redefining "waters of the United States." Final Rule, 88 Fed. Reg. at 3,004. They adopted Justice Kennedy's significant-nexus test from *Rapanos*, even if in name only. *See id.* at 3,035–38. And they asserted jurisdiction over intrastate waters they had not previously, using broad, malleable standards that were "inconsistent with the text and structure of the CWA." *See Sackett*, 598 U.S. at 679.

The Final Rule generally included five categories of jurisdictional waters: traditional waters,[1] jurisdictional impoundments,[2] jurisdictional tributaries,[3] jurisdictional adjacent wetlands,[4] and other intrastate jurisdictional waters.[5] For the last three categories, the Final Rule purported to allow jurisdiction to be established under either the

[1] These are traditional navigable waters, territorial seas, and interstate waters and wetlands. 88 Fed. Reg. at 3,132.

[2] These are impoundments of "waters of the United States." *Id.*

[3] These are tributaries to either traditional waters or jurisdictional impoundments. *Id.*

[4] These are wetlands adjacent to either a qualifying traditional water, jurisdictional impoundment, or jurisdictional tributary. *Id.*

[5] These are intrastate lakes and ponds, streams, or wetlands not identified in the previous categories that meet either the relatively permanent standard or the significant-nexus standard. *Id.* at 3,132–33.

Rapanos plurality's relatively permanent standard or Justice Kennedy's significant-nexus standard. Final Rule, 88 Fed. Reg. at 3,132–33. So for example, "relatively permanent, standing or continuously flowing" tributaries to navigable waters were jurisdictional under the Final Rule. *Id.* at 3,143. But so were any tributaries that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of traditional waters. *Id.* The Final Rule's either-or *Rapanos* standard "replace[d] the interstate commerce test," which considered jurisdiction over non-navigable, intrastate waters "based solely on whether the use, degradation, or destruction of the water could affect interstate or foreign commerce." *Id.* at 3029. The Agencies admitted, as was obvious, that the Final Rule swept new waters into their CWA jurisdictional bucket. *See* Opp'n to PI, R.31, PageID#975; H'rg Tr., R.45, PageID#1993–96, 2006–10. The Agencies issued the Final Rule knowing that the Supreme Court had already heard oral arguments in *Sackett*.

Before the Final Rule took effect, more than half the States challenged it in court. Kentucky sued in the Eastern District of Kentucky, arguing among other things that the rule was an unlawful infringement on the Commonwealth's sovereignty because it purported to give the Agencies jurisdiction over waters that Kentucky properly regulates. Compl., R.1, PageID#1–39. The district court consolidated Kentucky's complaint with a parallel challenge brought by several business groups (together, the Kentucky Chamber of Commerce). Order, R.16, PageID#425–26.

Kentucky and the Kentucky Chamber of Commerce both sought a preliminary injunction against enforcement of the Final Rule before it took effect. Ky. PI Mot., R.10, PageID#372–401; Ky. Chamber PI Mot., R.17, PageID#427–28. Although two other district courts issued preliminary injunctions against the Final Rule in 26 States, *Texas v. EPA*, --- F. Supp. 3d ---, 2023 WL 2574591 (S.D. Tex. Mar. 19, 2023); *West Virginia v. EPA*, --- F. Supp. 3d ---, 2023 WL 2914389 (D.N.D. Apr. 12, 2023), the court below denied the motions for a preliminary injunction. It denied them not on the merits, but because it found that the Commonwealth and the Kentucky Chamber of Commerce had not sufficiently established standing. Op. & Order, R.51, PageID#2120–41. And the district court sua sponte and without notice dismissed both complaints without prejudice. *Id.* at PageID#2141.

Kentucky appealed, as did the Kentucky Chamber of Commerce. Ky. Notice of Appeal, R.60, PageID#2324–26; Ky. Chamber Notice of Appeal, R.61, PageID#2327. After seeking emergency relief in district court, they both promptly sought an injunction pending appeal in this Court. Almost immediately, this Court administratively stayed enforcement of the Final Rule. Order, App.R.9-1. And after the injunction motions were fully briefed, the Court granted an injunction pending appeal. Order, App.R.24. In doing so, the motion panel held that Kentucky likely alleged standing so as to avoid dismissal and likely proved standing so to establish entitlement to an injunction pending appeal. *Id.* at 3–4. The Court also found Kentucky was likely to succeed on the merits of its challenge to the Final Rule. *Id.* at 5.

Shortly before the Court issued its injunction order, the district court ruled on the Commonwealth's motion for an injunction pending appeal, which Kentucky had protectively filed to comply with Federal Rule of Appellate Procedure 8(a)(1)(C). Mem. & Order, R.66, PageID#2342–54. The district court stuck to its guns about Kentucky's alleged lack of standing, *id.* at PageID#2343–52, but the court recognized that dismissing Kentucky's complaint sua sponte without notice was a mistake, *id.* at PageID#2352–53.

2. A few weeks after this Court's motion-panel ruling, the Supreme Court decided *Sackett*. It concluded that Justice Kennedy's significant-nexus test and other aspects of how the Agencies had defined "waters of the United States" are "inconsistent with the text and structure of the CWA." 598 U.S. at 679–81. While the Final Rule was not specifically before the Court, *Sackett* all but ruled it unlawful. *See id.*

In response, the Agencies issued the six-page Amended Rule to try to comply with *Sackett*. 88 Fed. Reg. at 61,964. For example, the Amended Rule removed the significant-nexus standard from the last three categories of waters, and it revised the definition of "adjacent" for determining jurisdictional wetlands. *Id.* at 61,967. Even so, much of the Final Rule stayed in place. Thus, the Agencies fixed *some* of the problems with the Final Rule, but they left others undisturbed. And they introduced potential new issues, like amending a notice-and-comment rule on the fly.

The issuance of the Amended Rule unsurprisingly affected the litigation challenging the Final Rule. The Agencies voluntarily dismissed their appeals from the *Texas*

and *West Virginia* preliminary injunctions. Order, *Texas v. EPA*, No. 23-40306 (5th Cir. Oct. 6, 2023) ECF No. 44-2; Judgment, *West Virginia v. EPA*, No. 23-2411 (8th Cir. Oct. 10, 2023). And in both district courts, the plaintiffs filed amended complaints to challenge the Amended Rule. Second Am. Compl., *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex. Nov. 13, 2023) ECF No. 90; Am. Compl., *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Nov. 13, 2023) ECF No. 176. Kentucky, however, has been unable to take this step in this case because of the district court's dismissal order.

SUMMARY OF THE ARGUMENT

Although this case challenges a far-reaching rule affecting waters over which Kentucky rightly exercises sovereign control, this appeal is relatively narrow. Kentucky makes only two asks of the Court.

First, the Court should vacate the district court's dismissal of Kentucky's complaint. The district court has forthrightly recognized it erred in this respect. Published precedent from this Court required that Kentucky receive unmistakable notice of the district court's intent to sua sponte dismiss its complaint. Yet Kentucky received no notice. In addition, the district court confused the remedy for inadequately establishing standing sufficient to receive a preliminary injunction. The appropriate remedy is denial of the motion for a preliminary injunction, not dismissal of the suit. On this point as well, this Court's published precedent compels vacatur.

Second, the Court should hold that Kentucky proved its standing to seek a preliminary injunction. In finding to the contrary, the district court failed to account for

the Agencies' admission that the Final Rule expands their reach to include more waters than they had previously regulated. And that admitted incursion on Kentucky's sovereignty and the resulting compliance costs were sufficient to establish the Commonwealth's standing. As a result, the Court should hold that Kentucky proved its standing to seek a preliminary injunction and vacate and remand the denial of Kentucky's motion for a preliminary injunction. This relief will allow Kentucky to address the merits of the Amended Rule in the district court in the first instance.

STANDARD OF REVIEW

This Court reviews the district court's decision to dismiss the complaint for lack of subject-matter jurisdiction de novo. *RNI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1133–34 (6th Cir. 1996). Its review of the district court's standing ruling is also de novo. *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1031 (6th Cir. 2022). Legal questions in the preliminary-injunction context likewise receive de novo review. *Online Merchs. Guild v. Cameron*, 995 F.3d 540, 546 (6th Cir. 2021).

ARGUMENT

I. The district court improperly dismissed Kentucky's complaint.

The district court improperly dismissed Kentucky's complaint. There are two ways to approach this error. And neither depends on whether the district court was

ultimately correct about Kentucky not proving its standing to seek a preliminary injunction (the district court erred in this respect, as discussed in Part II).

1. This Court's rule regarding sua sponte dismissals is clear and mandatory. "Before dismissing a complaint sua sponte, even if the dismissal is without prejudice, the court *must* give notice to the plaintiff." *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 558 (6th Cir. 2012) (emphasis added). And that notice should be "unmistakable." *Doe v. Oberlin Coll.*, 60 F.4th 345, 352 (6th Cir. 2023) (citation omitted). There can be no dispute that the district court did not follow this simple rule. Before entering its dismissal order, the court gave the Commonwealth no indication that it intended to dismiss the case. Rather, the court's opinion dismissing the complaint was the first Kentucky learned of the Court's plan. And the court's decision even acknowledged that the Agencies had not sought dismissal. Op. & Order, R.51 PageID#2139–41.

To be fair, the district court eventually admitted its error. But that recognition came too late for the court to fix its mistake. In denying the Commonwealth's motion for an injunction pending appeal, the district court conceded it should not have dismissed the complaint without notice. Mem. & Order, R.66, PageID#2353. Even though it agreed that the Commonwealth "should have been afforded notice and an opportunity to be heard," the court found it could no longer revisit its order. *Id.* That was because it lost jurisdiction when Kentucky appealed. *Id.* So the district court recognized that the proper court to fix its error is this one.

The Court should do so. *Chase Bank* is published precedent. Its rule is mandatory. And its notice requirement serves important ends. If Kentucky had received notice of the district court's plan, it could have done at least two things. First, the Commonwealth could have amended its complaint to address the district court's concerns (more accurately, the court's misunderstandings about standing). *See Stanislaw v. Thetford*, No. 20-1660, 2021 WL 3027195, at *7 (6th Cir. July 19, 2021) (unpublished) (noting that a sua sponte dismissal deprives the plaintiff of the opportunity to amend the complaint). Because the Agencies had not answered the Commonwealth's complaint, Kentucky could have amended its complaint as a matter of course. Fed. R. Civ. P. 15(a)(1). The district court seemed to acknowledge that an amended complaint could have cured its standing concerns. Op. & Order, R.51, PageID#2139 ("As explained throughout this Order, certain developments, pleadings, or allegations could ripen this matter into a controversy fit for judicial review.").

Second, if the required notice had been given, Kentucky could have addressed the district court's standing concerns under the proper standard for dismissing a complaint at the outset of a case. This case never made it past the pleadings stage. Kentucky filed its complaint, but the Agencies never had to respond to it. (The district court dismissed the complaint before the Agencies' 60-day deadline to answer expired. Fed. R. Civ. P. 12(a)(2).) At such an early stage, a court contemplating dismissal focuses on allegations, not proof. More specifically, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e]

that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted); *see also Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 916 n.6 (6th Cir. 2002). But the district court did not even try to apply a pleadings-based standard. Instead, it repeatedly asked whether Kentucky had offered sufficient *proof* of standing. *E.g.*, Op. & Order, R.51, PageID#2126 ("Accordingly, the issue is whether the Plaintiffs provide evidence that the Rule threatens a certainly impending injury."), *id.* at PageID#2138 ("The Commonwealth did not provide big or small picture *evidence*, it merely submitted a speculative claim it will 'likely' face increased costs."). That focus was a mistake, albeit an understandable one, given that Kentucky was seeking a preliminary injunction, which requires establishing a "substantial likelihood" of standing. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 386 (6th Cir. 2020). That standard, however, is "height-ened" compared to the allegation-based standard that governs the pleadings stage. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 n.3 (6th Cir. 2018). If Kentucky had received notice of the district court's plan to dismiss the complaint, it could have pointed out the more lenient standard that governs dismissal.

The Agencies will perhaps respond that the Court can render the district court's error harmless by applying the correct standard to Kentucky's complaint for the first time on appeal. Of course, the motion panel already held—correctly—that Kentucky's allegations "likely suffice[d] at the pleading stage." Order, App.R.24 at 3–4. But for two reasons, the Court should simply apply *Chase Bank* and vacate the dismissal. First,

litigating this issue for the first time on appeal does not overcome Kentucky losing out on its right to amend its complaint in response to the court's standing concerns, as outlined above. Although unpublished, this Court's *Stanislaw* opinion makes that very point. 2021 WL 3027195, at *7. And second, *Chase Bank*'s rule does not come with an always-available workaround. *Chase Bank* stated its rule in mandatory terms. 695 F.3d at 558. More importantly, the Court has already rejected a harmless-error exception that would swallow *Chase Bank*'s rule. *Shelton v. United States*, 800 F.3d 292, 295 (6th Cir. 2015).

2. This leads to the second way to think about the problem with the district court's dismissal of Kentucky's complaint. In particular, the district court equated insufficient proof of standing at the preliminary-injunction stage with a lack of subject-matter jurisdiction. But the two are distinct.

Under this Court's caselaw, inadequate proof of standing at the preliminary-injunction stage affects the plaintiff's likelihood of success on the merits, not the district court's subject-matter jurisdiction. *Arizona v. Biden*, 40 F.4th 375, 383 (6th Cir. 2022) (holding that standing is "relevant to likelihood of success"); *Online Merch. Guild*, 995 F.3d at 547 (similar). More to the point, "an inability to establish a substantial likelihood of standing requires denial of the motion for preliminary injunction, not dismissal of the case." *Hargett*, 978 F.3d at 386 (citation omitted); *see also Waskul*, 900 F.3d at 255 n.3 ("caution[ing] district courts" to apply this rule). Consistent with this rule, the Court has addressed the merits of a preliminary-injunction appeal despite also finding that the

plaintiffs likely lacked standing. *Arizona*, 40 F.4th at 383–94; *see also L.W. v. Skrmetti*, 83 F.4th 460, 472–89, 491 (6th Cir. 2023) (addressing the merits of a preliminary-injunction appeal despite finding that "[a]s a factual and legal matter, [the existence of standing] is undeveloped and potentially knotty").

The district court did not appreciate the distinction between standing to file suit and standing as it relates to a preliminary injunction. In fact, it collapsed the two. Op. & Order, R.51, PageID#2139 ("Having found that the Plaintiffs lack standing, the Court must dismiss this matter for lack of jurisdiction."). But it does not follow that a plaintiff who provides insufficient proof of standing for purposes of a preliminary injunction lacks standing to file a complaint. As noted above, the inquiries are different. One is based on allegations, while the other applies a "heightened" standard. *See Waskul*, 900 F.3d at 255 n.3; *see also Hargett*, 978 F.3d at 386. As a result, even if the district court were right that Kentucky's standing proof was insufficient to win a preliminary injunction, the appropriate remedy was to deny Kentucky's motion for a preliminary injunction.

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By its own admission, the district court improperly dismissed this case without notice. This Court's caselaw required Kentucky to receive unmistakable notice of the district court's intent to dismiss. Yet the court afforded Kentucky no notice before pulling the trigger on dismissal, depriving Kentucky of the chance to amend its complaint or engage with the appropriate standard for pleadings-based dismissals. On top

of that, the district court ordered the wrong remedy for a perceived lack of standing at the preliminary-injunction stage. Even if Kentucky submitted insufficient proof of standing (it did not), the district court's subject-matter jurisdiction was not at issue.

II. Kentucky had standing to seek a preliminary injunction.

The district court wrongly held that Kentucky submitted insufficient proof to seek a preliminary injunction. This Court's motion panel essentially recognized this error by granting Kentucky's motion for an injunction pending appeal. Order, App.R.24 at 3. So in addition to vacating the dismissal of this case, the Court should hold that Kentucky sufficiently proved its standing.

1. Before discussing the problems with the district court's standing holding, a quick word about the procedural posture of this matter helps to frame matters. When Kentucky filed suit, it challenged the Final Rule. Of course, we now have *Sackett* and the follow-on Amended Rule.[6] But those later events don't affect the standing inquiry here. The relevant point in time for standing is when the plaintiff filed the complaint. As this Court just reaffirmed, the "critical time for standing" is "the outset of the litigation." *Fox v. Saginaw Cnty.*, 67 F.4th 284, 294 (6th Cir. 2023) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000)). Stated differently, "a

[6] Because the district court dismissed Kentucky's complaint, the Commonwealth has not had an opportunity to amend its complaint to address the Amended Rule. By contrast, the other States that initially challenged the Final Rule have opted to amend their complaints. *Supra* at 12.

court's jurisdiction has long turned on the facts as they are when a plaintiff sues, not later-in-time facts." *Id.* at 294–95 (citation omitted). Any "later factual changes cannot deprive the plaintiff of standing."[7] *Id.* at 295. So the Court's focus in this preliminary-injunction appeal is the same as the district court's was: whether Kentucky sufficiently proved its standing to seek a preliminary injunction upon filing suit.

2. When it comes to its lands and waters, Kentucky wears two hats relevant to standing—first, as a sovereign and, second, as a regulator. As a sovereign, Kentucky has primary authority over the resources within its borders. *SWANCC*, 531 U.S. at 174. Indeed, the "power to control navigation, fishing, and other public uses of water" is "an essential attribute of [Kentucky's] sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (cleaned up); *see also Kansas v. Nebraska*, 574 U.S. 445, 480 (2015) (Thomas, J., concurring in part and dissenting in part) ("Authority over water is a core attribute of state sovereignty . . . ."). And in regulating its waters, Kentucky has established a comprehensive statutory scheme. *See, e.g.*, Ky. Rev. Stat. §§ 224.70-100 to

[7] The only potential bearing the Amended Rule could have here relates to mootness. *Fox*, 67 F.4th at 295. But this appeal is not moot. Although the Agencies amended the Final Rule, much of it lives on in the Amended Rule. And the Amended Rule still encroaches on Kentucky's sovereign authority to regulate its waters. If the Agencies nevertheless believe that this appeal is moot, they bear the "heavy burden" of proving it. *Friends of the Earth*, 528 U.S. at 170. And if the Agencies succeed in this respect, Kentucky is entitled to *Munsingwear* vacatur of the district court's denial of its motion for a preliminary injunction. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc).

-150, 224.16-040 to -090. So Kentucky has, and actively exercises, a sovereign interest in regulating its waters.

Kentucky also helps the Agencies implement federal water standards. For example, Kentucky must enact Water Quality Standards (WQS) for those "waters of the United States" within the Commonwealth. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), 131.4(a). It must monitor those waters and act if they fall short of WQS. 33 U.S.C. § 1313(c); 40 C.F.R. § 130.7. Kentucky also must prepare and submit to EPA a biennial water quality report describing the "quality of all navigable waters" in the Commonwealth and analyzing how well individual waters support wildlife and recreational activities. 33 U.S.C. § 1315(b)(1)(A). Kentucky also helps issue CWA certifications, *id.* § 1341(a), and approve discharge permit applications, *id.* § 1342(b).

The Final Rule's re-definition of "waters of the United States" injures Kentucky's sovereign interests and imposes compliance costs on the Bluegrass State. The Final Rule causes those injuries, which would be redressed by an injunction against its enforcement. Kentucky therefore has standing to challenge the Final Rule *both* as a sovereign and as a regulator.

Although State standing can be a thorny topic, this Court's caselaw makes the analysis on both points straightforward, especially given the "special solicitude" afforded to Kentucky as a sovereign. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Two Kentucky-led cases are the key precedents. In *Kentucky v. Biden*, several States

challenged a mandate that federal contractors ensure their employees are vaccinated. 23 F.4th 585, 589–90 (6th Cir. 2022) (*Biden*). The Court recognized that States "have sovereign interests to sue when they believe that the federal government has intruded upon areas traditionally within states' control." *Id.* at 598. As a result, the Court held that Kentucky had standing to "vindicate" its sovereign interests simply because the challenged mandate "plausibly" intruded on an area traditionally left to the States. *Id.* at 598–99.

The Court reaffirmed this sovereign-standing framework in *Kentucky v. Yellen*, 54 F.4th 325, 335–38 (6th Cir. 2022) (*Yellen*). There, Kentucky and a sister State challenged a federal tax mandate. Upon filing suit, the States had standing as sovereigns in part because the mandate "at least arguably" affected their prerogative "to control their own internal taxation policies" and because they "illustrated a credible threat of enforcement." *See id.* at 336–37; *see also id.* at 360–62 (Nalbandian, J., concurring in part and dissenting in part).

Biden and *Yellen* also speak to Kentucky's standing as a regulator. Both decisions recognized that the object of a federal action generally has standing to challenge it, particularly because of compliance costs. For example, in *Biden*, Kentucky independently had standing as a government contractor subject to the mandate given the "virtual certainty that [Kentucky] [would] either bid on new federal contracts or renew existing ones." 23 F.4th at 594–95; *accord Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) (*Biden II*) (detailing the compliance costs of the challenged mandate). Likewise,

because complying with the tax mandate in *Yellen* required "undertak[ing] compliance efforts," the Court found an injury in fact. 54 F.4th at 342–43. Indeed, *Yellen* squarely held that "compliance costs are a recognized harm for purposes of Article III." *Id.* at 342.

Just like the mandates in *Biden* and *Yellen*, the Final Rule "intrude[s] upon an area traditionally left to the states." *Biden*, 23 F.4th at 599. As this Court's motion panel recognized, the Agencies "admitted that the Final Rule does in fact sweep additional waters into their jurisdiction." Order, App.R.24 at 4 (citing Economic Analysis Excerpt, R.31-5, PageID#1053). The Agencies have admitted this key point several times, including before this Court. Opp'n to PI, R.31, PageID#975; H'rg Tr., R.45, PageID#1993–96, 2006–10; Opp'n to Inj., App.R.18 at 8–9. Given this admission, "discovery very likely will allow Kentucky to show that at least one water within its borders is now within the agencies' jurisdiction and thus that its sovereign interests are harmed." Order, App.R.24 at 4. By admittedly expanding jurisdictional waters under the CWA, it follows that the federal government now exercises primary control over waters that were previously regulated by Kentucky, infringing on "an essential attribute of [Kentucky's] sovereignty." *See Tarrant Reg'l Water Dist.*, 569 U.S. at 631 (citation omitted).

Kentucky is a wet state, with "more navigable miles of water than any other state except Alaska."[8] As a result, it is beyond merely "plausibl[e]" that the federal

[8] University of Kentucky, Water Fact Sheet, https://perma.cc/U2CS-Y3FQ.

government has intruded on a traditional state prerogative. *Biden*, 23 F.4th at 599; *see also Yellen*, 54 F.4th at 335–37 (finding standing where a State's sovereign taxing authority was "at least arguably proscribed" by federal law). The injury to Kentucky's sovereign prerogative over its waters flows directly from the Final Rule's admitted expansion of federal jurisdiction over those same waters. Because that injury would be redressed by returning those waters to Kentucky, the Commonwealth has shown that it is substantially likely to possess standing as a sovereign.[9] *See Hargett*, 978 F.3d at 386 (holding that a "substantial likelihood" of standing is all that is required at the preliminary-injunction stage); *accord* Order, App.R.24 at 3 (requiring a "reasonable chance of proving facts—after discovery—that support standing").

It makes no difference for standing purposes that the Agencies (wrongly) believe that their intrusion on Kentucky's sovereignty is small. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"). Under the deal struck in our Constitution, Kentucky retains "a residuary and *inviolable* sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (citation omitted) (emphasis added). The federal government's de minimis theory of sovereign harm is antithetical to our dual-sovereign model of government.

[9] Unlike the court below, the two other district courts to address this issue have found that the States had standing as sovereigns to challenge the Final Rule. *West Virginia*, 2023 WL 2914389, at *7–8; *Texas*, 2023 WL 2574591, at *5–6.

There is also a "slightly different" way to understand why Kentucky is suffering a sufficiently imminent sovereign injury. *Yellen*, 54 F.4th at 360 (Nalbandian, J., concurring in part and dissenting in part). States "can establish an imminent injury by showing a 'risk of harm' to their sovereign or quasi-sovereign interests." *Id.* (quoting *Massachusetts*, 549 U.S. at 521). Kentucky has made that showing in spades. If the "EPA's refusal to regulate greenhouse gas emissions presented an imminent injury to state interests related to climate change" in *Massachusetts*, *id.*, the expansive, malleable, and uncertain scope of the Final Rule likewise threatens imminent injury to Kentucky's sovereignty.

Aside from the injury to its sovereignty, Kentucky also faces compliance costs not unlike those faced in *Biden* and *Yellen*. As the *West Virginia* district court put it, the Final Rule "does cause injury to the States because they are the direct object of its requirements." 2023 WL 2914389, at *8. To meet its CWA monitoring and reporting obligations, Kentucky will need to "immediately assess which waters . . . will become jurisdictional under the Final Rule." Horne Decl., R.10-1, PageID#407. This process "will require significant time and resources," including "careful legal and technical analysis of the Final Rule as well as field and survey work across the Commonwealth." *Id.* Kentucky will also expend resources "to develop a plan to address the implications of the" Final Rule's jurisdiction "on a number of programs administered by the Commonwealth." *Id.* at PageID#408.

But these are only the start-up costs. More jurisdictional waters under the Final Rule mean more monitoring costs for Kentucky. *See, e.g.*, 33 U.S.C. § 1313(c); 40 C.F.R.

§ 130.7. And it is a "virtual certainty," *Biden*, 23 F.4th at 595, that the Commonwealth will need to process more CWA permits, as more projects will implicate jurisdictional waters under the Final Rule, *see* Horne Dec., R. 10-1, PageID#408. These compliance costs establish an injury in fact.[10] *Yellen*, 54 F.4th at 342–43; *see also Biden II*, 57 F.4th at 556. Because these costs are directly traceable to the Final Rule and would be remedied by a favorable ruling in this matter, Kentucky independently has standing in its capacity as regulator.[11]

3. The district court also framed its standing analysis in terms of ripeness. Op. & Order, R.51, PageID#2125, 2132, 2138–39. But this holding was part and parcel of its conclusion that Kentucky did not establish a sufficiently impending injury for purposes of standing. The district court's ripeness concern is therefore answered by all the points just discussed. By expanding federal jurisdiction at the expense of Kentucky's control over its waters, the Final Rule harmed Kentucky's sovereignty. And by affecting Kentucky's role as a regulator, the Final Rule imposed compliance costs on the Commonwealth. As a result, the district court's ripeness concerns cannot save its reasoning, as

[10] The district court faulted the Commonwealth for not providing dollar amounts for compliance costs. Op. & Order, R.51, PageID#2136–38. Although such amounts may affect the degree of irreparable harm under the preliminary-injunction standard, *Biden II*, 57 F.4th at 556, what matters for standing is that the Commonwealth will have to expend money to implement the Final Rule, *see Czyzewski*, 580 U.S. at 464.

[11] Unlike the district court here, the two other district courts to address this issue have found that the States had standing as regulators to challenge the Final Rule. *West Virginia*, 2023 WL 2914389, at *8; *Texas*, 2023 WL 2574591, at *5–6.

this Court's motion panel already recognized. Order, App.R.24 at 4 ("For the reasons discussed above, Plaintiffs' likelihood of success in establishing standing indicates a likelihood of success in showing ripeness and that the district court erred in concluding otherwise.").

4. Because of its standing holding, the district court did not address the merits of Kentucky's challenge to the Final Rule. Op. & Order, R.51, PageID#2139. However, this Court's motion panel did. Order, App.R.24 at 5. The motion panel did not "detail [its] reasoning" due to the "preliminary stage of the appeal," but it concluded that Kentucky "will likely prevail in [its] challenge to the Final Rule's validity." *Id.* In so holding, the motion panel favorably cited the *Texas* and *West Virginia* decisions granting preliminary injunctions against the Final Rule. *Id.* (citing *Texas*, 2023 WL 2574591, at *7–10; *West Virginia*, 2023 WL 2914389, at *9–15).

As noted above, several things have changed since this Court's motion-panel ruling. The Supreme Court handed the Agencies a resounding loss in *Sackett*. Indeed, not a single Justice endorsed Justice Kennedy's test that purported to form part of the Final Rule. 598 U.S. at 680 (majority), 715–16 (Kavanaugh, J., concurring in the judgment). And in response to *Sackett*, the Agencies issued the Amended Rule in an (unsuccessful) attempt to save the Final Rule. The Commonwealth submits that the issuance of *Sackett* and the promulgation of the Amended Rule counsel in favor of allowing the district court to address the merits of Kentucky's challenge in the first instance. That is how the other State-led litigation is proceeding. Indeed, rather than litigate the *Texas*

and *West Virginia* preliminary injunctions in the first instance in the Fifth and Eighth Circuits respectively, the Agencies opted to voluntarily dismiss their appeals. *Supra* at 11–12. In sum, although the Amended Rule is unlawful for some of the same reasons as the Final Rule, the Commonwealth submits that judicial economy favors this Court rejecting the district court's standing analysis and vacating and remanding the denial of Kentucky's motion for a preliminary injunction for further proceedings in district court.

CONCLUSION

The Court should vacate the dismissal of Kentucky's complaint. It should also hold that Kentucky sufficiently proved its standing and vacate and remand the denial of Kentucky's motion for a preliminary injunction.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g) and 6th Cir. R. 32, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,755 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond font using Microsoft Word.

s/ Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on December 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kuhn

ADDENDUM

The Commonwealth designates the following district court documents as relevant to this appeal:

1. Kentucky's complaint, R.1, PageID#1–40;
2. Kentucky's motion for a preliminary injunction, R.10, PageID#372–401;
3. Declaration of John G. Horne, II, R.10-1, PageID#404–08;
4. Agencies' combined opposition to motions for a preliminary injunction, R.31, PageID#948–1013;
5. Kentucky's reply in support of its motion for a preliminary injunction, R.39, PageID#1868–86;
6. Hearing transcript, R.45, PageID#1989–2044;
7. Opinion and Order, R.51, PageID#2120–41;
8. Kentucky's emergency motion for an injunction pending appeal, R.52, PageID#2142–54;
9. Agencies' combined opposition to emergency motions for injunction pending appeal, R.57, PageID#2227–57; and
10. Memorandum Opinion and Order, R.66, PageID#2342–54.