Nos. 23-5343, 23-5345

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**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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COMMONWEALTH OF KENTUCKY,
*Plaintiff-Appellant*,
*and*
KENTUCKY CHAMBER OF COMMERCE, et al.
*Plaintiffs-Appellants*.
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
*Defendants-Appellees*.

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On Appeal from the U.S. District Court
for the Eastern District of Kentucky
No. 3:23-cv-7 (Hon. Gregory F. Van Tatenhove, U.S. District Judge)

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# FEDERAL APPELLEES' BRIEF

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## STATEMENT REGARDING ORAL ARGUMENT

Federal Appellees believe that oral argument would assist the Court in its consideration of whether Plaintiffs established standing and whether recent events, such as the Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023), and the subsequent issuance of the *Revised Definition of "Waters of the United States"; Conforming*, 88 Fed. Reg. 61,964 (Sept. 8, 2023), have rendered this appeal moot.

## STATEMENT OF THE ISSUES

1. Whether the district court was required to provide Plaintiffs additional notice before dismissing their complaints for lack of standing.

2. Whether the district court correctly concluded Plaintiffs lack standing.

3. Whether this appeal is moot in light of the Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023), and the Agencies' subsequent issuance of amended regulations defining "waters of the United States."

## INTRODUCTION

These cases arise from a challenge by the Commonwealth of Kentucky and various trade associations to a January 2023 joint rule of the Army Corps of Engineers and the Environmental Protection Agency interpreting the term "waters of the United States" in the Clean Water Act. The definition codified in the Rule largely tracked the Agencies' pre-2015 regulatory regime, which was based on a longstanding regulatory definition as implemented based on case law, guidance, and agency practice. Because Plaintiffs failed to show that the Rule, which generally reflected the status-quo ante, would cause them to suffer a concrete injury, the district court dismissed their complaints for lack of standing.

The district court's determination that neither Kentucky nor the Associations have standing was correct. Kentucky asserts that the hypothetical expansion of federal regulatory jurisdiction under the Rule invades Kentucky's sovereign interest in the waterways within its border. But such abstract injuries have never been considered judicially cognizable. And while both Kentucky and the Associations posit that the Rule might increase compliance costs, their supposition does not establish a certainly impending injury. Plaintiffs' failure to identify a

single change to the regulatory definition that materially affected them or any imminent injury stemming from the Rule forecloses their suit. This Court should affirm the district court's dismissal for lack of standing.

Additionally, since the initiation of these appeals, the Agencies issued a final rule to conform the regulatory definition of "waters of the United States" to the Supreme Court's intervening decision in *Sackett v. EPA*, 598 U.S. 651 (2023). As a result, whether Plaintiffs had standing to challenge regulations that are no longer in force is not a live inquiry. These appeals are moot.

## STATEMENT OF THE CASE

1. In 1972, Congress enacted the Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA's centerpiece is a prohibition on the unauthorized "discharge of any pollutant." 33 U.S.C. § 1311(a). The Act defines a "discharge" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The

Act does not further define "waters of the United States." Since the CWA was enacted, the Agencies have interpreted the term in regulations.

For nearly forty years, regulations promulgated by the Corps and EPA in the 1980s were in effect. Those regulations, known as the 1986 Regulations, defined "waters of the United States" to include: (1) traditional navigable waters; (2) interstate waters; (3) "other waters," i.e., intrastate waters which could affect interstate or foreign commerce; (4) impoundments; (5) tributaries; (6) the territorial seas; and (7) adjacent wetlands. 33 C.F.R. § 328.3(a) (2014). Adjacent wetlands were defined as "bordering, contiguous, or neighboring" to another covered water. *Id.*

The Agencies refined their application of the 1986 Regulations over time, and as informed by Supreme Court decisions. In *United States v. Riverside Bayview Homes*, the Court upheld the Corps' assertion of CWA jurisdiction over adjacent wetlands. 474 U.S. 121, 135 (1985). In *Solid Waste Agency of Northern Cook County v. Corps* (*SWANCC*), the Court invalidated the Corps' assertion of jurisdiction over isolated ponds based solely on their use by migratory birds. 531 U.S. 159 (2001). In *Rapanos v. United States*, the Court assessed the Agencies' assertion of

jurisdiction over certain adjacent wetlands and, in a decision fractured in its rationale, remanded for further consideration. 547 U.S. 715, 757 (2006) (Scalia, J., plurality) (setting forth "relatively permanent" standard); *id.* at 786-87 (Kennedy, J., concurring) (setting forth "significant nexus" standard); *id.* at 810 (Stevens, J., dissenting) (finding that wetlands satisfying the Agencies' regulations, the plurality standard, or the concurrence standard are covered).

After *SWANCC*, the Agencies established coordination procedures for the "other waters" category of the 1986 Regulations. *See* 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003) ("[F]ield staff should seek formal project-specific Headquarters approval prior to asserting jurisdiction over such waters, including permitting and enforcement actions."). After *Rapanos*, the Agencies developed guidance on how to apply certain provisions of the 1986 Regulations consistent with that precedent. Under the guidance, tributaries and adjacent wetlands were generally subject to the Act if they met either the *Rapanos* plurality's "relatively permanent" standard or Justice Kennedy's "significant nexus" standard. *Rapanos Guidance*, R.31-2.

2. Between 2015 and 2020, the Agencies undertook three rulemakings revising the "waters of the United States" definition. In 2015, the Agencies adopted a definition that deemed certain waters "jurisdictional by rule" without the need for case-specific analysis, among other provisions. 80 Fed. Reg. 37,054, 37,058-59 (June 29, 2015). This Court stayed the 2015 Rule nationwide. *In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015), *rev'd for lack of jurisdiction*, 138 S. Ct. 617 (2018). In 2019, the Agencies repealed the 2015 Rule and recodified the 1986 Regulations, to be implemented consistent with the pre-2015 regime. 84 Fed. Reg. 56,626 (Oct. 22, 2019).

In 2020, the Agencies redefined the term "waters of the United States," this time adopting a narrower definition than past rules. 85 Fed. Reg. 22,250 (Apr. 21, 2020). The 2020 Rule was also subject to extensive litigation and was vacated in 2021. *See Sackett*, 598 U.S. at 668 (citing *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021)); *see also Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021).[1]

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[1] As of this writing, all litigation over the 2015, 2019, and 2020 rules has concluded.

Where and when the 2015 and 2020 Rules were not in effect, the pre-2015 regime applied. The pre-2015 regime refers to the Agencies' 1986 Regulations implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience. *Revised Definition of "Waters of the United States,"* 88 Fed. Reg. 3004, 3006 n.6 (Jan. 18, 2023).

3. The Agencies issued a rule in January 2023 that largely codified that pre-2015 regime. *Id.* The 2023 Rule, which is the agency action at issue here, affirmed and refined the regulatory framework that had been in place for more than four decades. Like the 1986 Regulations, the 2023 Rule categorically included in the definition of "waters of the United States" three classes of waters: traditional navigable waters, the territorial seas, and interstate waters. *Id.* at 3142. But rather than categorically including tributaries and adjacent wetlands, or asserting jurisdiction over non-navigable, intrastate waters based solely on their relationship with interstate commerce, as the 1986 Regulations did, the 2023 Rule instead required those waters to meet either the relatively permanent standard or the significant-nexus standard. *Id.* at 3142-43; *see also* 33 C.F.R. § 328.3 (2014); 88 Fed. Reg. at 3006 (describing

relatively permanent and significant-nexus standards). For wetlands, the relatively permanent standard required a continuous surface connection to certain other jurisdictional waters in order for the wetlands to be considered "waters of the United States." The 2023 Rule also codified several exclusions from the definition that the Agencies had generally applied under the pre-2015 regime. 88 Fed. Reg. at 3142-43.

4. States and trade associations filed five Administrative Procedure Act (APA) suits challenging the 2023 Rule. The Eastern District of Kentucky consolidated a suit brought by six trade associations with a suit brought by the Commonwealth of Kentucky. Plaintiffs sought preliminary injunctions.

On March 31, 2023, the district court denied the motions for preliminary injunctions and dismissed Plaintiffs' claims without prejudice, holding that Plaintiffs lacked standing and that their claims were unripe. Order, R.51, PageID#2140. The court reasoned that Plaintiffs' "claimed financial and sovereignty injuries are too speculative to constitute imminent injuries in fact." *Id.*

Plaintiffs appealed and sought injunctions pending appeal both in the district court and in this Court. A motions panel of this Court sua

sponte administratively stayed the 2023 Rule's enforcement, both in Kentucky and against the Associations and their members. Order, App.R.9-1. Soon after, the district court denied Plaintiffs' motions for injunctions pending appeal. Order, R.66. On May 10, 2023, this Court's motions panel granted an injunction pending appeal. Order, App.R.24.

5. On May 25, 2023, the Supreme Court decided *Sackett v. EPA*, 598 U.S. 651. The Court's opinion revisited the definition of "waters of the United States" in considering the extent to which the CWA encompasses adjacent wetlands.

*Sackett* rejected the significant-nexus standard set forth in Justice Kennedy's *Rapanos* concurrence and instead adopted the relatively permanent standard of the *Rapanos* plurality. The Supreme Court concluded that "waters of the United States" encompass "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and 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." 598 U.S. at 671, 678 (quoting *Rapanos*, 547 U.S. at 739, 742 (Scalia, J., plurality)).

6. After the Supreme Court decided *Sackett*, the Agencies amended the 2023 Rule's regulatory text to ensure that the Agencies' regulations conformed to the Supreme Court's decision. On the Agencies' unopposed motion, this Court held these appeals in abeyance pending publication of that rule. Order Granting Abeyance, Dkt.32. On August 29, 2023, the Agencies issued the final rule. Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (Conforming Rule). The Conforming Rule removed the significant-nexus standard as a basis for jurisdiction and redefined "adjacent" to mean "having a continuous surface connection," among other amendments summarized below.

**Table.** Rule comparison.

| Conforming Rule | 2023 Rule | 1986 Regulations |
|---|---|---|
| **(a)(1) waters:** traditional navigable waters; the territorial seas; and interstate waters | **(a)(1) waters:** traditional navigable waters; the territorial seas; and interstate waters (including wetlands) | Same text for these categories of waters as the 2023 Rule |

| | | |
|---|---|---|
| **(a)(2) impoundments:** impoundments of the (a)(1) waters, relatively permanent (a)(3) tributaries, or (a)(4) adjacent wetlands, e.g., reservoirs created by dams | **(a)(2) impoundments:** impoundments of the (a)(1) waters, (a)(3) tributaries, or (a)(4) adjacent wetlands, e.g., reservoirs created by dams | Similar text, but the 1986 Regulations *also included* impounded "other waters" ((a)(5) waters in the 2023 Rule) |
| **(a)(3) tributaries:** relatively permanent tributaries of the (a)(1) or (a)(2) waters | **(a)(3) tributaries:** tributaries of the (a)(1) or (a)(2) waters; tributaries must be relatively permanent or meet significant-nexus standard | Categorically covered tributaries |
| **(a)(4) adjacent wetlands:** wetlands with a continuous surface connection to (a)(1) waters; or wetlands with a continuous surface connection to relatively a permanent (a)(2) impoundments or relatively permanent (a)(3) tributaries | **(a)(4) adjacent wetlands:** wetlands "adjacent" to (meaning bordering, contiguous, or neighboring) (a)(1) waters; or wetlands "adjacent" to (a)(2) impoundments or (a)(3) tributaries if the wetland either has a continuous surface connection to a relatively permanent (a)(2)/(a)(3) water, or meets the significant nexus standard | Categorically covered "adjacent" wetlands |

| **(a)(5) other waters:** relatively permanent intrastate lakes and ponds with a continuous surface connection to (a)(1) waters or relatively permanent (a)(3) tributaries | **(a)(5) other waters:** relatively permanent intrastate lakes, ponds, streams, or wetlands with a continuous surface connection to (a)(1) waters or relatively permanent (a)(3) tributaries; or intrastate lakes, ponds, streams, or wetlands that meet the significant-nexus standard | "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce" |
|---|---|---|

*See* 88 Fed. Reg. at 61,968-69; 88 Fed. Reg. at 3142-43; 33 C.F.R. § 328.3 (2014); *see also* EPA, "Amendments to 40 C.F.R. 120.2 and 33 C.F.R. 328.3," https://perma.cc/737Y-6NBJ (redline of changes Conforming Rule made to 2023 Rule).

Following the Conforming Rule's September 8, 2023, effective date, the Agencies began applying the amended regulations in the locations and for those entities that had not obtained an injunction against enforcement of the 2023 Rule. *See* EPA, Definition of "Waters of the United States": Rule Status and Litigation Update, available at https://www.epa.gov/wotus/definition-waters-united-states-rule-status-

and-litigation-update. For those areas and persons for which an injunction applies, including within Kentucky and as to Plaintiff Associations and their members, the Agencies are currently applying the 1986 Regulations as implemented in the pre-2015 regime and as consistent with *Sackett*. *Id.* The suite of regulations challenged in this case—as codified in the 2023 Rule—is no longer in effect anywhere in the country. *Id.*[2]

## SUMMARY OF THE ARGUMENT

1. The district court correctly dismissed Plaintiffs' complaints rather than only denying the motions for preliminary injunction. The district court correctly evaluated Plaintiffs' standing under the pleading standard and concluded that Plaintiffs failed to allege an injury-in-fact. When a court determines that it lacks jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Plaintiffs' claim that Sixth Circuit precedent requires courts to provide notice before dismissing for lack of standing is incorrect. *See Doe v. Oberlin*, 60 F.4th 345, 352 (6th Cir. 2023) (explaining that the Sixth

[2] Hereinafter, we use the shorthand "Rule" to refer to the 2023 Rule.

Circuit "require[s] the district court to give a plaintiff notice of the specific grounds for a planned sua sponte dismissal *on the merits*") (emphasis added).

In any event, Plaintiffs had notice and an opportunity to show their standing through contested briefing and oral argument on the issue under the heightened preliminary-injunction standard. The district court was not required to afford Plaintiffs additional notice of the obvious point that, as a threshold matter, they needed to plead a judicially cognizable injury.

2. Kentucky lacks standing to challenge the Rule. Article III grants only the power to adjudicate concrete, particularized injuries. Kentucky's claims of injury are merely hypothetical disputes over sovereignty and allegations of indirect or incidental effects from the Rule, not invasions of any legally protected interest.

The Supreme Court has repeatedly rejected States' assertions that their disputes with the federal government over the respective spheres of regulatory jurisdiction are Article III cases or controversies. *E.g.*, *New Jersey v. Sargent*, 269 U.S. 328 (1926). Our Nation's history and tradition

confirm that abstract questions of sovereignty of the type Kentucky asserts here are not suitable to judicial resolution.

Nor may Kentucky sue the federal government based on the indirect, incidental effects of a federal law. Federal policies routinely have incidental effects on States' expenditures, revenues, and other activities. Yet, for good reason, such indirect burdens have never been viewed as judicially cognizable injuries.

3. The Associations lack standing to challenge the Rule. Two Associations failed at the threshold to identify any member with standing and therefore lack associational standing. *See Ass'n of Am. Phys. & Surgeons v. FDA*, 13 F.4th 531, 543 (6th Cir. 2021). The remaining Associations did not allege a certainly impending injury; instead, they alleged that injury was possible while conceding that it was not imminent. Because the Associations did not identify any particular waterbody or project and explain how the Rule would affect it, the district court correctly concluded that they had failed to allege a certainly impending injury. And the Associations fail to establish that their members' asserted injuries are fairly traceable to the Rule they

challenge, rather than to the CWA or other preexisting requirements that predate and were unchanged by the Rule.

The Associations' objections stem not from the challenged rule but from separate legal sources, such as their objection to the CWA's permitting requirement, the need to assess whether waters are jurisdictional, and the inability to rely on jurisdictional determinations issued under a prior rule that was vacated by court order. Those alleged harms cannot support standing because the Associations do not demonstrate that their alleged injuries resulted from the challenged Rule.

4. Not only did the district court correctly determine that it lacked jurisdiction, but this Court also lacks jurisdiction because the appeals are moot. The Agencies have promulgated a Conforming Rule that amends the challenged Rule. This Court's declaration of Plaintiffs' standing to challenge a prior set of regulations would not affect anyone's rights because the district court cannot grant any effective relief against that set of regulations. These cases should therefore be dismissed, in the alternative, as moot.

## STANDARD OF REVIEW

The Court can address Article III standing and mootness-on-appeal in any order it chooses. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 4 (2023). Dismissal on standing grounds is reviewed de novo. *See Ames v. LaRose*, 86 F.4th 729, 731 (6th Cir. 2023).

Though the district court denied Plaintiffs' motions for preliminary injunctions, it did so solely on the ground that Plaintiffs lack standing. Plaintiffs' briefs do not present argument why a preliminary injunction should issue; they argue only why lack of standing was an improper basis to deny relief. Plaintiffs cannot, and do not purport to, incorporate by reference the briefs they filed in the district court and before a motions panel of this Court. *See* Fed. R. App. P. 28(a)(8); *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003). Plaintiffs have forfeited any argument for reversal (as opposed to vacatur) of the district court's order denying preliminary injunctions, and the standard of review governing an appeal from a preliminary-injunction order is not relevant to the solitary issue on appeal. *Contra* Ky. Br. 13; Assns. Br. 18.

# ARGUMENT

## I. Dismissal was procedurally proper.

### A. The district court was not required to give Plaintiffs additional notice before dismissing their complaints for lack of standing.

A federal court must dismiss a complaint when it concludes that it lacks Article III jurisdiction. It may even do so sua sponte: "Even if no party raises the propriety of a plaintiff's standing, [a federal court is] under an independent obligation to examine [its] own jurisdiction." *United States v. Health Possibilities*, 207 F.3d 335, 342 n.5 (6th Cir. 2000) (cleaned up). And because standing is not a "mere pleading requiremen[t] but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). From the moment Plaintiffs filed their complaint, they bore the burden of establishing that the court had jurisdiction. "The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of

the judicial power of the United States and is inflexible and without exception." *Steel Co.*, 523 U.S. at 94-95 (cleaned up).

Plaintiffs cite no precedent contradicting those fundamental rules. Instead, they cite cases requiring the court to provide notice before dismissing a complaint sua sponte on non-standing grounds. *Chase Bank USA, N.A. v. City of Cleveland*, the case Plaintiffs principally rely on, does not create a notice rule for sua sponte dismissals for lack of standing; rather, it requires notice before sua sponte dismissal for failure to state a claim—a determination on the merits. 695 F.3d 548, 558 (6th Cir. 2012); *see Bell v. Hood*, 327 U.S. 678, 682 (1946). Likewise, in *Doe v. Oberlin*, this Court explained that it "require[s] the district court to give a plaintiff notice of the specific grounds for a planned sua sponte dismissal *on the merits*." 60 F.4th at 352 (emphasis added).[3] Contrary to

[3] None of the remaining cases cited by Plaintiffs establish a notice requirement before dismissal for lack of standing either. *See Shelton v. United States*, 800 F.3d 292, 295 (6th Cir. 2015) (requiring notice before sua sponte dismissing a federal habeas petition as untimely); *Morrison v. Tomano*, 755 F.2d 515, 517 (6th Cir. 1985) (requiring notice before sua sponte dismissal for failure to state a claim); *Stanislaw v. Thetford Twp., Michigan*, No. 20-1660, 2021 WL 3027195, at *7 (6th Cir. July 19, 2021) (unpublished) ("Dismissal *for failure to state a claim* without providing plaintiff adequate notice of the deficiency in the complaint generally warrants reversal." (emphasis added)).

Plaintiffs' contentions, this Court has concluded that district courts may dismiss for lack of standing sua sponte "regardless of whether and how the issue was addressed" by the parties. *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 983 (6th Cir. 2012).

Plaintiffs' rule would contradict a federal court's obligation to dismiss a complaint upon concluding that the court lacks Article III jurisdiction. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 256 (6th Cir. 2018) (noting that if the district court, in the course of ruling on a request for preliminary injunctive relief, had determined that the plaintiff lacked standing "it would have had to dismiss the Association from this suit"); *see also Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1215-16 (10th Cir. 2006) (affirming sua sponte dismissal for lack of standing upon preliminary injunction denial).

Indeed, it is hard to understand what Plaintiffs would have had the district court do once it concluded that it lacked jurisdiction. Continuing to exercise judicial power in that context "is, by very definition, for a court to act ultra vires." *Steel Co.*, 523 U.S. at 102. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the

court is that of announcing the fact and dismissing the cause." *Id.* at 94 (cleaned up). The district court correctly did just that. Plaintiffs identify no precedent requiring the district court to do anything but dismiss when it concludes that it lacks jurisdiction. This Court should not be the first to create a notice exception to a federal court's independent obligation to assess Article III jurisdiction—a constitutional limit on judicial power that is "inflexible and without exception." *Id.* at 95 (cleaned up).

Plaintiffs are not helped by their assertion that the district court later "conceded" in its ruling on Plaintiffs' motions for emergency injunction pending appeal that it should have provided notice. Ky. Br. 14; Assns. Br. 38. The district court did not concede that Sixth Circuit precedent required it to provide notice before dismissing for lack of standing. Mem. Op, R.66, PageID#2352-53. Rather, it considered Sixth Circuit "guidance" on the matter and concluded that the cases were contradictory and in tension with Supreme Court guidance. *Id.* "In light of this apparent conflict," the district court said that it would have been "best practices" to make notice of its intent "unmistakable." *Id.* But the court did not determine that Sixth Circuit case law *mandated* those best practices. *Id.* On the contrary, the court suggested that requiring a

district court to give notice before dismissing for lack of standing would conflict with the Federal Rules of Civil Procedure and the Supreme Court's direction that "when [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Id.* (quoting Fed. R. Civ. P. 12(h)(3) *and Steel Co.*, 523 U.S. at 94).

Finally, even if there were a notice requirement, Plaintiffs had notice that the district court would consider their standing. All plaintiffs are on constructive notice that upon filing a complaint, they must establish the court's jurisdiction as an indispensable part of their case. Plaintiffs here also had actual notice that they had to meet a higher standard to obtain a preliminary injunction and engaged in a hearing and extensive briefing regarding their standing as part of their efforts to establish their entitlement to a preliminary injunction. *See, e.g.*, PI Opp., R.31, PageID#981-84; Hearing Tr., R.45, PageID#2010-23. Plaintiffs therefore had ample notice; it would be illogical to say that Plaintiffs had notice that they would need to meet a heightened standing burden but were unaware that they might also need to meet a lower, threshold

standing burden. And as explained next, the district court applied the appropriate standard for evaluating Plaintiffs' standing.

### B. The district court applied the correct standard to dismiss at the pleading stage.

Because Plaintiffs filed their complaints simultaneously with motions for preliminary injunctions, two standards to evaluate Plaintiffs' standing are relevant here. The "substantial likelihood" standard applicable to a motion for preliminary injunction resembles the "heightened standard for evaluating a motion for summary judgment." *Food & Water Watch v. Vilsack*, 808 F.3d 912 (D.C. Cir. 2015). A less rigorous pleading standard is appropriate "for determining whether to dismiss the case in its entirety." *Id.* at 912-23. The district court correctly applied the latter standard, concluded that Plaintiffs failed to allege that they would suffer any non-speculative injury, and accordingly dismissed their complaints.

Plaintiffs emphasize that "an inability to establish a substantial likelihood of standing requires denial of the motion for preliminary injunction, not dismissal of the case." *Id.* at 913; Assns. Br. 37; Ky. Br. 17. True—if a court determines that plaintiffs failed to provide sufficient evidence to meet the heightened standard for a preliminary injunction,

then the court should deny the preliminary injunction request. But if the court further determines that plaintiffs failed to establish standing as a matter of law under the lower standard, the proper course is to dismiss immediately. *See Elec. Priv. Info. Ctr. v. United States Dep't of Com.*, 928 F.3d 95, 104 (D.C. Cir. 2019) (explaining different courses of action for different standing-related defects).

Here, the district court correctly concluded that Plaintiffs failed to establish standing as a matter of law under the lower pleading standard, and accordingly dismissed their complaints. *See* Order, R.51, PageID#2126-38. Kentucky seems to believe that the district court's use of the word "evidence" proves that the court applied an incorrect standard when dismissing its complaint. *See* Ky. Br. 16. *But see* Assns. Br. 27 (acknowledging that the district court "did not take evidentiary issue with any of the identified costs, but concluded that they were simply the wrong kind of costs and therefore legally insufficient"). When read as a whole, the order belies the notion that the district court applied a heightened standard when evaluating whether Kentucky established standing as a threshold matter. *See* Order, R.51, PageID#2135-38 (concluding that Kentucky failed to allege any certainly impending injury

in fact). But even reading the cited portions of the order in isolation, the district court was merely following the Supreme Court's mandate that "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. The degree of evidence required at the pleading stage is less: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* at 561. But as the district court correctly observed, Plaintiffs still must show at the pleading stage that they meet their burden of establishing standing through factual allegations of judicially cognizable injury.

The district court was permitted to—indeed, was required to—dismiss when it concluded that Plaintiffs' theories of standing were legally insufficient. Moreover, even if this Court disagrees with the grounds for the district court's dismissal, it must independently assess its own jurisdiction, which includes de novo review of the jurisdiction of the court below. *See Cleveland Surgi-Ctr. v. Jones*, 2 F.3d 686, 688 (6th Cir. 1993).

## II. Kentucky does not have standing.

Article III empowers federal courts to decide "Cases" and "Controversies." U.S. Const. Art. III, § 2. A case or controversy exists only if the plaintiff has standing—that is, only if the plaintiff has suffered or is about to suffer a concrete and particularized injury in fact that is fairly traceable to the challenged action and would likely be redressed by judicial relief. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). An Article III injury, in turn, requires the invasion of a "legally and judicially cognizable" interest, which means that the dispute must be of the sort "traditionally thought to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (cleaned up). Kentucky does not identify a cognizable injury, either in the form of an injury to its sovereignty or as to the indirect costs of the Rule.

### A. Kentucky has not established that it has standing to challenge the Rule in its sovereign capacity.

#### 1. Kentucky failed to make allegations to support its theory of injury to sovereignty.

Kentucky asserts that it has standing because the Rule "plausibly" affects its sovereign interest in regulating the waters within its borders. Ky. Br. 22. Kentucky's theory of sovereign injury is premised on a

fundamental misunderstanding of the Rule. As a legal matter, the Rule does not create federal jurisdiction over any new categories of water. Instead, the Rule largely codified the preexisting regulatory regime. Only a minuscule fraction of aquatic resources are even potentially newly covered by the Rule. Any possible change in jurisdictional status is not because the Rule covers any new categories of waterbodies, *see supra* pp. 9-11, but because of slight differences in the manner of implementing the relatively permanent and significant-nexus standards (standards that also existed in the pre-2015 regime), *see* Economic Analysis, R.31-5, PageID#1053. As a result, the Agencies did not predict any quantifiable changes in the jurisdictional status of waters because of the Rule. *Id.*

Even assuming that the slight differences in implementation may cause a change in the jurisdictional status of a water *somewhere*, Kentucky has not identified, as a factual matter, any particular water that is at imminent risk of being affected. The district court was not required to accept Kentucky's legal conclusion that the Rule will newly subject any of Kentucky's waters to Clean Water Act jurisdiction. *See Heinrich v. Waiting Angels Adoption Servs.*, 668 F.3d 393, 403 (6th Cir. 2012).

Kentucky made no *factual* assertions to support its claim to a sovereignty injury. *See* Order, R.51, PageID#2136. That Kentucky asserts a sovereign interest does not absolve it of the responsibility of any plaintiff to assert facts that show a certainly impending injury when filing a complaint. *See* Order, R.51, PageID#2135-36 (discussing *Kansas v. United States*, 249 F.3d 1213, 1218 (10th Cir. 2001) (alleging that tribal landowners intended to construct a gaming facility that would injure state sovereign claim to specific land at issue)).

The district court suggested that the standing analysis might be different had Kentucky made factual allegations that established that an injury was certainly impending. Order, R.51, PageID#2136. But Kentucky did not identify a single body of water that it believes will be affected. And it did not allege any facts about planned conduct that the Rule would disrupt. Without more specific allegations, the district court correctly concluded that the assertion "Kentucky is a wet state" does not suffice to show a certainly impending injury. *See* Ky. Br. 23; Order, R.51, PageID#2135-36. Nor was the district court required to wait for discovery so that Kentucky might uncover some affected aquatic activity. *Cf.* Ky. Br. 23. Even setting aside the fact that discovery would not be available

to Plaintiffs in this APA suit,[4] Kentucky's inability to identify a single water within its borders that is newly covered by the Rule is a fundamental failure to set forth sufficient facts. The district court correctly declined to assume facts to fill the fatal gaps in Kentucky's pleading. *See Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.").

**2. States do not have standing to litigate abstract questions of sovereignty against the federal government.**

Even if Kentucky had been correct about the Rule's effect, it is a foundational principle of standing doctrine that States suffer no free-standing Article III injury when the federal government allegedly impinges on areas of State authority. *See, e.g.*, *Georgia v. Stanton*, 6 Wall. 50, 77 (1868) (finding Georgia's challenge to Reconstruction did not

[4] APA review is based solely on the administrative record, so discovery would not be available to Plaintiffs on the merits of their claims. *See Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997); *see also Air Transp. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011). Even if Plaintiffs could propound discovery on the government in an effort to unearth evidence of their standing to sue the government, it is not evident how any document not already found in the administrative record would reveal to Kentucky a new water in the Commonwealth that it did not previously know was affected by the Rule.

present an Article III case or controversy because the State did not assert "rights of persons or property," but rather "the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State"); *Texas v. Interstate Com. Comm'n*, 258 U.S. 158, 162 (1922) (holding that the question whether authority lies with the federal government or "within the field reserved to the several states" is an "abstract question" that "does not present a case or controversy within the range of the judicial power as defined by the Constitution"); *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923) (holding that the State lacked an Article III injury based on the "naked contention that Congress has usurped the reserved powers of the several states").

That authority over water is a "core attribute of state sovereignty," Ky. Br. 20 (quoting *Kansas v. Nebraska*, 574 U.S. 445, 480 (2015)), does not convert Kentucky's abstract interest into a judicially cognizable injury. The Supreme Court has expressly refused to recognize the same injury that Kentucky asserts here. In *New Jersey v. Sargent*, as here, the State asserted a sovereign interest in its waterways and alleged that the challenged federal law exceeded federal authority and impinged on the state's authority over its waterways. 269 U.S. at 339. The Supreme Court

rejected that argument on Article III grounds, finding that "[p]lainly these allegations do not suffice as a basis for invoking an exercise of judicial power." *Id.* at 337. Like the district court in this case, the Supreme Court explained that it lacked the power to adjudicate the validity of federal law until the laws are "given or are about to be given some practical application and effect," for example once the federal law became "part of an accepted license, and after some right, privilege, immunity or duty asserted under [the law] becomes the subject of actual controversy." *Id.* at 339. Although New Jersey argued that the federal law "pass[ed] beyond the field of congressional power and invad[ed] that reserved to the State," the Court concluded that it lacked jurisdiction because the State made "no showing that it has determined on or is about to proceed with any definite project . . . [or is] now taking or about to take any definite action respecting waters bordering on or within the State." *Id. Sargent* controls and unequivocally rejects Kentucky's theory of sovereignty standing.

If anything, the State's allegations in *Sargent* were more specific than Kentucky's allegations here. In *Sargent*, the State asserted that it had intentions to use a specific canal that it had recently acquired for

power development and asserted that the challenged federal law would interfere with its planned development, jeopardize State policies respecting the conservation of potable water, "deprive the state of revenue from the leasing of its submerged lands and from the development and conservation of water resources," and "subject the state and its citizens to onerous restrictions and conditions." *Id.* at 338. By contrast, Kentucky asserts only that it has a general sovereign interest in the waterbodies within its borders. *See* Ky. Br. 20. It identifies no concrete plans related to those waters—indeed, not even a single particular waterbody—that have been affected by the Rule.

#### 3. Kentucky does not cite any cases supporting its theory of standing.

The Commonwealth does not cite a single case in which a court conferred standing in any analogous context. In *Kentucky v. Yellen*, the Court relied on a "tripartite" framework to assess whether the Commonwealth had standing to challenge a provision in a federal law that prohibited States from using a grant-in-aid statute's funds to "either directly or indirectly offset a reduction in the net tax revenue of such State." 54 F.4th 325, 330-31 (6th Cir. 2022) (quoting 42 U.S.C.

§ 802(c)(2)(A)); *id.* at 336. In that context, the Court asked whether the States:

> had established (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) that this course of conduct was arguably proscribed by the Offset Provision, and (3) that if the States should pursue such a course of conduct, there was a credible threat that Treasury would pursue a recoupment action.

*Id.* at 336.

*Yellen*'s framework does not help Kentucky here. Kentucky does not assert that it intends to engage in any conduct proscribed by the CWA under the definition set forth in the Rule. It does not assert that the definitional rule preempts any existing law, nor that Kentucky has any imminent plans to enact any contrary law or policy. *Cf.* 88 Fed. Reg. at 3141 (noting that the Rule "does not impose any new costs or other requirements on States, preempt State law, or limit States' policy discretion"). And Kentucky does not show that it faces any imminent threat of enforcement if it were to take some action contrary to the CWA under the Rule's definition. By contrast, in *Yellen*, the States asserted that they were constrained from enacting tax cuts because the challenged statute allowed the federal government to recoup funds used in violation of the statute's provisions. 54 F.4th at 331. Kentucky does not allege—

nor could it—that the Rule allows the federal government to recoup federal funding if Kentucky enacted a contrary policy. The Rule challenged here has no such provision; it simply sets forth the federal definition of "waters of the United States" under the CWA.

Ultimately, *Yellen* concluded that Kentucky's challenge in that case was mooted by a subsequent regulation that clarified there was no imminent threat of enforcement. *Id.* at 341. The Court explained: "we do not see how the sovereign-authority theory could support injunctive relief when the States identified no specific course of conduct they wish to pursue but against which Treasury will initiate an enforcement proceeding." *Id.* at 339. If the theory of sovereign standing that Kentucky advances in this case were correct, then the Court in *Yellen* should have maintained jurisdiction because the Commonwealth there asserted that a sovereign interest—its traditional taxing authority—was affected by the federal law, which even after the guidance, "narrow[ed] the range of permissible tax policies the States may enact." *Id.* at 363 (Nalbandian, J., concurring in part and dissenting in part). The *Yellen* majority recognized that a State does not show a concrete injury merely by identifying a sovereign interest affected by federal law; rather, it must

show a specific planned course of conduct that will lead to an imminent threat of enforcement (or other recognized concrete injury). *Id.* at 339.

*Kentucky v. Biden*, in which States challenged the federal-contractor vaccine mandate, likewise does not support the Commonwealth's standing argument. 23 F.4th 585 (6th Cir. 2022). As a preliminary matter, Kentucky quotes from the Court's analysis of prudential standing, not Article III standing. *Id.* at 601. When evaluating constitutional standing, the Court listed the sovereign interest in regulating public health among the showings that the State plaintiffs made that, taken together, sufficed to convince the court that the States were likely to show standing. *Id.* at 602. But the Court did not hold that asserting an invasion of a sovereign interest *on its own* could establish standing. *Id.* Such a holding would contradict centuries of Supreme Court precedent. *See supra* Part II.A.2; *infra* Part II.A.4.

Rather, in *Biden* the States also asserted standing as contractors; that is, they asserted standing to protect their own proprietary interests and their States' economies. *Id.* at 601-602. Because the States established that the vaccine mandate challenged in that case threatened existing federal contracts held both by the State and its residents, the

Court concluded that the States likely established standing. *Id.* Those facts are far from Kentucky's allegations here.

Kentucky cannot overcome the obstacles to standing by invoking the "special solicitude" to States referred to in *Massachusetts v. EPA*, 549 U.S. 497, 510 (2007). Even assuming that the principle still applies, *but see United States v. Texas*, 599 U.S. 670, 689 (2023) (Gorsuch, J., concurring in the judgment) (suggesting that "lower courts should just leave [the idea of special solicitude] on the shelf in future [cases]"), it is of no help to Kentucky here. *Massachusetts* does not alter the concrete-injury requirement. Indeed, *Massachusetts*, turned on a classic concrete injury: the State's interest as a coastal property owner in preventing the destruction of its own property. 549 U.S. at 522-23; *see also Delaware Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("This special solicitude does not eliminate the state petitioner's obligation to establish a concrete injury"). Kentucky identifies no specific property interest that the Rule imminently harms.

**4. History and tradition refute Kentucky's theory of abstract sovereign standing.**

A "telling indication of the severe constitutional problem" with the Commonwealth's standing theory "is the lack of historical precedent"

supporting it. *Texas*, 599 U.S. at 677. Constitutional law would have developed quite differently if States could have sued the federal government any time federal policies affected their sovereign interests in the abstract. Maryland could have sued the Bank of the United States to enjoin its operations. *Cf. McCulloch v. Maryland*, 4 Wheat. 316 (1819) (considering Maryland's tax on the national bank). New York could have sued the Monroe Administration to enjoin issuance of federal steamboat licenses. *Cf. Gibbons v. Ogden*, 9 Wheat. 1 (1824) (considering New York's law granting exclusive license to steamboat navigation in State waters). Georgia could have sued the Jackson Administration to contest federal assertions of power over Indian lands. *Cf. Worcester v. Georgia*, 6 Pet. 515 (1832) (considering Georgia's law prohibiting non-Cherokees from living on Cherokee land without a state license). Georgia also could have sued President Andrew Johnson's Administration to challenge Reconstruction. *But see Georgia v. Stanton*, 6 Wall. 50 (1868) (dismissing bill for want of jurisdiction).

The absence from the historical record of suits against the federal government over States' abstract policy interests confirms that such disputes were not traditionally regarded as "cases" or "controversies"

capable of resolution by the Judiciary. *See Raines*, 521 U.S. at 826 (rejecting a theory of legislative standing because "[i]t is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought"). Kentucky's case, premised on the same sort of abstract policy dispute, is no different.

**B. The indirect costs of the Rule do not give Kentucky standing.**

Kentucky asserts that the Rule imposes "compliance costs" that give Kentucky standing. But the Rule does not impose any substantive requirements or proscribe Kentucky's conduct. *See* 88 Fed. Reg. at 3141 (noting that the Rule "does not impose any new costs or other requirements on States"). Primarily, Kentucky relies on the money it says it spends as a CWA co-regulator.[5] Those costs are not new to

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[5] Kentucky also references "start-up costs," in other words, the threshold costs shared by all entities to determine *whether* a rule has any effects. But Kentucky does not point to any precedent treating as an Article III injury the initial costs of familiarizing oneself with a regulation and its potential implications. And the "start-up costs" to understand a new rule are (at most) a past cost. Although "a completed injury may give a plaintiff the right to seek damages, it does not alone give the plaintiff the right to seek an injunction." *Ass'n of Am. Physicians*, 13 F.4th at 540. Damages are not available in this suit, *see* 5 U.S.C. § 702, and Kentucky does not explain why the remedy for money spent to understand the new

Kentucky, nor are they caused by the Rule. And States may not sue the federal government based on such indirect, derivative effects.

A State may sue the federal government when the State is an object of the challenged action—for example, when the challenged action directs the State to act or to refrain from acting, determines how much federal funding it receives, or deprives it of a legal right. *See Arizona v. Biden*, 40 F.4th 375, 383, 386 (6th Cir. 2022). But a State may not sue the federal government simply because a federal policy has incidental effects on the State. *Id.* Federal policies routinely have incidental effects on States' expenditures. *Id.* Yet such effects have not been viewed as judicially cognizable injuries. *Id.* Kentucky's contrary view would allow any State to sue the federal government about virtually any policy—sharply undermining Article III's requirements and the separation-of-powers principles they serve. Virtually any federal action, from prosecuting crime to imposing taxes to managing federal property, could be said to

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Rule would be to enjoin the entire Rule. Indeed, that relief would only seem to exacerbate the problem as Kentucky would then need to familiarize itself with a separate (though substantially similar) regime in the form of the pre-2015 regime as filtered through the *Sackett* decision.

have some incidental effect on state finances. If such effects satisfy Article III, "what limits on state standing remain?" *Id.*

**1. The Supreme Court has repeatedly rejected States' claims of standing based on the indirect costs of federal law.**

A State does not have standing simply because a federal law generates indirect effects on its spending. After all, "in our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending." *See Texas*, 599 U.S. at 690 n.3. Thus, the Supreme Court has repeatedly held that States do not have standing based on the indirect costs of federal policies. In *Florida v. Mellon*, the Supreme Court held that Florida lacked standing to challenge the constitutionality of a federal inheritance tax. 273 U.S. 12, 18 (1927). Florida argued that the tax would cause the State financial harm by prompting the "withdrawal from Florida of several million dollars per annum." *Id.* at 16. But the Court rejected that theory, explaining that Florida was required to show a "direct injury" and that any harm stemming from the tax was, "at most, only remote and indirect." *Id.* at 18.

The Supreme Court has recently reaffirmed those principles. In *United States v. Texas*, the Supreme Court acknowledged that "States would incur costs as a result of the [challenged federal guidelines]." 599 U.S. at 675. Those costs were allegedly in the "hundreds of millions of dollars." *Id.* at 717 (Alito, J., dissenting). But those costs did not constitute a judicially cognizable injury because they were not a direct effect of the federal policy. *See id.* at 690 n.3.

So too in *Haaland v. Brackeen*, where a State asserted a pocketbook injury from complying with the Indian Child Welfare Act's child-placement preferences. 599 U.S. 255, 296 (2023). The State asserted that the challenged requirements made its child-custody proceedings more expensive by requiring it to provide specific types of notice, hire expert witnesses, and maintain records of its compliance with child-placement preferences—all totaling hundreds of thousands of dollars annually. *See* Reply Brief for Petitioner the State of Texas, *Haaland v. Brackeen*, 2022 WL 5305089 (Oct. 3, 2022) (Texas *Brackeen* Reply Brief), at *14. Despite the substantial indirect costs of compliance with the child-placement preference, the Court determined that those pocketbook injuries were not fairly traceable to the child-placement preference because the State's

costs were only exacerbated by the child-placement preference, not directly caused by it. *Brackeen*, 599 U.S. at 296. Ultimately, the State's obligations arose from separate legal provisions, and the State did not have standing based on the increased cost of performing those duties. *Id.*

*California v. Texas* reflects more of the same: The Supreme Court there rejected States' standing to challenge a federal action that exacerbated independently imposed expenditures. *See* 141 S. Ct. 2104, 2119-20 (2021) (rejecting States' claims that the minimum-essential-coverage provision caused them to incur additional costs of, among other things, "providing beneficiaries of state health plans with information about their health insurance coverage" and increased Medicaid expenditures because those expenditures were caused in the first instance by independent provisions).

Those well-established principles apply here. Kentucky does not assert that the Rule itself requires the State to enact water-quality standards, prepare a biennial water-quality report describing water quality of all navigable waters in state, help issue CWA certifications, or approve discharge-permit applications. *Cf.* Ky. Br. 21. Any such obligations, where they apply, flow from the CWA itself, not the

challenged Rule. Kentucky asserts only that its preexisting obligations might become more expensive because of the new regulatory definition. *Id.*

Kentucky's claim of pocketbook injury is also far weaker than the still-insufficient injuries States asserted in the above cases. For example, in *Brackeen*, the State argued that if it did not comply with the challenged child-placement preferences, it stood to lose Social Security funding. *See* Texas *Brackeen* Reply Brief at *14. Although Kentucky voluntarily administers various CWA programs, such as the discharge-permit program, it would suffer no financial penalty if it declined to do so. *See* 33 U.S.C. § 1344(g). And compared to the increased expenditures generated by the child-placement preference, Kentucky's asserted injury layers speculation on speculation. Alleging harm from increased permit applications, for example, depends on several contingencies that Kentucky has not addressed: 1) additional waters being jurisdictional in Kentucky, 2) more individuals deciding to apply for permits, 3) the extra workload being so large that it outpaces the office's current capacity, and 4) Kentucky hiring additional personnel to handle new permit requests. So many contingencies in the causal chain of Kentucky's purported injury

severely undermine any claim of imminent harm. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (concluding that plaintiffs lacked standing where claimed injury rested on a "speculative chain of possibilities"); *see also Lujan*, 504 U.S. at 562 (no standing when theory of injury "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict").

**2. Kentucky does not cite any cases supporting its indirect-costs theory of standing.**

Kentucky finds no support in *Biden* or *Yellen* because both cases illustrate State standing based on *direct* compliance costs. In *Biden*, the challenged Rule imposed a new requirement that States document tens of millions of workers' vaccination status at the peril of losing government contracts. 23 F.4th 585. In *Yellen*, the challenged regulation included reporting rules and directly prohibited the States from offsetting tax cuts with federal funds. 54 F.4th at 335-38. In those cases, the costs to States flowed directly from *new* obligations created by the challenged regulation. Here, by contrast, Kentucky asserts only that the scope of its *existing* obligations might change as an indirect effect of the federal definition. Such "indirect fiscal burdens" are a "humdrum

feature" of federal policies, not a basis for standing. *Arizona*, 40 F.4th at 386. To say otherwise would "make a mockery . . . of the constitutional requirement of case or controversy." *Id.* (quoting Alexander M. Bickel, *The Voting Rights Cases*, 1966 Sup. Ct. Rev. 79, 89 (1966)).

#### 3. History and tradition confirm that States lack standing to sue over the indirect costs of federal laws.

Our Nation's history and tradition confirm that the peripheral effects of federal laws do not qualify as "legally and judicially cognizable" injuries. *Raines*, 521 U.S. at 819. Consider how Jeffersonian States reacted when a Federalist Congress adopted the Alien and Sedition Acts in 1798. Virginia and Kentucky adopted resolutions condemning the laws as unconstitutional. THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 554-555, 566-570 (Jonathan Elliot ed., 1836). Virginia specifically complained that the Acts' restrictions on immigration harmed the State, because its "situation render[ed] the easy admission of artisans and laborers an interest of vast importance." *Id.* at 557. Yet neither State sued the Adams Administration to enjoin it from executing the Acts. Or consider how Federalist States responded to President Jefferson's embargo of 1807.

Massachusetts denounced it as "unjust, oppressive, and unconstitutional" and encouraged affected citizens to "apply for redress" in "the judicial courts." STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES 34 (Herman Ames ed., 1911). Connecticut and Delaware declared the embargo "incompatible with the constitution" and asserted that it had "brought distress and ruin" for their citizens. *Id.* at 37, 41. Yet none of those States sued the Jefferson Administration themselves.

Or consider Massachusetts' suit against the Secretary of Defense to enjoin the Vietnam War. *Massachusetts v. Laird*, 400 U.S. 886 (1970). The Supreme Court summarily rejected the suit, *id.* at 886, but Justice Douglas argued in dissent that the State had standing, *id.* at 887-891. On Kentucky's theory, the Court was wrong, and Justice Douglas was right. Surely the Vietnam War caused at least one dollar in indirect economic harm to Massachusetts—for example, because drafted Bay Staters would earn less taxable income while away or be entitled to veterans' benefits after returning. But our Nation's history rejects the notion that States may sue to vindicate their interest in being free from the peripheral effects of federal policies. A contrary holding would inject the federal

courts into all manner of policy controversies at the behest of States seeking to secure by court order what they could not obtain through the political process. *See Arizona*, 40 F.4th at 386.

* * *

This Court should affirm the dismissal of Kentucky's complaint for lack of standing.

**III. The Associations do not have standing.**

An organization can show standing either on its own behalf or as its members' representative. *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 332-33 (6th Cir. 2002). The Associations assert only "associational standing" on behalf of their members, which means they must show that, among other things, their "members would otherwise have standing to sue in their own right." *Ass'n of Am. Physicians*, 13 F.4th at 537. *But cf. id.* at 537-42 (opining that the test for associational standing is "not obviously reconcilable" with more recent Supreme Court standing jurisprudence). The Associations fail that test because none has "identif[ied] a member who has suffered (or is about to suffer) a concrete and particularized injury from the [2023 Rule]." *Id.* at 543. This Court therefore should affirm the dismissal of their complaint.

### A. The two Associations that failed to identify an individual member lack standing.

Two of the Associations—the Portland Cement Association and the Home Builders' Association of Kentucky—identified no individual member even allegedly harmed by the 2023 Rule. Baer Decl., R.17-1, PageID#434-38; Sanford Decl., R.17-1, PageID#470-72. Those Associations failed to carry their burden "to make specific allegations establishing that at least one *identified* member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added).

The Associations do not argue that the two Associations that failed to identify a member have standing. Rather they assert that the two Associations need not show standing because only one Association must demonstrate standing where several associations seek the same relief. Assns. Br. 23 n.11. *But see Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008) ("Our determination of standing is both plaintiff- and provision-specific. That one plaintiff has standing to assert a particular claim does not mean that all of them do."); *see also id.* at 615-18 (considering individually each association's standing to challenge

statutory provisions and concluding that some associations lacked standing).

The proposition that the Court need not address academic questions of standing does not help the Associations here, because it matters which (if any) of them have standing, as the relief afforded to them need not be the same. "A valid Article III remedy operates with respect to specific parties, not with respect to a law in the abstract." *Arizona v. Biden*, 31 F.4th 469, 483 (6th Cir. 2022) (Sutton, C.J., concurring) (cleaned up). And courts "should not issue relief that extends further than necessary to remedy the plaintiff's injury." *Williams v. Skrmetti*, 83 F.4th 460, 490 (6th Cir. 2023) (cleaned up). Each Association must seek relief for *its* members, not non-members or the members of other associations. *Cf. Warth v. Seldin*, 422 U.S. 490, 515 (1975) (reasoning that the court can "suppose[ ]" that an injunction obtained by an association "will inure to the benefit of *those members of the association* actually injured" (emphasis added)). At the motions stage, preliminary injunctive relief was tailored to the parties. Order, App.R.24 at 7; *see also id.* at 2 (describing administrative stay "enjoining enforcement of the Final Rule within the Commonwealth of Kentucky

and against the Associations and their members"). The Associations do not suggest that relief would, or should, be dispensed in gross at the merits stage either.

The Associations that failed to allege that even one member has standing should not be allowed to obtain injunctive relief for their members by bootstrapping onto the allegations of another association's members. At a minimum, this Court should affirm the dismissal from this case of the Associations that failed to allege that any individual member had standing.

### B. None of the Associations identify any certainly impending injury.

The remaining Associations similarly failed to establish standing. Because the Associations seek declaratory and injunctive relief, they must allege a future injury, not merely a past injury. *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). That future injury must not be "hypothetical future harm"—rather, "threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 568 U.S. at 410, 416. The Associations assert only hypothetical future harm and fail to allege any certainly impending injury. They therefore lack standing.

Although the Associations alleged that some members had projects that implicated the CWA, they did not explain how they expect the challenged Rule to affect those projects. To the contrary, the Associations affirmatively expressed doubt about whether the Rule would affect their projects or increase costs at all. *See, e.g.*, Stout Decl., R.17-1, PageID#476 ("it is unclear whether the parameters affected by permitting for [projects it is creating bids for] will change"). Without any allegation that the Rule affected planned projects, the district court could not conclude that an injury was certainly impending or understand how any future injury would be traceable to the Rule. *See* Order, R.51, PageID#2130 ("The Court has 'no idea whether or when' the Rule will change how the CWA applies to any particular member because [the Associations] do not identify any specific water feature or related project and explain how the Rule will affect it." (quoting *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163 (1967))). And the district court was "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-56.

The Associations claim that their standing is self-evident because their members have projects involving waters. Assns. Br. 25-26. It was

their burden, however, to allege facts sufficient to establish standing. *See Lujan*, 504 U.S. at 561. Moreover, even if the district court could assume that having projects with waters makes it reasonably likely that the Rule will affect those projects, asserting only an "objectively reasonable likelihood" of injury is "inconsistent with [the] requirement that threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 568 U.S. at 410 (cleaned up). To be sure, the Associations repeatedly assert that the CWA affects their plans, but the Associations do not argue that the CWA itself is unlawful. They have challenged the 2023 Rule, and they must show that their injuries are traceable to the Rule, not to other statutory or regulatory burdens. *See, e.g.*, *Brackeen*, 599 U.S. at 296. For that reason, it is insufficient for the Associations to assert that their members "have ongoing or planned activities that would impact waters or wetlands." Assns. Br. 25-26.

The Associations also argue that they suffer an injury because their members must limit the use of their properties and may need to submit to a permitting process. Assns. Br. 31. But again, the Associations do not trace those asserted injuries to the Rule. Under the CWA, discharging a pollutant from a point source into waters of the United States is unlawful

without a permit. *See* 33 U.S.C. § 1311. That prohibition may cause persons to assess whether certain waters on their property are jurisdictional or seek permits if they intend to discharge pollutants into jurisdictional waters. Nothing in the Rule changes that structure, which has been in place for the last half-century since the CWA's enactment.

Indeed, the Associations' declarants assert that they were injured by jurisdictional assessment and permitting processes *before* the Rule was promulgated. Mitchell Decl., R.17-1, PageID#455-56 (asserting that Logan has spent time and money over the past 8 years "on consultants and permitting fees to assess the jurisdictional status of its property and apply for Nationwide permits" and that it may continue to incur those costs after the Rule); O'Bryan Decl., R.17-1, PageID#460-61 (asserting that his companies were "required to hire attorneys to defend and advise [them] concerning" the jurisdictional bounds of the CWA and were required to obtain permits before the issuance of the Rule and may continue to be required to do so after the Rule). The Associations do not identify any certainly impending injury that is traceable to the Rule, and the standing analysis should end there.

Having failed to assert that their members will suffer a certainly impending injury traceable to the Rule, the Associations instead argue, for various reasons, that they need not make such a showing. The Associations' arguments that they should be absolved of Article III's requirements are unpersuasive.

First, the Associations claim per se standing as a class of regulated entities. The Associations cite the refrain that when "the plaintiff is himself an object of the action (or foregone action) at issue . . . there is ordinarily little question that the action or inaction has caused him injury." *Lujan*, 504 U.S. at 561-62; Assns. Br. 24-25. The Court did not thereby allow regulated entities to opt out of the standing burden it had just described. Instead, the Court was contrasting how, as it immediately continued, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Lujan*, 504 U.S. at 562.

Even if the Associations are properly considered the object of a rule that defines which waterbodies are protected under federal law, the Associations cite no case that permits the objects of a regulation to skip over the ordinary standing showing. In the cases that the Associations

cite, the courts do not end their inquiry at a conclusion that plaintiffs are the objects of the regulation. Instead, the analysis begins with the conclusion that plaintiffs are the object of the regulation and therefore need not meet a heightened burden to show standing. *See Grand River Enters. Six Nations v. Boughton*, 988 F.3d 114, 121 (2d Cir. 2021); *Contender Farms v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015). Then, the courts proceed with the ordinary injury-causation-redressability inquiry. The standing of regulated parties is often self-evident because regulated entities usually have no trouble demonstrating the elements of standing, not because they are excused from doing so. The facts of the cases that the Associations cite bear that out. *See Grand River*, 988 F.3d at 121 (tobacco companies incurred costs in complying with challenged requirements to sell cigarettes in the State); *Yellen*, 54 F.4th at 342 (State incurred costs to comply with the Act's prohibition on States indirectly offsetting tax cuts with the Act's funds).

Second, the Associations assert that they need not identify a certainly impending injury because they must undertake compliance efforts to stave off "possible (but not necessarily imminent) enforcement." Assns. Br. 24. That argument is squarely foreclosed by Supreme Court

precedent. In *Clapper*, plaintiffs asserted that they faced an "objectively reasonable likelihood" of future injury. *Clapper*, 568 U.S. at 410; *cf.* Assns. Br. 24 ("possible" enforcement). And, like the Associations here, they asserted that they incurred costs to avoid likely future injury. The Supreme Court rejected that argument, holding:

> Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.

*Clapper*, 568 U.S. at 416. A plaintiff cannot claim standing based on compliance costs incurred to avoid even an "objectively reasonable likelihood" of future injury, much less the merely "possible" injury that the Associations here allege. *Id.* at 410. And Plaintiffs do not, and cannot, claim a credible threat of enforcement under *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). Assns. Br. 33.

Supreme Court precedent notwithstanding, the Associations assert that Sixth Circuit law permits standing premised on the costs to stave off merely possible enforcement. Assns. Br. 24-25 (quoting *Yellen*, 54 F.4th

at 343 n.14). It does not. The full sentence that the Associations selectively quote reads:

> Supreme Court doctrine, we note, provides that a federal court has jurisdiction over a regulated entity's pre-enforcement challenge even when no enforcement action is imminent *if the enforcement action's remoteness stems from the regulated entity's own involuntary efforts to comply with the contested proscription.*

*Yellen*, 54 F.4th at 343 n.14 (emphasis added). In other words, plaintiffs still must show that enforcement *would have been* imminent *but for* the measures that they have taken to comply.

That is not what the Associations have alleged here. The Associations do not allege that their members involuntarily complied to prevent imminent enforcement. Instead, they assert that, although they are not yet sure whether or how the Rule will affect their members, enforcement is *possible* and therefore the costs to stave off "possible (but not necessarily imminent) enforcement" are judicially cognizable. Assns. Br. 24. That is exactly the theory of injury that the Supreme Court rejected in *Clapper*, and it likewise finds no support in Sixth Circuit precedent.[6]

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[6] As for the Associations' flyspecking of the specific authorities that the district court cited for settled propositions, *see* Assns. Br. 33-35, the cases

Finally, the Associations argue that other courts have allowed challenges to this Rule and other rules defining "waters of the United States" to proceed. Assns. Br. 31-33. Standing is evaluated case-by-case, and the district court correctly assessed the Associations' standing on the allegations that they presented. *See Allen v. Wright*, 468 U.S. 737, 752 (1984). The Associations' present challenge is different from other litigants' challenges to past rules because the Associations have not established how the 2023 Rule, which largely codifies the pre-2015 regime, concretely affects them. It is irrelevant that other courts have held on different records that plaintiffs successfully alleged injuries stemming from this or other rules defining "waters of the United States." Therefore, the Associations' concern that the district court's reasoning would bar other challenges has no basis in the decision below, which

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and the district court's analysis speak for themselves. *See* Order, R.51, PageID# 2124-25 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), for the uncontroversial proposition that plaintiffs must identify a certainly impending injury); *id.* at PageID#2125-2129 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), to evaluate the degree of certainty necessary in the pre-enforcement context, where "standing and ripeness issues boil down to the same question: whether the threatened injury is certainly impending" (cleaned up)); *id.* at PageID# 2132-33 (citing *Commonwealth v. Biden*, 57 F.4th 545 (6th Cir. 2023), because "[a]t the preliminary injunction hearing, the private-sector plaintiffs indicated that [it is] their best case on standing").

explains in detail why that is not the case. *See* 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. But at this point, the plaintiffs allege only uncertain concerns about the Rule's impact."). That the Associations here failed to allege that they have been injured does not remotely mean that "no private entity could ever bring a facial pre-enforcement challenge to a rule defining 'waters of the United States.'" Assns. Br. 32.

### C. The Associations do not have standing based on one member of one Association's anticipated need for a new jurisdictional determination from the Corps.

The Associations also assert standing based on the cost to one member of the Georgia Chamber of Commerce[7] of potentially needing to

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[7] That member is the Savannah Economic Development Authority (SEDA). Tollison Decl., R.17-1, PageID#478. SEDA is a public authority created under the Constitution of the State of Georgia. *Id.* The State of Georgia brought a lawsuit challenging the 2023 Rule in the District of North Dakota before the Associations' complaint was filed in this case. *Compare* Compl., *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 16, 2023) ECF No. 1, *with* Assns' Compl., *Kentucky Chamber of Commerce v. EPA*, No. 3:23-cv-00008 (E.D. Ky. Feb. 22, 2023) ECF No. 1. The Associations do not explain what would permit SEDA to sue "in [its] own right," *Ass'n of Am. Physicians*, 13 F.4th at 537, where its parent government previously filed a separate suit in a different federal court. *Cf. Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 479 (6th Cir. 2004) ("a

obtain a new jurisdictional determination—a free service provided by the Corps. Assns. Br. 36. That allegation cannot possibly confer standing on an Association other than the Georgia Chamber of Commerce. *See supra*, Part III.A. It does not confer standing on the Georgia Chamber and all of its "nearly 50,000 members" either. *See* Perry Decl., R.17-1, PageID#464.

The Rule does not *require* anyone to obtain a new jurisdictional determination. The Rule also "does not invalidate [jurisdictional determinations] issued under prior definitions." 88 Fed. Reg. at 3136. In the preamble to the 2023 Rule, the Agencies simply observed that, because courts had vacated the 2020 Rule in 2021, jurisdictional determinations issued under the vacated rule "may not reliably state" the presence or absence of waters of the United States on a particular parcel. *Id.*; *see also Sackett*, 598 U.S. at 668 (recognizing that the 2020 Rule "did not last" due to vacatur). Therefore, the Agencies cautioned that they would be unable to rely on those determinations to issue new permits. 88 Fed. Reg. at 3136. But the Rule did not invalidate existing jurisdictional determinations. If one Association's member desires a new jurisdictional determination for some future project or in order to obtain a new permit,

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plaintiff must join all claims arising from the same set of facts in a single proceeding and cannot split them across multiple fora").

any costs are traceable to the courts' vacatur of the 2020 rule, not to the Agencies' issuance of the 2023 Rule.

**IV. This appeal is moot.**

Because the regulations that Plaintiffs challenged have been amended by the Conforming Rule, determining whether Plaintiffs had standing to seek vacatur of the former regulations would be an advisory opinion. This appeal is therefore moot. *See Resurrection Sch. v. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (en banc).

The Court's mootness analysis begins with "the familiar proposition that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (cleaned up). Deciding whether Plaintiffs have standing to challenge superseded regulations cannot affect Plaintiffs' rights because regardless of the answer to that question, a court cannot vacate regulations that no longer exist. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

The Associations appear to argue that the appeal is not moot because this Court can grant effective relief by "vacating the dismissal and remanding for further proceedings." Assns. Br. 20. That is not the

standard for effective relief. If an appellate court's ability to reverse could enliven an otherwise moot dispute, no case would ever become moot on appeal.

Plaintiffs also argue that the appeal is not moot because aspects of the 2023 Rule live on following the amendments in the Conforming Rule. Assns. Br. 20, Ky. Br. 20. It is true that some elements of the former regulations have carried through into the amended regulations. But that only highlights that the proper course would be for Plaintiffs to challenge the amended regulations, not attempt to resuscitate their challenge against old regulations that are no longer in effect anywhere in the country. In the other cases in which parties challenged the 2023 Rule, plaintiffs have since filed amended complaints to challenge the regulations as amended by the Conforming Rule. *See* 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.

Plaintiffs do not assert that the district court's without-prejudice dismissal bars them from filing a suit to challenge the current regulations as amended by the Conforming Rule—they assert only that

they cannot do so by amending their original complaint. Ky. Br. 12; Assns. Br. 19-20. But Plaintiffs need not revive their complaints challenging the old regulations to seek relief in a new suit over the current regulations. And reinstating Plaintiffs' action would not independently afford them any relief because it would be legally meaningless for the district court to enjoin the application of stale regulations. *Cf. Ozinga v. Price*, 855 F.3d 730, 735 (7th Cir. 2017) ("Any injunction directed to the prior regulations . . . necessarily would be meaningless, as those regulations no longer exist."). Therefore, deciding whether Plaintiffs had standing, at one point in time, to challenge prior regulations is a textbook example of an opinion with no real-world application.

## CONCLUSION

This Court should affirm the dismissal of Plaintiffs' complaints for lack of standing or remand with instructions to dismiss the cases as moot.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

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s/ *Arielle Mourrain Jeffries*
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## CERTIFICATE OF SERVICE

I certify that on February 16, 2024, 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/ *Arielle Mourrain Jeffries*
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*Counsel for Appellees*

## ADDENDUM

Federal Appellees designate the following district court documents as relevant to this appeal:

1. Kentucky's complaint, R.1, PageID#1-40;
2. Associations' complaint, R.1 (No. 3:23-cv-00008-GFVT), PageID#1-40;
3. Kentucky's motion for a preliminary injunction, R.10, PageID#372-401;
4. Declaration of John G. Horne, II, R.10-1, PageID#404-408;
5. Associations' motion for a preliminary injunction, R.17, PageID#427-30;
6. Associations' declarations, R.17-1, PageID#431-91;
7. Memorandum in support of Associations' motion for preliminary injunction, R.18, PageID# 636–62;
8. Agencies' opposition to motions for preliminary injunction, R.31, PageID#948-1013;
9. *Rapanos* guidance, R.31-2, PageID#1020-32.
10. Economic analysis excerpts, R.31-5, PageID#1042-53;
11. Hearing transcript, R.45, PageID#1989-2044;

12. Opinion and order denying motions for preliminary injunction, R.51, PageID#2120-41;
13. Kentucky's emergency motion for an injunction pending appeal, R.52, PageID#2142-54;
14. Associations' emergency motion for an injunction pending appeal, R.53, PageID#2158–72;
15. Agencies' combined opposition to emergency motions for injunction pending appeal, R.57, PageID#2227-57;
16. Ky Notice of Appeal, R.60, PageID#2324-26;
17. Associations' Notice of Appeal, R.61, PageID#2327; and
18. Memorandum Opinion and Order denying Plaintiffs' motions for emergency injunction pending appeal, R.66, PageID#2342-54.