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

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

COMMONWEALTH OF KENTUCKY,
Plaintiff,

and

KENTUCKY CHAMBER OF COMMERCE, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Kentucky
Case No. 3:23-cv-00007

# REPLY BRIEF OF APPELLANT ASSOCIATIONS

Matthew Z. Leopold
Kerry L. McGrath
Erica N. Peterson
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
mleopold@HuntonAK.com
kmcgrath@HuntonAK.com
epeterson@HuntonAK.com

Elbert Lin
Hunton Andrews Kurth LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
(804) 788-8200
elin@HuntonAK.com

*Counsel for Appellant Associations*

Additional counsel listed on next page

Charles E. English, Jr. (“Buzz”)
Sarah P. Jarboe
LaJuana Wilcher
English, Lucas, Priest & Owsley, LLP
1101 College Street; P.O. Box 770
Bowling Green, KY 42102-0770
(270) 781-6500
benglish@elpolaw.com
sjarboe@elpolaw.com
lwilcher@elpolaw.com

*Counsel for Appellant Associations Kentucky Chamber of Commerce, Chamber of Commerce of the United States of America, Associated General Contractors of Kentucky, Inc., Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce*

Andrew R. Varcoe
Stephanie A. Maloney
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
avarcoe@USChamber.com
smaloney@USChamber.com

*Counsel for Appellant Chamber of Commerce of the United States of America*

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## INTRODUCTION

The district court's decision dismissing this case was wrong and should be vacated. For starters, the district court erred in the preliminary-injunction standing analysis on which it based its decision to dismiss. Before this Court entered its injunction pending appeal, Appellant Associations' members had to incur costs to stay in compliance with the expanded regulatory regime ushered in by the Final Rule[1] and thereby stave off the prospect of enforcement action against them. Those are the kind of compliance costs this Court recognized in *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022), as sufficient for standing. But even if its standing analysis had been correct, the district court would still have been wrong to dismiss the case. In such a scenario, the proper remedy would have been "'denial of the motion for preliminary injunction, not dismissal of the case.'" *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 385–86 (6th Cir. 2020) (citation omitted).

The responses of Appellee Agencies ("the Agencies") to Appellant Associations merely confirm all of this. As to the district court's standing analysis, the Agencies attack strawmen that appear nowhere in Appellants' brief, ignore numerous arguments about how the Clean Water Act ("CWA") and Final Rule operate *immediately* on landowners, misapprehend the evidence in the record, and

[1] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023) ("Final Rule").

misread this Court's decision in *Yellen*. And the main legal authority they offer in place of *Yellen*—the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)—is inapposite. Unlike here and in *Yellen*, the plaintiffs in *Clapper* were not incurring costs to stay in compliance and thereby stave off possible enforcement *against them*. Instead, they were voluntarily incurring costs out of fear that they might be indirectly harmed by government action *against others*.

The Agencies also have no persuasive response to Appellants' contention that if the district court were correct, no private entity could ever bring a facial pre-enforcement challenge to a rule defining "waters of the United States." The Agencies simply say that this is "not remotely" true. Agencies Br. 58. But that is the necessary consequence of the district court's core premise—which is that Appellant Associations had not been harmed because "[t]he Rule has not yet been enforced" with respect to a specific water. Op. & Order Denying Mot. for Prelim. Inj. & Dismissing Without Prejudice ("Order"), RE 51, PageID# 2120.

The Agencies fare no better at defending the district court's decision—assuming it was correct on standing—to dismiss Appellants' case instead of denying the preliminary injunction. They argue that the district court *did* apply the "lower pleading standard," for which "'allegations . . . may suffice,'" and therefore was right to dismiss the case. Agencies Br. 23–24 (citation omitted). But that misstates the decision. The district court expressly refused to evaluate standing as a "'mere

pleading requirement[,]'" and instead insisted that as "[m]ovants" for a preliminary injunction, Appellant Associations "must substantiate their claimed injury with evidence." Order, RE 51, PageID# 2126 (citation omitted). It never once asked whether there might have been enough to survive dismissal, even if there wasn't enough for a preliminary injunction.

Finally, the Agencies are wrong in arguing that the Amended Rule[2]—which made changes to the Final Rule after *Sackett v. EPA*, 598 U.S. 651 (2023) ("*Sackett II*")—has mooted this appeal. They assert that, as a result of the Amended Rule, the Final Rule is "no longer in effect anywhere in the country." Agencies Br. 61. The preamble to the Amended Rule itself, however, makes clear that it did *not* repeal the Final Rule but simply revised some of the Final Rule's language. In fact, the Agencies are saying exactly that to the public *outside this litigation*: EPA's website represents that they "are implementing" the Final Rule "as amended."[3]

## ARGUMENT

### I. The decision dismissing this case was wrong and should be vacated.

As Appellant Associations have explained (Br. 22–36), there are multiple independent bases for vacating the decision below. Foremost, as this Court already

[2] Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964 (Sept. 8, 2023) ("Amended Rule").

[3] U.S. EPA, *Current Implementation of Waters of the United States*, https://www.epa.gov/wotus/current-implementation-waters-united-states (last visited Mar. 15, 2024) ("EPA, *Current Implementation of WOTUS*").

agreed in granting an injunction pending appeal, the district court legally erred in the preliminary-injunction standing analysis on which it based its decision to dismiss. And even if its standing analysis had been correct, the district court would still have been wrong to dismiss the case. The Agencies attempt to defend both aspects of the decision, but their arguments do not hold up to scrutiny.

### A. The district court incorrectly concluded that Appellant Associations failed to establish standing to seek a preliminary injunction.

To start, the Agencies fail to rebut either of Appellant Associations' two distinct grounds for standing. The Agencies offer a grab-bag of mostly conclusory, often inaccurate, and sometimes contradictory assertions in defense of the district court's ruling that Appellant Associations failed to establish standing to seek preliminary injunctive relief. None is persuasive.

#### 1. Appellant Associations established standing by describing members who were required to undertake compliance costs to stave off enforcement of a changed regulatory proscription.

The first of Appellant Associations' bases for standing comprised the costs their members would have incurred (were it not for this Court's temporary injunction) to remain in compliance with the Final Rule's expanded regulatory regime. As this Court said in *Yellen*, costs to "maintain compliance" with changed regulatory "proscriptions" and thereby "stave off" the prospect of enforcement are "recognized harm for purposes of Article III." 54 F.4th at 342–43. Appellants

described members who, due to "ongoing or planned activities that would impact waters or wetlands," "would incur such costs immediately absent an injunction." Assns. Br. 25. Specifically, "those members were poised to delay acting and incur costs to assess how the Final Rule affects their impacted waters and whether, as a result, they would have to obtain permits or adjust projects." *Id.* at 25–26.

**a) The Agencies respond, in part, by misapprehending Appellants' compliance arguments.**

As a threshold matter, the Agencies answer by attacking strawmen. For example, the Agencies argue that Appellant Associations "did not allege a certainly impending injury" because they "instead . . . alleged that injury was possible while conceding that it was not imminent." Agencies Br. 14; *see also id.* at 55 (referring to "the merely 'possible' injury that the Associations here allege"). That is not accurate. As noted above, Appellant Associations submitted declarations averring that members would have to incur compliance costs "immediately." Assns. Br. 25; *see also id.* ("poised to delay acting and incur costs"); *id.* (citing and quoting declarations).

The Agencies also assert that "the Associations claim per se standing as a class of regulated entities." Agencies Br. 53. But that, too, is mistaken. Appellant Associations did not argue, as the Agencies claim, that "the objects of a regulation [get] to skip over the ordinary standing showing." *Id.* Appellants explained that their members "were the objects of the regulation *and* would incur [compliance] costs

immediately." Assns. Br. 25 (emphasis added). They argued at length—with reference to substantial evidentiary support—that their members were injured by the need to take immediate "steps to ensure compliance" with the changed regulatory regime. *Id.* at 28.

**b) The Agencies simply repeat the district court's flawed understanding of when compliance begins under the Final Rule.**

When the Agencies attempt to address Appellant Associations' actual arguments about compliance costs, they turn first to restating the district court's reasoning below. As Appellants have explained (Assns. Br. 27), the district court believed that the identified costs were not actually *compliance* costs, but instead "preliminary" costs "of assessing whether one needs to comply with a regulation." Order, RE 51, PageID# 2133. That stemmed from the district court's (erroneous) view that the Final Rule does not "appl[y]" to any member until it is determined that "specific waters on their lands [are] jurisdictional." *Id.* at PageID# 2134.

The Agencies repeat the district court's mistaken understanding. The Agencies say it is "insufficient for the Associations to assert that their members 'have ongoing or planned activities that would impact waters or wetlands,'" and therefore that those members must incur costs to assess "whether" the Final Rule's expanded regime affects those impacted waters. Agencies Br. 50–51. Instead, the Agencies contend that Appellants needed to have alleged that the Final Rule actually

did "affect[] planned projects" and echo the district court's complaint that Appellants did not definitively "identify" newly jurisdictional waters. *Id.* at 50.

But that is all the Agencies say. They never explain *why* their and the district court's cramped view of when the Final Rule applies is correct. Appellant Associations set out in their opening brief that "the district court's analysis fundamentally misunderstands the Final Rule and how it fits within the regulatory framework of the CWA." Assns. Br. 27. Contrary to the district court's conclusion, the Final Rule "dictates the scope of the CWA's prohibition [on discharges] and applies *immediately*." *Id.* Like any legal proscription, "[i]t is meant to act preemptively and, through the threat of serious penalties, compel anyone contemplating specific action to take steps to ensure compliance, and to defer discharges until those steps are taken." *Id.* at 28. The Agencies offer no response to any of this.

Nor do the Agencies even recognize, much less try to rebut, any of Appellant Associations' several further points that confirm the Final Rule operates in this self-executing way:

- *First*, CWA enforcement is "'after the fact,'" which means landowners cannot simply wait for the government to tell them whether they have "waters of the United States" on their property. Assns. Br. 26, 28 (citation omitted). If they have concrete plans that will impact waters or wetlands—

as Appellant Associations' members do—they *must* take compliance steps that start with assessing how the Final Rule's expanded reach affects those waters.

- *Second*, the Agencies' own statements and actions reflect this same understanding of when compliance begins. Assns. Br. 28–29. For example, in the district court below, the Agencies admitted that immediately upon the Final Rule's effective date, "people . . . need[ed] to start assessing jurisdiction under the rule versus the status quo." Tr. of Mot. Hr'g Proceedings, RE 45, PageID# 2042. Similarly, the Agencies' jurisdictional determination program is a clear acknowledgment that determining whether a property contains jurisdictional waters is *part* of ensuring compliance, not *prior* to it.

To read the Agencies' brief, one would not know either of these points had been made.

Perhaps most notable is the Agencies' failure to acknowledge the Supreme Court's clear concern in *Sackett II* about the burden placed immediately on landowners by any rule—including the Final Rule—that purports to define the term "waters of the United States." As the Supreme Court observed, such a rule "puts many property owners in a precarious position because it is 'often difficult to determine whether a particular piece of property contains waters of the United

States.'" *Sackett II*, 598 U.S. at 669 (quoting *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594 (2016)). Thus, the Court specifically asked: "What are landowners to do if they want to build on their property" but avoid the "risk of criminal prosecution or onerous civil penalties"? *Id.* at 670. And then it walked through some of the very same compliance costs and measures Appellants' identified to the district court as necessary. None of this discussion in *Sackett II* is addressed, or mentioned, in the Agencies' brief.

The Agencies' silence is telling. The core premise of the district court's standing analysis with respect to Appellant Associations—*i.e.*, that compliance does not begin until *after* it is determined that specific waters are jurisdictional—is indefensible.

**c) Appellant Associations have traced their injuries to the Final Rule.**

Having failed to defend the district court's reasoning, the Agencies pivot to arguing that Appellants have not "trace[d] th[eir] asserted injuries to the Rule." Agencies Br. 51. In this part of their brief, they seemingly concede that the CWA's prohibition on discharges can injure landowners right away by "caus[ing] persons to assess whether certain waters on their property are jurisdictional or seek permits if they intend to discharge pollutants into jurisdictional waters." *Id.* at 52. But, they contend, "the Associations' declarants assert that they were injured by jurisdictional assessment and permitting processes *before* the Rule was promulgated." *Id.*

This argument is belied by the complete record. It is true that certain declarants, as background to demonstrate familiarity with the CWA, described their experience complying with predecessors to the Final Rule. But they went on to say more. As Appellant Associations pointed out in the opening brief, the declarants made repeatedly clear that the compliance costs in question arise from staying in compliance with the *new* jurisdictional tests *introduced by the Final Rule* into the CWA's prohibition. Assns. Br. 34.

**d) Compliance costs are injury under Article III.**

As a last alternative, the Agencies argue that even if Appellant Associations have identified compliance costs traceable to the Final Rule, caselaw does not recognize those costs as Article III injury. They first address this Court's decision in *Yellen.* As Appellant Associations explained, this Court held in *Yellen* that costs to "'maintain compliance'" with changed regulatory "'proscriptions'" and thereby "'stave off'" enforcement action, whether that enforcement is imminent or not, are "'recognized harm for purposes of Article III.'" Assns. Br. 24 (quoting *Yellen*, 54 F.4th at 342–43).

Zeroing in on a single footnote, the Agencies claim *Yellen* actually holds that plaintiffs "still must show that enforcement *would have been* imminent *but for* the measures that they have taken to comply." Agencies Br. 56 (discussing *Yellen*, 54 F.4th at 343 n.14). That is a vast overreading of the footnote. It is not, as the Agencies

suggest, a qualification on this Court's holding. Instead, as the footnote plainly says, it is merely a "note" about one situation found in "Supreme Court doctrine" that supports the Court's holding that imminent enforcement is not always required for Article III injury. *Yellen*, 54 F.4th at 343 n.14. Nothing in the footnote says that it is identifying the *only* such situation.

Indeed, the rest of the *Yellen* opinion—which the Agencies entirely ignore while "flyspecking" footnote 14 (Agencies Br. 56 n.6)—unequivocally rejects the Agencies' claim that there must be proof of otherwise imminent enforcement. In *Yellen*, the Court distinguished between the "imminent-recoupment" and "sovereign-authority" theories of standing, on one hand, and the "compliance-costs" theory, on the other. 54 F.4th at 342. The Court rejected standing on the first two theories on the ground that there was no "likely" or "imminent recoupment action." *Id.* at 341. But in evaluating the "compliance-costs" theory—on which Appellant Associations rely here—this Court expressly stated that it had "no similar imminence concern." *Id.* at 342. The Court found standing under that theory *even though* it had just determined that there was no imminent recoupment action. It was enough that Tennessee had to "undertake compliance efforts at present," including costs "to determine *whether* its tax policies *may provoke* a recoupment action." *Id.* (emphases added).

That is exactly the situation here. Because Appellant Associations' members have ongoing or planned projects that will impact waters and wetlands, they must "undertake compliance efforts at present," including costs "to determine whether [those projects] may provoke a[n] [enforcement] action" by the Agencies. *See id.* Indeed, if those members waited until the Agencies indicated that enforcement action is imminent to take compliance measures, they could be facing staggering retroactive penalties. As noted earlier, enforcement under the CWA is "after the fact" and can reach back months, and even years, to the point the Agencies later determine the violation began. *Supra* I.A.1.b.

The Agencies next suggest that if *Yellen* does not require proof of imminent enforcement, as they suggest it does, then the opinion is inconsistent with the Supreme Court's decision in *Clapper*. But that case concerned a fundamentally different set of circumstances than the required compliance costs that this Court confronted in *Yellen* and faces here.

*Clapper* involved the Foreign Intelligence Surveillance Act ("FISA"), which allowed surveillance of individuals who are not "United States persons" and are reasonably believed to be located outside the United States. 568 U.S. at 401. The plaintiffs in that case were not such foreign individuals, but rather were United States persons who alleged that their work required them to engage in sensitive communications with foreign contacts who they believed would likely be targets of

surveillance. *Id.* They claimed standing based on costs they were incurring to protect the confidentiality of their communications from the possibility of interception under FISA. *Id.* at 401–02.

What makes *Clapper* profoundly different is that, unlike here and in *Yellen*, the plaintiffs in *Clapper* were not incurring *compliance* costs. As U.S. persons, the plaintiffs were not the objects of the statutory regime, and were not required to incur costs to "stave off" possible enforcement of a regulatory proscription *against them*. *Yellen*, 54 F.4th at 343. Instead, they were voluntarily incurring costs in response to the "highly speculative fear" that their communications with foreign contacts would be picked up in the course of surveillance of foreign citizens. *Clapper*, 568 U.S. at 410. Those costs had nothing at all to do with the plaintiffs staying in compliance with a regulatory regime, or avoiding any action targeted at them. As the Supreme Court explained, their theory "necessarily rest[ed] on their assertion that the Government will target *other individuals*—namely, their foreign contacts." *Id.* at 411.

That was not the case in *Yellen*, and it is not the case here. In *Yellen*, Tennessee had to incur costs "to determine whether its tax policies may provoke a recoupment action" by the federal government *against Tennessee*. 54 F.4th at 342. And here, Appellant Associations' members were poised to incur costs to determine whether their planned and ongoing projects may provoke an enforcement action by the

federal government *against them*. In both cases, the costs were "to maintain compliance with" a changed federal "proscription[]" and thereby "stave off" enforcement. *Id.* at 343. As this Court said in *Yellen*, that is "recognized harm for purposes of Article III," *id.* at 342, and *Clapper* does not hold any different.

**e) If the district court were correct, no private entity could ever bring a facial pre-enforcement challenge to a rule defining "waters of the United States."**

Finally, the Agencies attempt to wave away (Agencies Br. 57) Appellants' contention (Assns. Br. 31) that "*no* court—of the many that have considered challenges to rules defining 'waters of the United States'—has found lack of standing (in any procedural posture) for the district court's reason." They respond that "[s]tanding is evaluated case-by-case, and the district court correctly assessed the Associations' standing on the allegations that they presented." Agencies Br. 57.

This misses the point. The issue is that the core premise underlying the district court's rejection of Appellant Associations' injuries—again, that compliance does not begin until *after* it is determined that specific waters are jurisdictional—is an outlier. And were that correct, it would necessarily mean that no private entity could ever bring a facial pre-enforcement challenge to a rule defining "waters of the United States." The Agencies protest that this is "not remotely" true. *Id.* at 58. But the district court itself stressed that Appellant Associations lacked standing because "[t]he Rule has not yet been enforced." Order, RE 51, PageID# 2120.

What is more, the Agencies never respond directly to Appellants' observation that "two district courts have considered and rejected reasoning similar to that of the district court" here. Assns. Br. 32 (discussing *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Oct. 23, 2023), and *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008)). The Agencies note, in passing, that "past rules" are "different." Agencies Br. 57. But, as already discussed, the core premise of the district court's ruling fundamentally misunderstands how *any* rule defining "waters of the United States" works. Furthermore, one of the two cited decisions—issued just months ago by the U.S. District Court for the District of North Dakota—involved a challenge to the same Final Rule at issue here.

**2. Appellant Associations independently established standing for a preliminary injunction because the Final Rule revokes jurisdictional determinations that benefit their members.**

Beyond the harm from compliance costs, Appellant Associations also established standing based on the harm from the Final Rule's revocation of jurisdictional determinations made previously under the Navigable Waters Protection Rule ("NWPR"). Assns. Br. 36. All of the Agencies' responses lack merit.

The Agencies first assert that "[t]he Rule does not *require* anyone to obtain a new jurisdictional determination." Agencies Br. 59. But that is, once more, a strawman. Appellant Associations never argued that the Final Rule requires anyone to obtain a jurisdictional determination. They argued that harm resulted from

"los[ing] [the] ability to rely on . . . an approved jurisdictional determination." Assns. Br. 36.

Next, the Agencies falsely contend that the Rule does not deprive parties of the benefit of certain jurisdictional determinations made under the NWPR. Agencies Br. 59. In support, they point to the Final Rule's statement that it "'does not invalidate [jurisdictional determinations] issued under prior definitions'" of "waters of the United States." *Id.* (quoting 88 Fed. Reg. at 3136). But they fail to quote the very next sentence, which says: "As such, any existing [jurisdictional determination]—*except [jurisdictional determinations] issued under the vacated 2020 NWPR*, which are discussed below—will remain valid. . . ." 88 Fed. Reg. at 3136 (emphasis added). And then a paragraph later, the Final Rule unequivocally states that jurisdictional determinations made under the NWPR "will not be relied upon by the Corps." *Id.* Indeed, in *Sackett II*, the Supreme Court highlighted this precise text in the Final Rule as "announcing exceptions to the legal effect of some previous determinations." 598 U.S. at 670. The Agencies' assertion that they did not rob entities of jurisdictional determinations made under the NWPR, Agencies Br. 59, is incorrect.[4]

[4] The Agencies also argue—in a footnote and for the first time in this case—that Appellant Georgia Chamber of Commerce cannot rely on harms to the Savannah Economic Development Authority ("SEDA"). They contend that SEDA was required to join its claims with the litigation filed by the State of Georgia in another federal court. Agencies Br. 58 n.7. For this reason, they argue that SEDA cannot

### B. Even if the district court had been right about standing, the court erred in dismissing the case.

As Appellant Associations also showed, even if the district court's standing analysis at the preliminary injunction stage had been correct, it was wrong to dismiss the case. Assns. Br. 36–39. Under this Court's precedent, a court cannot simply assume that a plaintiff's failure to show standing sufficient for a preliminary injunction means the plaintiff would also fail to defeat a motion to dismiss. The proper remedy was "denial of the motion for preliminary injunction, not dismissal of the case." *Memphis A. Philip Randolph Inst.*, 978 F.3d at 385–86 (citation omitted).

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"sue in its own right" and cannot, as a member of the Georgia Chamber, assist in establishing associational standing. *Id.* (cleaned up).

That is wrong. Associational standing does not require that members be able to "sue in their own right," as the Agencies selectively quote—it requires that they "'*have standing* to sue in their own right,'" *Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 537 (6th Cir. 2021) (emphasis added) (citation omitted). The associational standing inquiry is about an association vindicating a member's injury. *Warth v. Seldin*, 422 U.S. 490, 515 (1975). Thus, what matters is whether a member has suffered traceable and redressable injury for purposes of Article III, not whether the member also satisfies all the myriad other factors that might affect its ability to file a lawsuit. In any event, the Agencies cite no authority at all for their assumption that SEDA and Georgia must be considered a single "plaintiff" and that SEDA cannot sue in its own right. That assumption flies in the face of the fact that SEDA has been granted, by the Georgia legislature, the power to "sue and be sued" "by that name." Savannah Ordinance 8-302; 1951 Ga. Laws, 190, § 5; 1925 Ga. Laws, 1451, § 1. Nor do the Agencies acknowledge caselaw in which a geographically limited authority in Georgia created by "local" legislation—like SEDA, *see* 1975 Ga. Laws, 3132, § 1—was held to be a "local government authority" and not "a creature of the State." *Holmes v. Chatham Area Transit Auth.*, 505 S.E.2d 225, 225–26 (Ga. Ct. App. 1998).

The Agencies do not quarrel with the legal principle, but contend that "as a whole," the district court *did* apply the "lower" motion-to-dismiss standard. Appellees Br. 23–24. It did not. At the beginning of its opinion, the district court expressly disclaimed applying "'pleading requirements,'" and described "the issue" before the court as "whether the Plaintiffs provide evidence that the Rule threatens a certainly impending injury." Order, RE 51, PageID# 2126 (citing a case involving a preliminary injunction). The rest of the opinion is fully consistent with the preliminary-injunction standard the district court said it was applying. The opinion looks not to allegations in the complaints, but rather to whether Appellant Associations and the Commonwealth "substantiate[d] their claimed injury with evidence establishing that injury." Order, RE 51, PageID# 2126; *id.* at 2127–28, 2130–34 (examining Appellant Associations' declarations); *id.* at Page ID# 2138 ("[t]he Commonwealth did not provide big or small picture evidence" (emphasis omitted)).

The Agencies actually train most of their fire at Appellants' objection to the district court's decision to act without providing notice that it was considering dismissal. Agencies Br. 17–22. But even if they are right (and they are not, as explained further below), that doesn't cure the bigger problem—which is that the district court shouldn't have dismissed the case at all. The lack of notice "exacerbated" and is independent of that error. Assns. Br. 38.

In any event, the Agencies are wrong in every respect. They claim that if the district court had provided notice of its intent to dismiss for lack of jurisdiction, it would have *violated the Constitution* by exercising judicial power without jurisdiction. Agencies Br. 20. *Id.* Not so. "'[A] federal court always has jurisdiction to determine its own jurisdiction.'" *Brownback v. King*, 592 U.S. 209, 218 (2021) (citation omitted); *see also United States v. Ruiz*, 536 U.S. 622, 628 (2002) (describing this principle as "familiar law"). That includes the power to ask for briefing, and even hold argument, on the issue. *See, e.g.*, *Appalachian Voices v. U.S. Dep't of the Interior*, 78 F.4th 71, 76 (4th Cir. 2023) ("it is permissible for us to hold a hearing on the pending motions as we carefully consider the scope of our jurisdiction"). If, after reviewing the preliminary injunction record, the district court had doubts about whether Appellant Associations had standing under the pleading standard, it should have denied the preliminary injunction, provided notice that it was considering dismissing the case, and requested additional briefing on whether the allegations in the complaint met the applicable standard.

The Agencies next point out that this Court's cases requiring notice before dismissal all involve dismissals on the merits. Agencies Br. 18–19. That is true enough, but none limit their holding to that context. And the Supreme Court has said that "elementary principles of procedural fairness require[] that [a] [d]istrict [c]ourt, rather than acting *sua sponte*, give [plaintiffs] an opportunity" to answer questions

about jurisdiction. *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270–71 (2015).

Lastly, the Agencies contend that Appellant Associations had "ample notice" after "a hearing and extensive briefing regarding their standing as part of their efforts to establish their entitlement to a preliminary injunction." Agencies Br. 21. That just begs the very question posed earlier, however, which is whether a preliminary injunction proceeding can properly lead, without more, to a court dismissing the case in its entirety. And as Appellant Associations have already shown, the answer to that question under this Court's precedents is decidedly "no."

### C. This Court should not consider the correctness of the district court's decision on a party-by-party basis.

The Agencies separately argue that this Court, at minimum, should affirm the dismissal of two Appellant Associations for lack of standing. Agencies Br. 49. It should not.

The problem with this argument is that it fails to properly apply this Court's (and the Supreme Court's) precedent. As Appellant Associations showed in their opening brief, parties' standing can and should be evaluated together when they seek the same relief. Assns. Br. 23 n.11; *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016) ("When one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable."). The Agencies counter that Appellant Associations seek *only*

individualized (and therefore different) relief in the form of injunctions benefiting only their members. Agencies Br. 48–49. But that is not correct. The ultimate relief pleaded in the Complaint is cast in broad, non-individualized terms and includes not only injunctive relief, but declaratory relief and vacatur of the Final Rule. If one association has standing to pursue some or all of that ultimate relief, then all of them do. *See Am. C.L. Union v. Nat'l Sec. Agency*, 493 F.3d 644, 652 (6th Cir. 2007) ("for purposes of the asserted declaratory judgment—though not necessarily for the requested injunction—it is only necessary that one plaintiff has standing."). It follows that on the question of dismissal (which, as the Agencies acknowledge, is the sole question before this Court), it would be improper to distinguish between the Appellant Associations.

For all Appellant Associations, the district court's decision dismissing the case was wrong for the reasons described above. First, the district court erred in the preliminary-injunction standing analysis on which it based its decision to dismiss the whole case. And second, even were its standing analysis correct, the district court still overstepped by failing to actually consider standing under the pleading standard.

## II. This case is not moot.

In the final pages of their brief, the Agencies argue that the Amended Rule—which made changes to the Final Rule after *Sackett II*—has rendered this appeal moot. It has not. As Appellant Associations explained, "aspects of the Final Rule

remain in place and could continue to be challenged below if this Court vacates and reverses the dismissal." Assns. Br. 20. Accordingly, this Court can still give Appellants effective relief by vacating the district court's decision and remanding for further proceedings.

The Agencies first respond that "[i]f an appellate court's ability to reverse could enliven an otherwise moot dispute, no case would ever become moot on appeal." Agencies Br. 61. But Appellant Associations have not made that argument. Rather, Appellant Associations argue that vacatur and remand would provide effective relief *because there is more for the district court to do*—namely, decide Appellant Associations' challenges to those aspects of the Final Rule that remain in effect after the Amended Rule.

The Agencies next deny that the district court has anything to do on remand. They argue that "a court cannot vacate regulations that no longer exist," and that the Final Rule is "no longer in effect anywhere in the country." *Id.* at 60–61. They admit that aspects of the Final Rule persist, but contend that those elements have simply "carried through into the amended regulations." *Id.* at 61. In short, they appear to be claiming that the Amended Rule *repealed* the Final Rule and *replaced* it with regulations that incorporate aspects of the Final Rule.

But the preamble to the Amended Rule makes clear that it did *not* repeal the Final Rule. The preamble states that "the sole purpose of this rule is to amend these

specific provisions of the 2023 [Final] Rule to conform with *Sackett* [*II*].” 88 Fed. Reg. at 61,964–65. And it describes the Amended Rule as merely “revising” or “removing” language created by the Final Rule. *Id.* at 61,966. The word “repeal” does not appear anywhere in the preamble. This is in sharp contrast to a previous “waters of the United States” rule that expressly repealed its predecessor. *See* 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019) (the Agencies “are publishing a final rule to repeal the 2015 Clean Water Rule”).

EPA’s website is consistent in its description of the Final Rule’s current status. In EPA’s parlance, the Final Rule is the “January 2023 Rule,” and the Amended Rule is the “conforming rule.”[5] The website states that “[w]here the January 2023 Rule is not enjoined, the agencies are implementing the January 2023 Rule, as amended by the conforming rule.”[6] That tracks exactly with the Amended Rule’s preamble and flatly contradicts the Agencies’ claim here that the Final Rule is “no longer in effect anywhere in the country.” Agencies Br. 61.

Had the Agencies actually repealed the Final Rule, this case likely would be moot, and the proper remedy would be for this Court to vacate the decision below under the *Munsingwear* doctrine (which, incidentally, the Agencies do not contest). *See* Assns. Br. 20 n.9. But there is no serious argument that the Agencies repealed

[5] EPA, *Current Implementation of WOTUS*.
[6] *Id.*

the Final Rule. Instead, they amended it and left in place elements that Appellant Associations challenged in their complaint. As a result, this Court can give Appellant Associations effective relief by vacating the decision below and remanding to allow litigation to resume as to those elements. And that means this appeal is not moot.

## CONCLUSION

For the reasons above and Appellant Associations' opening brief, this Court should vacate the decision below and remand for further proceedings.

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/s/ Elbert Lin
Elbert Lin
Hunton Andrews Kurth LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
(804) 788-8200
elin@HuntonAK.com

Matthew Z. Leopold
Kerry L. McGrath
Erica N. Peterson
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
mleopold@HuntonAK.com
kmcgrath@HuntonAK.com
epeterson@HuntonAK.com

Charles E. English, Jr. ("Buzz")
Sarah P. Jarboe
LaJuana S. Wilcher
English, Lucas, Priest & Owsley, LLP
1101 College Street; P.O. Box 770

Bowling Green, KY 42102-0770
(270) 781-6500
benglish@elpolaw.com
sjarboe@elpolaw.com
lwilcher@elpolaw.com

*Counsel for Appellant Associations Kentucky Chamber of Commerce, Chamber of Commerce of the United States of America, Associated General Contractors of Kentucky, Inc., Home Builders Association of Kentucky, Portland Cement Association, and Georgia Chamber of Commerce*

Andrew R. Varcoe
Stephanie A. Maloney
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
avarcoe@USChamber.com
smaloney@USChamber.com

*Counsel for Appellant Chamber of Commerce of the United States of America*

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Reply Brief of Appellant Associations complies with the length limitation of Fed. R. App. P. 32(a)(7) because it contains 5,671 words, excluding the items exempted by Fed. R. App. P. 32(f). The 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 Times New Roman font using Microsoft Word.

/s/ Elbert Lin

**CERTIFICATE OF SERVICE**

I certify that on this 18th day of March 2024, I filed a copy of the above document with the Court's electronic-filing system, which will send an electronic copy to all counsel.

/s/ Elbert Lin