IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

HARRY WILEY, and MATTHEW WARD, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Civil Action No. 2:25-cv-227
(Honorable Irene C. Berger)

ROBERT F. KENNEDY, JR., in his official capacity as Secretary of Health and Human Services, and US DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS[1]

Defendants filed their motion to renew their arguments on a number of issues that have been previously briefed. Indeed, arguments on two of the issues are limited to incorporation by reference of prior filed documents. (*See* Defs.' Mem. in Supp. of Renewed Mot. to Dismiss at 5, 6, 11 [ECF Doc. No. 56].) As such, Plaintiffs likewise incorporate by reference their responses to these arguments in the following filings: Plaintiff's Reply in Resp. in Opp. to Mot. for Prelim. Inj.

[1] Defendants' Renewed Motion to Dismiss was filed prior to the Court granting Plaintiffs' leave to file their Second Amended Complaint. Technically, the Renewed Motion could be considered moot in the wake of the docketing of the Second Amended Complaint. However, the Court did not explicitly moot the Renewed Motion to Dismiss and indicated it was inclined to address the issues raised by the Renewed Motion once it was fully briefed. (*See* Mem. Op. & Order at 3-4 & n.1 (Aug. 14, 2025) [ECF Doc. No. 58].) Accordingly, Plaintiffs respectfully submit this Response for the Court's consideration.

[ECF Doc. No. 25]; Plf.'s Resp. to Def.'s Mot. to Dismiss [ECF Doc. No. 37]; Plf.'s Sur-Reply to Defs.' Reply in Supp. of Def.'s Mot. to Dismiss [ECF Doc. No. 42-1].

Additionally, two of the arguments reasserted by the Defendants in their Renewed Motion were addressed by this Court in its issuance of a Preliminary Injunction. First, the Court found that Plaintiff Wiley "has presented evidence of actual, concrete, particularized, imminent injury, causally connected to Defendants actions indefinitely "pausing" the [Coal Workers Health Surveillance Program] CWHSP, and that injury would likely be redressed by the relief sought." (Mem. Op. & Order Granting Prelim. Inj. at 17 (May 13, 2025) [ECF Doc. No. 36].) Defendants' arguments with regard to standing are simply an incorporation of arguments and evidence that were before the Court when it decided to issue its Preliminary Injunction.[2] (Defs.' Mem. of Law in Supp. of Renewed Mot. to Dismiss at 5 [ECF Doc. No. 56] (incorporating by reference Mem. of Law in Supp. of Mot. to Dismiss [ECF Doc. No. 22]).) As such the Defendants' standing arguments should be summarily rejected. Similarly, the Court heard argument and considered evidence before denying Defendants' sovereign immunity defense. (*See* Mem. Op. & Order Granting Prelim. Inj. at 18.) All of the arguments reasserted by the Defendants were before the Court at the time of that decision. (*See* Defs.' Mem. of Law in Supp. of Renewed Mot. to Dismiss (simply incorporating by reference Mem. of Law in Supp. of Mot. to Dismiss.) There is no reason for the Court to revisit its prior conclusion. Defendants' arguments in support of dismissal based on sovereign immunity should also be summarily rejected.

[2] Defendants' Renewed Motion to Dismiss was filed while the Plaintiffs' Motion to File Second Amended Complaint was pending. It does not address Mr. Ward in any capacity. Plaintiffs reserve the right to respond if Defendants raise issues regarding Mr. Ward's standing for the first time in their Reply Brief.

As for the remaining arguments, for the reasons explained more fully below, Defendants' arguments also fail. With regards to mootness, Defendants only attempt to demonstrate that they have voluntarily ceased their previously challenged actions. They have made no assurances that they will not resume such conduct when this case concludes. As such they have not met their "formidable" burden to show that there is "no reasonable expectation" they will "not return to [their] old ways." *Federal Bureau of Investigation v. Fikre,* 601 U.S. 234, 241 (2024).

Also, while Defendants point to recent Supreme Court rulings involving agency actions, to argue that the Court cannot interfere with agency reorganization, those cases are readily distinguishable. First, all were in the context of preliminary injunctions—notably not on motions to dismiss or any other dispositive posture. Second, none contained explanation or rationale that can be applied to the matter at hand. Finally, all were broad-based challenges to executive orders. Here in contrast Plaintiffs challenge specific agency actions regarding the curtailment of services required by statute.

LEGAL STANDARD

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). "[T]he legal sufficiency of a complaint is measured by whether it meets the standard stated in Rule 8 [of the Federal Rules of Civil Procedure] (providing general rules of pleading) ... and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted.)" *Francis*, 588 F.3d at 192. Federal Rule of Civil Procedure 8(a)(2) requires that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

When a defendant asserts that a court is without jurisdiction to hear a plaintiff's claims, the motion to dismiss falls within the scope of Federal Rule of Civil Procedure 12(b)(1). *See* Fed. R. Civ. P. 12(b)(1) (allowing a defense that the court "lack[s] subject matter jurisdiction"). When considering a Rule 12(b)(1) motion, the court "may consider evidence outside the pleadings without converting the proceeding into one for summary judgment." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (quotation omitted); *see Evans v. B.F. Perkins Co.,* 166 F.3d 642, 647 (4th Cir. 1999) ("When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.") (internal citations omitted).

ARGUMENT

I. Plaintiffs Have Standing

"Whether a plaintiff has standing is determined by considering the relevant facts as they existed at the time the action was commenced." *Republic Bank & Trust v. Kucan,* 245 Fed. Appx. 308, 310 (4th Cir. 2007) (citing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 ("[W]e have an obligation to assure ourselves that [the plaintiff] has Article III standing at the time of the outset of litigation.")). As this Court has already determined, Mr. Wiley presented evidence demonstrating he had standing at the time this action was filed. (*See* Mem. Op. & Order Granting Prelim. Inj. at 17.) In contrast any new evidence submitted by Defendants pertains to events occurring after the initiation of litigation and therefore more accurately raise a question of mootness—not standing. *See Deal v. Mercer County Bd. of Education*, 911 F.3d 183, 187 ("Unlike questions of mootness and ripeness, the standing inquiry asks whether the plaintiff had a requisite stake in the in the outcome of a case "at the outset of litigation.") (quoting *Laidlaw,* 528 U.S. at

180). As such, there is no reason for the Court to reconsider or overturn its prior decision on standing.

Even if the Court were to consider subsequent events, however, the Court should find that Mr. Wiley still has standing. As NIOSH Director, John Howard's, declaration makes clear, Mr. Wiley is still engaged in an ongoing process to seek his Part 90 job transfer. (Resp. in Opp. to Plf.'s Mot. to File Sec. Am. Compl. at Ex. 1 at 3 n.4 [ECF Doc. No. 52-1].) As Mr. Wiley reasserted in Plaintiffs' newly filed Second Amended Complaint, he is still employed as a coal miner and still facing exposure to hazardous dust. (Sec. Am. Compl. ¶ 29 [ECF Doc. No. 59].) Moreover, Mr. Wiley still intends to take advantage of health screening that must be provided or arranged by the Defendants at no cost to Mr. Wiley and "in the locality where the miner resides." 30 U.S.C. § 843(c). Although Defendants assert that mobile health screenings have resumed, none are available near Kanawha County, West Viriginia where Mr. Wiley resides. (*See* Sec. Am. Compl. ¶ 9 (stating Mr. Wiley is a resident of Kanawha County); Ex. 1 (showing mobile health screening for northern West Virginia, Ohio, and Maryland); Plf.'s Reply in Supp. of Mot. for Leave to File Sec. Am. Compl at Ex. 1 [ECF Doc. No. 54-1] (showing prior mobile health screening for northern West Virginia, Pennsylvania, and Maryland).) Finally, Defendants have made no attempt to show that they are fulfilling mandatory duties related to their review and approval for sampling devices and research into respirable dust control under the Mine Act, which would protect active miners such as Harry Wiley. (Sec. Am. Compl. ¶¶ 44–47.) Taking these allegations as true for the purpose of the pending Renewed Motion to Dismiss, Plaintiffs have adequately established standing.

II. This Action Is Not Moot

Defendants suggest that because they "have not expressly stated that they could 'return to the old ways' that led to this litigation," that the Court must find this action moot. (Defs.' Mem of

Law in Supp. of Renewed Mot. to Dismiss at 11.) Such a holding would directly contradict the correct standard for evaluating voluntary cessation and fly in the face of recent Supreme Court and Fourth Circuit precedent. Indeed, in the very case Defendants' quote for this proposition, the Fourth Circuit found that the case was *not* moot because the government had declined to acknowledge that its prior conduct was illegal or to offer explicit guarantees that it would not return to previous behavior. *See Porter v. Clarke,* 852 F.3d 358, 364–66 (4th Cir. 2017).[3] That is much the same as the present situation where the Defendants may have changed their conduct but have made no concessions on the illegality of their behavior or assurances as to their future conduct.

Finding an action against the government moot unless it "expressly states" that it could return to its old ways would upend the established standard regarding voluntary cessation. The voluntary cessation doctrine was developed in recognition that "a party should not be able to evade judicial review, or defeat a judgment, by temporarily altering questionable behavior." *Porter*, 852 F.3d at 363–64 (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 274, 284 n.1 (2001)). Accordingly, Defendants may not "automatically moot a case by the simple expedient of suspending [their] challenged conduct after [they are] sued." *Federal Bureau of Investigation v. Fikre*, 601 U.S. 234, 241 (2024) ("*Fikre*"). Instead, the case is not moot "unless it is absolutely

[3] Defendants also cite *Telco Comm. Inc., v. Carbaugh*, 888 F.2d 1225 (4th Cir. 1989) as a source for their standard. *Telco Comm.,* however, provided a unique fact pattern easily distinguishable from this case. There, the plaintiff argued that provisions of the Viginia State Code infringing on charitable solicitations were unconstitutional. 888 F.2d 1227. The Virginia Office of Consumer Affairs ("OCA") had not enforced a challenged provision of the code since a similar provision had been struck down in North Carolina. *Id.* at 1231. The Court found that "[t]o slap injunctions on state officials who have never violated the law or shown any intention to violate the law would exceed the proper bounds of equitable discretion." *Id.* As explained in this section the result in *Telco Comm.* is questionable given subsequent rulings by the Supreme Court. Even assuming it remains good law, the Court was clearly relying on concerns over federalism and the equitability of injunctive relief on officials who had never violated the law. Neither of those circumstances is presented in this matter.

clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Lackey,* 145 S. Ct. at 669 (internal quotation marks omitted) (citing *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Humans Resources,* 523 U.S. 598, 609 (2001)). The burden of making such showing is on Defendants. *Fikre*, 601 U.S. at 241 ("To show that a case is truly moot a defendant must prove no reasonable expectation remains it will return to its old ways.") (internal citations omitted). That "holds for governmental defendants no less than for private ones." *Id.* The Supreme Court has consistently described that burden as a "formidable" one. *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 190 (2000)).

Supreme Court precedent from the last few years makes unabashedly clear that the Defendant's proffered standard cannot be correct. In *West Virginia v. EPA*, the United States informed the Court that it had no intention to enforce the Clean Power Plan, which was the challenged action in that case, and that it intended to promulgate a new rule. 597 U.S. 697, 719–720 (2022). Despite that explicit assurance the Court found the case was not moot because "the Government nowhere suggests that if this litigation is resolved in its favor it will not reimpose emissions limits" and had vigorously defended its approach. *Id.* at 720.

Last year, the Supreme Court further illustrated the degree to which the government must provide assurances in order to avoid the voluntary cessation exception to mootness. In *Fikre,* the plaintiff had been placed on the government's "No Fly List" and sued the Federal Bureau of Investigation ("FBI") and other government officials. *Fikre*, 601 U.S. at 239. The government pointed to several pieces of evidence which it claimed showed there was no reasonable expectation it would return to its old ways. First, the government had removed Mr. Fikre from the No Fly List and he had remained off of the list for years. *Id.* at 243. Second, it submitted a sworn declaration that Mr. Fikre "will not be placed on the No Fly List in the future based on currently available

information." *Id.* at 242–243. The Court accepted the truth of that declaration. *Id.* Despite that evidence, the Court found that the case was not moot because the government had failed to satisfy the "formidable standard" that it bore to establish mootness due to the voluntary cessation of its activities.

Here the government attempts to establish mootness on far less evidence than defendants in *West Virginia* or *Fikre.* The government has vigorously defended this action opposing Preliminary Injunction, filing multiple Motions to Dismiss, opposing a proposed amendment of the Complaint on futility grounds, and has maintained—even in its current brief—that its actions are beyond judicial review. (*See* Defs.' Mot. to Dismiss [ECF Doc. No. 14]; Defs.' Mem. of Law in Supp. of Mot. to Dismiss Plf.'s Demand for Jury Trial [ECF Doc. No. 18]; Defs.' Mem of Law in Supp. of Mot. to Dismiss and Resp. in Opp. to Mot. for Prelim. Inj. [ECF Doc. No. 22]; Defs.' Resp. in Opp. to Mot. for Leave to File Sec. Am. Compl. [ECF Doc. No. 52]; Defs.' Renewed Mot. to Dismiss.) It relies on behavior taken after the filing of this action and the Court's issuance of a Preliminary Injunction to demonstrate its reluctant adherence to the law. (*See* Defs.' Mem. of Law in Supp. of Renewed Mot. to Dismiss at 9–11.) While it categorizes a declaration by NIOSH director John Howard as establishing formal assurances—nothing in Mr. Howard's declaration pertains to the Defendant's future conduct. The Defendants' action in this case is akin to EPA's cessation or enforcement of the Clean Power Plan, or the FBI's removal of Mr. Fikre from the federal No Fly List. The government here has not even made attempt to provide an assurance that it will not resume its illegal action if this case is resolved in its favor. As such, the Court should find the voluntary cessation doctrine applies and that this case is not moot.

Lastly, Defendants have not submitted any evidence to contravene the allegations that the agency is not performing necessary research and approval for protective equipment or to reduce

the exposure of miners to respirable dust. (*See* Sec. Am. Compl. ¶¶ 44–47.) As such, there is no basis for finding these claims moot. Because Defendants have failed to overcome their burden to make a formidable showing that the allegations set forth in the Second Amended Complaint are moot, the Renewed Motion to Dismiss should be denied.

III. Sovereign Immunity Is Not at Issue

As Plaintiffs explained in prior briefing, the Administrative Procedure Act ("APA") contains a clear wavier of sovereign immunity. Specifically, it provides as follows:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702. Where, as here when a party seeks nonmonetary relief, including declaratory relief, the APA provides the necessary waiver of sovereign immunity. *Perry Capitol LLC. v. Mnuchin,* 864 F.3d 591, 618 (D.C. Cir. 2017).

The Court recognized the APA was the basis of Plaintiffs' claims and that the waiver of sovereign immunity was sufficient to grant it jurisdiction in the Court's issuance of a Preliminary Injunction. (Mem. Op. & Order Granting Prelim. Inj. at 18.) Defendants have offered no additional evidence or rationale for disturbing that finding and the Court should decline to dismiss this case as a result of sovereign immunity.

IV. This Court Retains Authority to Offer Effective Relief to the Current Plaintiffs and Prospective Class Members.

Despite the fact that this action has been a prospective class action since it was filed, and despite the fact that the Plaintiffs are making no effort to expand the existing injunction, Defendants claim that this is in fact a broad-based challenge to the DHHS reorganization plan.

(Defs.' Mem. of Law in Supp. of Renewed Mot. to Dismiss at 11-13.) Rather, as this Court recognized, an injunction on Defendants curtailment of services was necessary because Defendants have presented "no evidence that individual employees or groups of employees could be terminated without impacting NIOSH's ability to perform the mandatory duties set forth in the Mine Act and associated regulations." (Mem. Op. & Order Granting Prelim. Inj. at 29.) This action was not instituted to prevent reorganization, it was filed to prevent the Defendants from cutting services mandated by the Mine Act and the impoundment of funds allocated by Congress for the fulfillment of the Department's mandatory duties.

In support of their Renewed Motion, Defendants rely heavily on two recent cases from the Supreme Courts' "shadow docket." Both *Trump v. Am. Fed'n of Gov't Emps.*, No. 24A1174 (U.S. July 8, 2025) and *McMahon v. New York*, No. 24A1203 (U.S. July 14, 2025), however, involved case specific stays of preliminary injunction orders. Here Defendants did not appeal or seek to stay the Court's Memorandum Opinion and Order Granting Preliminary Injunction. Moreover, the Court in *McMahon,* provided no rationale in support of its conclusion and articulated no principles of law that could extend beyond the situation of that case.

While the Court in issuing the *Trump* decision did write slightly more, it specifically stated that "[w]e express no view on the legality of any Agency RIF and Reorganization Plan produced or approved pursuant to the Executive Order and Memorandum." Here Plaintiffs are challenging specific actions of the Defendants in connection with agency Reductions in Force (RIFs), not the general legality of an Executive Order. They are engaged in a challenge to the exact type of challenge—agency issuance of RIFs—upon which the Supreme Court reserved judgment in *Trump.* As such, that case, like *McMahon* has little to no bearing on the present action.

CONCLUSION

For the reasons explained above, Plaintiffs respectfully request that the Court deny Defendants' Renewed Motion to Dismiss.

Respectfully Submitted,
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By counsel:

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