No. 22-1776

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUSTIN MAHWIKIZI, Plaintiff-Appellant, v. CENTERS FOR DISEASE CONTROL & PREVENTION, DEPARTMENT OF HEALTH & HUMAN SERVICES, J.B. PRITZKER, in his official capacity of Governor of Illinois, and ILLINOIS DEPARTMENT OF PUBLIC HEALTH, Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Illinois No. 1:21-cv-03467 The Honorable MANISH S. SHAH, Judge Presiding.

BRIEF AND APPENDIX OF STATE DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiff-Appellant Justin Mahwikizi is not complete and correct. State Defendants-Appellees J.B. Pritzker, in his official capacity as Governor of Illinois, and the Illinois Department of Public Health submit this jurisdictional statement under Seventh Circuit Rule 28(b).

Mahwikizi filed a complaint in the district court under 42 U.S.C. § 1983 asserting that the Centers for Disease Control and Prevention ("CDC") and United States Department of Health and Human Services (together "Federal Defendants"), as well the Governor of Illinois and Illinois Department of Public Health (together "State Defendants") violated his rights under the First and Ninth Amendments to the United States Constitution. Doc. 1.[1] Specifically, he alleged that his rights to free speech and exercise of his religion were impaired because an order of the CDC issued in January 2021 required him, a rideshare driver, to decline service to potential passengers unless they wore face coverings to prevent spread of Covid-19. *Id*. 1 at 1, 7-9, 14-19. Because the complaint raised federal questions, the district court had subject-matter jurisdiction over the case under 28 U.S.C. § 1331.

On November 22, 2021, the district court granted State Defendants' motion under Federal Rule of Civil Procedure ("Rule") 12(b)(1) and dismissed Mahwikizi's claims against them for want of subject-matter jurisdiction because he lacked

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[1] This brief cites the record on appeal, which is the district court's docket, as "Doc. [number] at [page]," the appellant's opening brief on appeal as "AT Br. [page]," and the appendix attached to this brief as "App. at __".

standing to sue State Defendants. Doc. 28. Since the claims were dismissed for want of jurisdiction, the dismissal was necessarily without prejudice yet nonetheless final for purposes of appeal. *See Lauderdale-El v. Ind. Parole Bd.*, 35 F.4th 572, 576 (7th Cir. 2022) (collecting cases).

On March 1, 2022, the district court granted Federal Defendants' motion under Rule 12(b)(6) to dismiss the claims against them for failure to state a claim, and the complaint was dismissed with prejudice, thereby disposing of all claims against all parties. Doc. 37 at 1, 5. That same day, a separate judgment order was entered on the district court's docket in accordance with Rule 58, indicating that the district court disposed of all claims against all parties and was finished with the case, Doc. 38. No motion to alter or amend the judgment was filed.

Within 30 days of the entry of judgment, on March 29, 2022, Mahwikizi filed a motion to extend the time to file a notice of appeal. Doc. 39; *see* 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(5)(A)(i). The district court summarily granted the motion the next day, March 30, purportedly extending the appeals period to May 2, 2022. Doc. 40 (citing Federal Rule of Appellate Procedure 4(a)(1)(B) and noting that the extension was unnecessary because an agency of the United States was a party, and thus the deadline for filing a notice of appeal was 60 days from the entry of judgment). This extension was permitted under Federal Rule of Appellate Procedure 4(a)(5), which allows district courts to extend the appeals period up to 30 days after the prescribed time, here until May 2, 2022, if the movant shows good cause or excusable neglect. Mahwikizi's purported inability to "complete the Notice of Appeal

with accompanying Docket Statement due to an Asbestos Abatement problem" in his home, Doc. 39, is evidence of good cause or excusable neglect, *see Nartey v. Franciscan Health Hosp.*, 2 F.4th 1020, 1024 (7th Cir. 2021) (extension decision is jurisdictional but reviewed for abuse of discretion and will be affirmed if record contains evidence on which district court "could have rationally based its decision") (internal quotation marks omitted).

Thus, the deadline for Mahwikizi's notice of appeal was May 2, 2022, whether due to the extension under Federal Rule of Appellate Procedure 4(a)(5), or the presence of an agency of the United States as a party, *see* Fed. R. App. P. 4(a)(1)(B). On May 2, 2022, Mahwikizi filed a notice of appeal. Doc. 42. Because Mahwikizi timely appealed from the district court's final judgment, this court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Whether this court should uphold the district court's order dismissing State Defendants from this action because Mahwikizi lacked standing to sue them over a CDC order that they were not responsible for issuing or enforcing and have no ability to rescind.

II. Whether the dismissal of State Defendants from the action should also be upheld because, even if Mahwikizi were challenging Illinois's executive orders imposing a mask requirement for public transportation, he would be precluded from doing so after he lost challenges based on the same operative facts in state court.

III. Whether, alternatively, this appeal should be dismissed because any challenge to Illinois's long-rescinded mask requirement is moot.

STATEMENT OF THE CASE

Mahwikizi, a rideshare driver in Cook County, Illinois, filed a complaint in the district court alleging violations of the First and Ninth Amendments based on a federal order issued by the CDC in January 2021 to prevent the spread of Covid-19 through requiring mask-wearing by passengers on public conveyances, including rideshare vehicles. Doc. 1 at 1–5. He alleged that "the [CDC] Order" curtailed his freedoms of religious exercise and speech because he could not practice the "Good Samaritan Principle" in his Catholic faith by accepting rides from passengers without masks. *Id*. at 1, 7–9, 14–19. He further alleged that on one occasion in May 2021, after he picked up an unmasked passenger, he was stopped by local police enforcing the CDC mask order. *Id*. at 10. As defendants, he named the State and Federal Defendants because, he alleged, they had "promulgated" the CDC order in Illinois and "enforced" it. *Id*. 1 at 1, 3, 4. For relief, he requested a declaratory judgment that his rights were violated by the CDC order and an injunction enjoining enforcement of the CDC order by "HHS, CDC, or anyone the under the Agencies' authorities." *Id*. at 20–22.

State Defendants moved to dismiss Mahwikizi's claims against them under Rule 12(b)(1) for lack of subject-matter jurisdiction, asserting that he lacked standing to sue them. Docs. 16, 17. They contended that they did not issue the CDC order or enforce it, but instead the Governor had taken action under the Illinois Constitution and the Illinois Emergency Management Agency Act, 20 ILCS 3305/1, to issue and enforce executive orders independently requiring mask-wearing on public

transportation in Illinois. Doc. 17 at 5–7.[2] As a result, State Defendants asserted, any injuries that Mahwikizi allegedly suffered from the CDC order were not caused by State Defendants or redressable by relief against them. *Id.* State Defendants further asserted that Mahwikizi was not challenging the Governor's executive orders in this action, and that regardless, the district court should abstain from hearing any federal constitutional challenges to the state orders under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), because Mahwikizi had three lawsuits pending in state court challenging the State's pandemic mitigations, including the mask requirement for public transportation. Doc. 16 at 2; Doc. 17 at 7–9.

Mahwikizi responded that State Defendants had "implemented" the CDC order in Illinois and were enforcing it because CDC guidance was referenced in the Governor's executive orders. *See* Doc. 24 at 1-3 (noting that Executive Order ("EO") 2021-12 stated: "All individuals . . . shall be required to wear a face covering consistent with CDC guidance, including (1) on planes, buses, trains, and other forms of public transportation[.]") (emphasis omitted); *see also* Doc. 1 at 1-7. He added that abstention was not warranted because his state court actions against State Defendants over their Covid-19 pandemic mitigations were brought under state law and did not include claims arising under the federal constitution. Doc. 24 at 3.

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[2] Illinois's executive orders are available at https://www.illinois.gov/government/executive-orders.html (visited Sept. 12, 2022).

The district court granted State Defendants' motion to dismiss Mahwikizi's claims against them for lack of standing. Doc. 28. It agreed with State Defendants that Mahwikizi failed to allege that any of his injuries from the CDC order were caused by State Defendants or redressable by relief against them. *Id*. at 5-6. It rejected Mahwikizi's arguments that State Defendants had incorporated the CDC order into the Governor's executive orders and enforced it in Illinois, noting that the Governor's authority to issue executive orders was "independent" of the CDC order. *Id*. The executive orders' reference to CDC guidance was "not the same as enforcing the federal mandate," the district court concluded. *Id*. at 6.

The district court also explained that, even if Mahwikizi's complaint could be read to challenge Illinois's executive orders, its abstention from hearing those claims against State Defendants was proper under *Colorado River*. *Id.* at 6 n.5. The court noted that Mahwikizi's state court actions against State Defendants related to Illinois's pandemic response, including the State's mask requirement for public transportation, that Mahwikizi's state court cases were "more advanced" than this federal action, and that "federal courts should avoid potentially inconsistent judgments." *Id*. at 6 n.5.

Eventually, the district court dismissed the claims against Federal Defendants on the merits and entered judgment on March 1, 2022. Doc. 38. Mahwikizi appealed. Doc. 42.

While this appeal was pending in this court, on April 22, 2022, the Governor issued EO 22-11, which rescinded Illinois's mask requirement for public

transportation, most recently re-issued in EO 22-06. Specifically, EO 22-11 "amended and revised" EO 22-06's "Section 2: Face Covering Requirements," in relevant part, as follows:

> All individuals, regardless of vaccination status, shall continue to be required to wear a face covering . . . ~~(2) on planes, buses, trains and other forms of public transportation and in transportation hubs such as airports and train and bus stations~~.

EO 22-11 was issued days after a district court in Florida vacated the CDC order, and despite mentioning the district court's decision, EO 22-11 did not purport to rely on it to rescind Illinois's own mask requirement. *See* EO 22-11. Instead, the Governor noted that the circumstances in Illinois had "improve[d] in recent weeks" and, as a result, he "no longer [found] such a state-wide requirement to be necessary," but that wearing a mask while on public transportation was still "recommend[ed]" to prevent viral spread. *See* EO 22-11.

Mahwikizi's state court cases were resolved against him before judgment was entered by the district court here. In two of Mahwikizi's state court actions, Nos. 20-CH-04089, 20-CH-0944, he identified himself as a rideshare driver and challenged the Governor's authority under state law to impose any Covid-19 mitigations beyond 30 days after the Governor's initial disaster proclamation. *See* Doc. 17-1 at 1–14 Mitigations at that time included a "face covering" requirement for Mahwikizi and his passengers whenever he provided essential travel services as a "transportation network provider[ ] (such as Uber and Lyft)." EO 20-32; *see also* Doc. 17-1 at 3. Mahwikizi's cases challenging the Governor's orders were consolidated and dismissed on the merits with prejudice on March 30, 2021. Doc. 17-1 at 10–14.

In his other state lawsuit, No. 21-CH-01272, Mahwikizi sued the Department of Public Health asserting that its emergency regulation requiring public transportation providers to enforce the Governor's mask-wearing requirement violated his First Amendment right to freely practice his religion. Doc. 17-1 at 16–17. An Illinois state court denied his motion for a temporary restraining order in May 2021, because, as relevant here, his First Amendment claim was unlikely to succeed on the merits, Doc. 17-1 at 16–23, a decision summarily affirmed by the Illinois Appellate Court later that month, *see Mahwikizi v. Ill. Dep't Pub. Health*, No. 1-21-0561 (Ill. App. Ct., May 26, 2021), *available at* App. at 1.[3] The state court dismissed that lawsuit as moot in November 2021, because it challenged an emergency rule that the Department had repealed in May 2021. *Mahwikizi v. Ill. Dep't Pub. Health*, No. 21-CH-01272 (Ill. Cir. Ct., Nov. 2, 2021), *available at* App. at 2.

[3] This court may take judicial notice of "court filings and other matters of public record when the accuracy of those documents reasonably cannot be questioned." *Parungao v. Cmty. Health Sys., Inc.*, 858 F.3d 452, 457 (7th Cir. 2017). The two state court decisions in State Defendants' appendix are matters of public record that may be verified by contacting the courts that issued those decisions.

SUMMARY OF ARGUMENT

This court should uphold the district court's order dismissing State Defendants from this action under Rule 12(b)(1) for lack of standing because Mahwikizi challenged a CDC order that State Defendants neither issued nor enforced and have no authority to rescind. Mahwikizi maintains that his claims were premised on a CDC order imposing a federal mask requirement for rideshare drivers, and thus he waived any claims challenging Illinois's independent mask requirement for public transportation established via the Governor's executive orders. State Defendants' enforcement of a similarly worded requirement issued under state law that merely referred to CDC guidance was independent from the CDC mask order. Thus, Mahwikizi failed to allege that any injuries he suffered from the CDC order were fairly traceable to actions of State Defendants or could be redressed by relief against them.

Regardless of his waiver, Mahwikizi cannot now challenge Illinois's mask requirement because his claims under the First Amendment would be precluded by *res judicata*. The district court afforded Mahwikizi an opportunity to challenge Illinois's mask requirement in state court, and he lost.

Alternatively, if Mahwikizi's filings can be understood to challenge Illinois's long-rescinded mask requirement, the portion of this appeal against State Defendants should be dismissed as moot. Illinois's mask requirement for public transportation was rescinded by EO 22-11, and as a result, Mahwikizi's claims would challenge an executive order that no longer applies to him or anyone else.

ARGUMENT

I. The district court's order granting State Defendants' motion to dismiss Mahwikizi's claims against them is reviewed *de novo*.

This court reviews *de novo* a district court's dismissal of claims under Rule 12(b)(1) for lack of federal subject-matter jurisdiction. *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 278 (7th Cir. 2020); *Council 31 of AFSCME, AFL-CIO v. Quinn*, 680 F.3d 875, 881 (7th Cir. 2012). On *de novo* review, this court applies the same procedural and legal standards as a district court would in deciding whether to dismiss, *Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010), and may affirm the judgment on any ground supported by the record and law, *Hernandez v. Cook Cty. Sheriff's Office*, 634 F.3d 906, 912 (7th Cir. 2011). At the pleading stage of litigation, the court "accept[s] as true all of the well-pleaded facts in the complaint and draw[s] all reasonable inferences in favor of the plaintiff." *Kubiak v. City of Chi.*, 810 F.3d 476, 480-81 (7th Cir. 2016).

II. The dismissal of State Defendants from this action should be upheld because Mahwikizi challenged only the federal mask requirement in the CDC order and thus lacked standing to sue State Defendants.

The district court properly dismissed Mahwikizi's claims against State Defendants under Rule 12(b)(1) because he challenged only the CDC order, and so he lacked standing to bring claims against State Defendants based on a federal order they had no part in enacting or enforcing and have no ability to rescind.

To begin, Mahwikizi made it clear in the district court that his claims were premised entirely on the CDC's mask order, and not the State's independent mask requirement in EO 21-12 and subsequent executive orders. Indeed, in his complaint

he challenged the "Federal Transportation Mask Mandate" issued by the CDC "as it applies in the State of Illinois." Doc. 1 at 1. He alleged that "the [CDC] Order orders Rideshare Drivers to require riders wear a mask or refuse service" and that this curtailed his freedoms of religion and speech because he could not practice the "Good Samaritan Principle" in his Catholic faith by accepting rides from passengers without masks. *Id*. at 1, 7-9, 14-19. He further alleged that in May 2021 he was stopped by local police enforcing the CDC order at a time when Illinois had no executive order imposing a mask requirement. *Id*. at 10. He also noted his belief that his lawsuit was the "third in the [N]ation" to challenge the federal order. *Id*. at 1. And his requested relief was directed at only the CDC order: He sought a declaratory judgment that his rights were violated by the CDC order, not the state executive orders, and the injunctive relief that he sought was exclusively from the CDC order, not any state order, by enjoining only the Federal Defendants (specifically "HHS, CDC, or anyone the under the Agencies' authorities"). *Id*. at 20-22. Moreover, Mahwikizi did not correct State Defendants after they moved to dismiss his claims against them on the ground that they were limited to challenging the CDC order and not Illinois's executive orders. *See* Doc. 24. Instead, he reiterated his allegation that State Defendants had enforced the CDC order by incorporating it into Illinois's orders. *See id*. at 2-4.

Thus, Mahwikizi chose to limit his claims to the lawfulness of the CDC order and, in doing so, waived any claims that Illinois's orders violated his rights. Parties choose claims and arguments to make in the district court, and those not raised are

"waived" on appeal, *Soo Line R.R. Co. v. Consol. Rail Corp.*, 965 F.3d 596, 601–02 (7th Cir. 2020), because defendants are entitled to "fair notice" of the claims against them, *Johnson v. Prentice*, 29 F.4th 895, 903 (7th Cir. 2022); *Romspen Mortg. Ltd. P'ship v. BGC Holdings LLC - Arlington Place One*, 20 F.4th 359, 373 (7th Cir. 2021). *Pro se* litigants like Mahwikizi "are generally subject to the same waiver rules as those who are represented by counsel." *Johnson*, 29 F.4th at 903 (citing *Douglas v. Reeves*, 964 F.3d 643, 649 (7th Cir. 2020)). And Mahwikizi's pleading and opposition to State Defendants' motion to dismiss put the parties and district court on notice that his claims were directed at the CDC order only. *See Wheeler v. Hronopoulos*, 891 F.3d 1072, 1073 (7th Cir. 2018) (claim waived where not asserted in complaint and plaintiff never corrected district court's understanding that he brought only a different claim); *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) (claim waived where complaint and argument in district court revealed "no signs" it was presented before appeal); *cf. Bensenberg v. FCA US LLC*, 31 F.4th 529, 537 (7th Cir. 2022) (no waiver of claims where memorandum opposing summary judgment indicated that plaintiff was pursuing them).

Because Mahwikizi challenged only the CDC order, not Illinois's orders, he lacked standing to assert his claims against State Defendants. To plausibly plead standing in federal court, a plaintiff must allege that he "'[1] suffered a concrete and particularized injury that is [2] fairly traceable to the challenged conduct, and is [3] likely to be redressed by a favorable judicial decision.'" *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016) (quoting *Hollingsworth v. Perry*, 570

U.S. 693, 704–05 (2013)). Mahwikizi's claims regarding the CDC order failed to satisfy elements two and three with respect to State Defendants.

Regarding causation, Mahwikizi failed to allege that any injuries he suffered from the CDC order were fairly traceable to actions of State Defendants. State Defendants did not issue or enforce the CDC order, but instead enforced their own state mask requirement in executive orders issued under state law. *See, e.g.*, EOs 21-12, 21-20, 22-06. Thus, the State's enforcement of its mask requirement for public transportation reflected in EO 21-12 and subsequent executive orders was not state enforcement of the CDC order that Mahwikizi challenged in this action.

For his part, Mahwikizi asserts that the district court should have found a "causation link" between the CDC order and Illinois's orders. AT Br. 33. This misunderstands the causation element of the standing analysis. The question here is not whether the CDC order "caused" Illinois's mask requirement, but whether State Defendants caused the injuries that Mahwikizi attributes to the CDC order. State Defendants did not cause these alleged injuries because they did not issue and are not responsible for enforcing the CDC order. *See J.B.*, 997 F.3d at 720 (injury "must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party") (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Mahwikizi's injuries are not traceable to State Defendants even though EO 21-12 and other executive orders imposing Illinois's mask requirement for public

transportation referenced CDC "guidance."[4] None of the executive orders purported to enforce the CDC mask order. In fact, EO 21-12, unlike the CDC order, did not contain a requirement that rideshare drivers seek to compel customers to wear masks.[5] Illinois's orders simply referenced CDC guidance with respect to mask wearing as one policy justification for its state-level requirement, which makes sense because the CDC is the Nation's "leading science-based, data-driven, service organization that protects the public's health." *About CDC*, Centers for Disease Control, https://www.cdc.gov/about/ (visited Sept. 12, 2022).

Mahwikizi also failed to allege that a favorable judgment against State Defendants would redress any injuries he suffered as a result of the CDC order. State Defendants lack authority to modify a federal agency's order. *See, e.g.*, *McHenry Cnty. v. Raoul*, 44 F.4th 581, 592–93 (7th Cir. 2022) (noting that the States may not directly regulate the Federal Government, for instance by placing prohibitions on it). And if State Defendants were ordered to stop enforcing the CDC mask order, that injunction would not provide meaningful relief, because they have never enforced the CDC order, as explained. And so, Mahwikizi could not obtain

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[4] EO 2021-12 states: "All individuals, including those who are fully vaccinated, shall be required to wear a face covering consistent with CDC guidance, including (1) on planes, buses, trains, and other forms of public transportation[.]"

[5] *Compare* Doc. 1, Ex. 1 ("Conveyance operators must use best efforts to ensure that any person on the conveyance wears a mask when boarding, disembarking, and for the duration of travel."), *with* Doc. 19-1, EO 2021-12 (lacking analogous provision).

from State Defendants the relief that he sought, or any other relief that he might seek, for his alleged injuries resulting from the CDC order.

To conclude, because State Defendants did not enact or enforce the CDC order, and cannot rescind the order, Mahwikizi's alleged injuries from the CDC order were not traceable to State Defendants' actions or redressable by relief against them. Accordingly, Mahwikizi's claims against State Defendants were properly dismissed because he lacked standing to bring them.

III. The dismissal of State Defendants also should be upheld because Mahwikizi's claims over Illinois's executive orders have already been litigated in state court and thus would be barred by *res judicata*.

The dismissal of State Defendants also should be upheld because Mahwikizi was afforded an opportunity to challenge the Governor's executive orders, including the mask requirement for public transportation in state court, but he lost. Indeed, the district court concluded that abstention under *Colorado River* was proper for any potential claims premised on Illinois's mask requirement because Mahwikizi had three ongoing state court actions against State Defendants challenging Illinois's pandemic mitigations. Doc. 28 at 6 n.5. Mahwikizi does not challenge the district court's ruling with respect to abstention, *see* AT Br., and, since that decision, two of his three state court cases resulted in judgments against him on the merits. As a result, Mahwikizi's First Amendment claim against State Defendants is now barred by *res judicata*.

The full faith and credit statute requires federal courts to give the same preclusive effect to a state-court judgment that it would receive under state law. 28

U.S.C. § 1738; *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 (1984); *Savory v. Cannon*, 947 F.3d 409, 418-19 (7th Cir. 2020). "Under Illinois law, 'a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action.'" *Hicks v. Midwest Transit, Inc.*, 479 F.3d 468, 470 (7th Cir. 2007) (quoting *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290 (1998)). Illinois has three requirements before "*res judicata* [precludes a claim]: '(1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies.'" *Id.* (quoting *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381 (2001)). "*Res judicata* bars not only issues that were actually raised in the prior proceeding, but also issues which could have been raised in the prior proceeding." *Id.* (citing *River Park*, 184 Ill. 2d at 290). There is no exception to this rule if, as here, the plaintiff was afforded in the state court proceedings "the minimum procedural requirements" of due process. *Id.* (quoting *Licari v. City of Chi.*, 298 F.3d 664, 667 (7th Cir. 2002)).

Here, Illinois's three requirements for *res judicata* were satisfied because Mahwikizi litigated and lost his challenge to the Governor's executive orders in consolidated case Nos. 20-CH-04089 and 20-CH-0944. First, the state court issued a final judgment on the merits dismissing Mahwikizi's claims challenging the Governor's authority under state law to impose Covid-19 mitigations, which included a mask requirement for public transportation at issue in this case. Doc. 17-1 at 10–14; *supra* at 8; *see also A & R Janitorial v. Pepper Constr. Co.*, 2018 IL 123220, ¶ 17.

Second, the cause of action was the same in the state court cases as here because the claims in all cases arose from a "single group of operative facts," *see River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998), specifically executive orders that included a mask requirement for providers of public transportation and their passengers, *see* Doc. 17-1 at 10–14; *A & R Janitorial*, 2018 IL 123220, ¶ 18 ("[S]eparate claims are considered the same cause of action if they 'arise from a single group of operative facts, regardless of whether they assert different theories of relief.'").

Third, the parties were identical there and here, even though the Department of Public Health was not named in the state court cases, because those cases and this one included Mahwikizi as plaintiff and the Governor as defendant. *A & R Janitorial*, 2018 IL 123220, ¶ 19 ("For *res judicata* purposes, the parties need not be identical to be considered the same.")(citing *Langone v. Schad, Diamond & Shedden, P.C.*, 406 Ill. App. 3d 820, 832 (1st Dist. 2010), stating litigants are "considered the same when their interests are sufficiently similar, even if they differ in name or number.")). Thus, Illinois's *res judicata* rules and policy against claim splitting would bar Mahwikizi's current claim challenging Illinois's public transportation mask mandate. *See Hudson v. City of Chi.*, 228 Ill. 2d 462, 471–72 (2008) ("[T]he principle that *res judicata* prohibits a party from seeking relief on the basis of issues that could have been resolved in a previous action serves to prevent parties from splitting their claims into multiple actions.").

And the federal exception for denial of due process is inapt because Mahwikizi has never asserted that the state court denied him fair proceedings. Indeed, Mahwikizi has never maintained that he should have had a second chance in this case to litigate his claims over the Governor's executive orders because he lacked an opportunity to do so in state court. *See* AT Br.; Doc. 24. Instead, Mahwikizi told the district court, incorrectly, that abstention was unwarranted because his state court actions did not include claims arising under the federal constitution. Doc. 28 at 6 n.5 (citing Doc. 24 at 3–4). Again, however, under Illinois law, *res judicata* bars not only claims that were actually raised, but also claims that could have been raised, in the prior proceeding. *Hicks*, 479 F.3d at 470. Mahwikizi could have raised his current First Amendment claim in the state court proceedings, as evidenced by the fact that he included that claim in one of his three state court cases. *See supra* at 9.

Finally, because claim preclusion was a foreseeable result of the district court abstaining to allow a plaintiff to litigate his claims in state court under *Colorado River*, State Defendants preserved their *res judicata* argument by invoking *Colorado River* in the district court. *See Baek v. Clausen*, 886 F.3d 652, 660 (7th Cir. 2018) (claims were *res judicata* after district court properly abstained under *Colorado River* and plaintiff lost on merits of claims in state court); *see also Huon v. Johnson & Bell, Ltd.*, 657 F.3d 641, 649 (7th Cir. 2011) (plaintiff accepted risk of claim preclusion by filing separate lawsuits in state and federal court, but in absence of possibly inconsistent judgments, defendants cannot use *Colorado River* as means to bar plaintiff's claims in federal court).

To conclude, Mahwikizi unsuccessfully pursued claims against the Governor in state court premised on Illinois's Covid-19 mitigations, including its mask requirement for public transportation, and he thus is precluded from challenging that requirement in this action, even if his complaint were generously construed as attempting to do so. Thus, the order dismissing State Defendants should be upheld.

IV. Alternatively, any claim premised on Illinois's long-rescinded mask requirement should be dismissed as moot.

If Mahwikizi's filings should be understood to raise a claim challenging Illinois's mask requirement in EO 22-06 and earlier executive orders, and that claim was not barred by *res judicata*, the portion of this appeal against State Defendants should be dismissed as moot. Whether a claim has been rendered moot is a legal question and jurisdictional issue that this court must resolve before the merits of the claim. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013) ("courts have 'no business' deciding legal disputes or expounding on law in the absence of . . . a case or controversy"); *Medlock v. Trs. of Ind. Univ.*, 683 F.3d 880, 882 (7th Cir. 2012) ("Article III of the Constitution limits federal courts' scope of judicial review to live cases and controversies.").

This jurisdictional limitation applies "at 'all stages of review, not merely at the time the complaint is filed.'" *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 860 (7th Cir. 2018) (quoting *Ciarpaglini v. Norwood*, 817 F.3d 541, 544 (7th Cir. 2016)). Thus, this court must, on its own, dismiss for lack of jurisdiction any portion of an appeal that has become moot. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *Dorel Juv. Grp., Inc. v. DiMartinis*, 495 F.3d 500, 503-04 (7th Cir. 2007).

Any claim in this case challenging Illinois's mask requirement for public transportation should be dismissed as moot because the Governor rescinded that requirement months ago. Indeed, this court recently dismissed as moot a challenge to Illinois's requirement that the plaintiffs vaccinate or test for Covid-19 as a condition of their employment because the requirement had been rescinded. *See Lukaszczyk v. Cook County*, __ F.4th ___, No. 21-3200, 2022 WL 3714639, at *4 (7th Cir. Aug. 29, 2022). As a result, this court held, the plaintiffs' claims were moot because they were "seek[ing] to enjoin a policy that no longer applie[d] to them." *Id*.

Similarly, here, to the extent that Mahwikizi seeks to enjoin Illinois's mask requirement for public transportation, he is seeking to enjoin a requirement that no longer applies to him (or anyone else). Five months ago, on April 22, 2022, the Governor issued EO 22-11, which "amended and revised" EO 22-06's "Section 2: Face Covering Requirements," in relevant part, as follows:

> All individuals, regardless of vaccination status, shall continue to be required to wear a face covering . . . ~~(2) on planes, buses, trains and other forms of public transportation and in transportation hubs such as airports and train and bus stations~~.

Thus, any claim in this action premised on Illinois's rescinded mask requirement for public transportation is moot.

Accordingly, the portion of this appeal against State Defendants should be dismissed as moot, if Mahwikzi's filings can be understood as raising a challenge to Illinois's mask requirement.

CONCLUSION

Accordingly, this court should affirm the district court's judgment in favor of Defendants-Appellees J.B. Pritzker and Illinois Department of Public Health.

Respectfully submitted,

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September 12, 2022

CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2016, in 12-point Century Schoolbook BT font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief is 22 pages.

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APPENDIX OF STATE DEFENDANTS-APPELLEES

APPENDIX TABLE OF CONTENTS

No. 1-21-0561

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JUSTIN MAHWIKIZI,

Petitioner-Appellant,

v.

ILLINOIS DEPARTMENT OF PUBLIC HEALTH and DR. NGOZI EZIKE,

Respondent-Appellee.

ORDER

This case is before the court on plaintiff's interlocutory appeal from an order denying his request for a temporary restraining order. The court being fully advised in the premises, it is hereby ORDERED:

The circuit court's order, entered May 14, 2021, denying plaintiff's request for a temporary restraining order is AFFIRMED.

ORDER ENTERED

MAY 26 2021

APPELLATE COURT FIRST DISTRICT

Nathaniel R. Howse, Jr.
Justice

Margaret S. McBride
Justice

Eileen O'Neill Burke
Justice

Date: _____

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JUSTIN MAHWIKIZI, Plaintiff, v. ILLINOIS DEPARTMENT of PUBLIC HEALTH and DR. NGOZI EZIKE, Defendants.	)	2021 CH 01272

ORDER

This matter coming to the Court to be heard on Plaintiff's Motion for Leave to Amend and Defendants' Motion to Dismiss, the Court having reviewed the briefs and heard arguments on November 2, 2021, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Leave to Amend is DENIED. The proposed amendment fails to cure Plaintiff's defective pleading. *See Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263 (1992).

2. Defendant's Combined 2-619 Motion to Dismiss is GRANTED, Plaintiff's complaint is dismissed with prejudice. Plaintiff's complaint challenges the Illinois Department of Public Health's August 7, 2020 emergency rule, 77 Ill. Admin. Code § 690.50(c)(2), ("IDPH Regulation"). The IDPH regulation was repealed on May 17, 2021. Thus, Plaintiff's complaint is moot and no justiciable, actual controversy exists between the parties.

Judge Eve M. Reilly

NOV 02 2021

Circuit Court-2122

ENTERED: _____

The Honorable Judge Eve M. Reilly

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 12, 2022, I electronically filed the foregoing Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that the other participants in this appeal, named below, are CM/ECF users and will be served by the CM/ECF system.

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