NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 13, 2022*
Decided December 19, 2022

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-1776

JUSTIN MAHWIKIZI,
Plaintiff-Appellant,

v.

CENTERS FOR DISEASE CONTROL AND PREVENTION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 21 CV 3467

Manish S. Shah,
Judge.

O R D E R

Justin Mahwikizi sued federal agencies and state officials, alleging that a federal mask mandate covering his rideshare business violated his First Amendment rights. The district court dismissed the suit for lack of standing and for failure to state a claim. Reviewing this dismissal de novo and treating the factual allegations in the complaint

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

as true, *see St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007), we affirm. The mandate is a neutral rule, generally applicable to commercial transporters, it only incidentally affects Mahwikizi's religious practices, and it regulates conduct, not speech.

Mahwikizi works for a rideshare business. As a Catholic, he practices the "Good Samaritan Principle," which instructs him to help those in need. He says that doing so became difficult when, in 2021, the Centers for Disease Control and Prevention issued a pandemic-mitigation order, the federal mask mandate. The mandate required that people wear masks during commercial transit, including rideshare use. *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*, 86 Fed. Reg. 8025, 8026–27 (Feb. 3, 2021). As a result, he had to cancel orders from customers who ordered rides but refused to wear a mask. (He still received payment from his company for the rides.) The mandate left him free to drive these people noncommercially. *Id.* at 8028.

Mahwikizi sued the U.S. Department of Health and Human Services, the CDC, the Governor of Illinois, and the Illinois Department of Public Health. Seeking to enjoin the mandate, he contended that he cannot drive maskless people who need rides; thus, he says, it violates his First Amendment rights of religion and speech. In dismissing the case, the district court ruled that Mahwikizi lacked standing to sue the state defendants because they did not enforce the federal mandate. It also ruled that Mahwikizi had no claim against the federal defendants under the First Amendment. The mandate, the court reasoned, was a neutral, generally applicable, and rational response to a public health problem; it thus did not violate his right to exercise his religion. It also did not violate his free-speech rights because it regulated the conduct of driving maskless customers, not speech. Finally, the court ruled alternatively, if speech was affected, it was commercial only and the restriction permissibly furthered the government's substantial interest in public health. The court dismissed the case and did not enjoin the mandate, although an injunction is under review elsewhere as the Eleventh Circuit considers whether the mandate is compatible with the CDC's statutory authority and the Administrative Procedure Act. *See Health Freedom Def. Fund, Inc. v. Biden*, No. 22-11287 (11th Cir. Docketed Apr. 21, 2022); *Wall v. CDC*, No. 22-11532 (11th Cir. Docketed May 4, 2022).

On appeal, Mahwikizi raises arguments that he has waived. Echoing the Eleventh Circuit's cases, he now argues that the mask mandate was "not within the CDC's statutory authority." Although he referred to the CDC's statutory authority in his complaint, when he responded to the motions to dismiss, he argued only that the

mandate violated his First Amendment rights. By failing to develop an argument about statutory authority in district court, Mahwikizi forfeited the contention. *See Wheeler v. Hronopoulus*, 891 F.3d 1072, 1073 (7th Cir. 2018). Likewise, he never argued before the district court that the mask mandate was a "Bill of Attainder"; thus he cannot raise that argument on appeal either. *See United States v. Ritz*, 721 F.3d 825, 826 (7th Cir. 2013).

As for arguments that Mahwikizi preserved, we begin with his belief that the mask mandate violates his free-speech rights. He contends that his desired "speech" of driving paying, maskless customers is not commercial: if he denies a customer a ride for refusing to wear a mask, he is paid anyway and thus, he concludes, he lacks a commercial incentive to drive that passenger. But the district court's ruling that driving paying customers is commercial activity was an alternative to its primary ruling that driving them is conduct, not speech. "[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). But "[s]ymbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial government interest, and if the interest is unrelated to the suppression of free speech." *Id.* (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The government "may not, however, proscribe particular conduct *because* it has expressive elements." *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

Based on these principles, Mahwikizi's free-speech claim fails for two reasons. First, Mahwikizi does not plausibly allege that passengers reasonably understood that, by charging them for rides, he was practicing the Good Samaritan Principle, so his conduct was not expressive. Second, even if his conduct were expressive, Mahwikizi does not plausibly allege that the government imposed the mask mandate *because* of his expressive content. Rather, the regulation is narrowly drawn to focus on the perceived risk to health. *See O'Brien*, 391 U.S. at 376–77, 383. Thus, wherever the line may be between expressive conduct that the government may regulate as in *Community for Creative Non-Violence,* and expressive conduct that the government may not regulate as in *Johnson,* this case falls on the side of permissible regulation.

That brings us to Mahwikizi's free-exercise claim. A generally applicable, neutral restriction that only incidentally affects religion is permissible. *See Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877–80 (1990). The mask mandate is generally applicable because it contains no reference to religion and applies to all rideshare drivers regardless of religion. *See St. John's United Church of Christ*, 502 F.3d at 633.

Mahwikizi insists, though, that the mandate affects Christians like him observing the Good Samaritan Principle more harshly than others. That is not true: Mahwikizi gets paid regardless of whether he drives a maskless passenger who orders a ride. And the mandate allows him to drive for free (that is, noncommercially) maskless passengers who need rides. Therefore, the mandate does not adversely restrict his religious practice of helping people in need. *See Ill. Bible Colleges Ass'n v. Anderson*, 870 F.3d 631, 640 (7th Cir. 2017). And we know that "[w]hether or not the Supreme Court continues to adhere to *Employment Division v. Smith* … there is no problem with application of a law that leaves people free to put their own religious beliefs into practice." *Doe v. Rokita*, — F.4th —, No. 22-2748, 2022 WL 17249016, at *2 (7th Cir. Nov. 28, 2022).

We address three final points. First, Mahwikizi argues that the mask mandate is not rational because the virus can spread around masks through airborne aerosols and the mandate does not apply to noncommercial passengers. But even if the mandate does not eliminate all virus spread, it is still rational because it mitigates the spread. Second, Mahwikizi contests the ruling that he lacked standing to sue the state defendants, arguing that the federal mask mandate "caused" the state mask mandate. But in this suit he challenges enforcement of only the federal mask mandate. Because the state defendants did not cause the injuries that he attributes to the federal mandate, he lacks standing to sue them. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Third, Mahwikizi argues that the district court wrongly denied his requests for a temporary restraining order. But we need not address that argument because none of his claims survives. *St. John's United Church of Christ*, 502 F.3d at 642.

AFFIRMED