FILED
United States Court of Appeals
Tenth Circuit

August 31, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UTAH VAPOR BUSINESS ASSOCIATION, INC., a Utah nonprofit corporation; THE SMOKE HOUSE LLC,

Plaintiffs - Appellants,

v.

STATE OF UTAH; UTAH DEPARTMENT OF HEALTH AND HUMAN SERVICES, a governmental entity; UTAH STATE TAX COMMISSION, a governmental entity; SPENCER J. COX, Governor, in his official capacity as Governor for the State of Utah; DEREK BROWN, in his official capacity as Attorney General for the State of Utah; TRACY S. GRUBER, Executive Director of the Utah Department of Health and Human Services; SCOTT W. SMITH, in his official capacity as Executive Director of the Utah State Tax Commission,

Defendants - Appellees.

No. 25-4046

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:24-CV-00950-DBB-JCB)

Submitted on the briefs:*

Deno G. Himonas and W. Bradford Barber of Wilson Sonsini Goodrich & Rosati; Phillip W. Dyer and Benjamin R. Dyer of Dyer Law Group PLLC; Trinity Jordan and Jordan E. Westgate of Dentons Durham Jones Pinegar, P.C.; Walter A. Romney and Katherine E. Pepin of Clyde Snow & Sessions; all of Salt Lake City, Utah on the briefs for Plaintiffs-Appellants.

Sarah Goldberg, Assistant Solicitor General, and David N. Wolf, Assistant Attorneys General, of Utah Attorney General's Office, Salt Lake City, Utah on the briefs for Defendants-Appellees.

Before **BACHARACH**, **EBEL**, and **FEDERICO**, Circuit Judges.

EBEL, Circuit Judge.

When the legislature for the State of Utah, following in the footsteps of many other states and localities, decided to prohibit the sale of flavored e-cigarettes due to concerns that they led young people to take up smoking, businesses that specialized in such products raised several concerns in anticipation of the significant economic impact it would have on their businesses. The two central issues raised here are whether Utah was preempted from passing such a law by the federal Tobacco Control Act and whether Utah's enforcement mechanism, which permitted discretionary warrantless searches of these businesses, violated the Fourth Amendment. The district court, at the preliminary injunction stage, ruled in favor of Utah as to the

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* FED. R. APP. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

preemption issue, holding there was no preemption, and in favor of the businesses as to the enforcement issue, prohibiting the warrantless searches, and each appealed the respective rulings adverse to them. After the legislature amended the act to alter its enforcement mechanism, the parties agreed the enforcement issue was moot, leaving only the preemption issue. But the businesses did not properly appeal the preemption issue, failing to identify the pertinent order in their notice of appeal. Because in civil matters an improper notice of appeal leaves this court without jurisdiction, and with only the improperly noticed issue remaining, we therefore DISMISS the appeal.

I. BACKGROUND

Though much of the lead-up to this appeal is ultimately extraneous to the jurisdictional issue decided herein, we briefly recount how this case arose and reached this court.

In March 2024, the Utah legislature passed its Electronic Cigarette Amendments (the "Act") to the existing Utah code provisions relating to e-cigarettes. The heart of these amendments was the new "Flavor Ban," prohibiting anyone in Utah from selling e-cigarettes that have a flavor other than tobacco or menthol. The purpose of this ban, as in many other states and localities, is to avoid encouraging young people to take up smoking by starting them with flavorful e-cigarettes. The Flavor Ban makes it a misdemeanor to sell flavored e-cigarettes in Utah. Prior to the 2024 amendments, general tobacco retailers—such as gas stations—were already prohibited from selling flavored e-cigarettes under the Utah code. Only Retail

Tobacco Specialty Businesses ("RTSB") were previously permitted to sell flavored e-cigarettes, so that is the group targeted by the Flavor Ban.

Plaintiffs are a group of RTSBs. Up until the 2024 amendments, Plaintiffs claim that 89% of their business was selling flavored e-cigarettes. Therefore, the Flavor Ban is expected to have a significant impact on their customer base, and they claim at least some RTSBs in Utah have already been forced to close. That said, Plaintiffs claim that only one local health department has in fact enforced the Flavor Ban to date.

Plaintiffs contend the Flavor Ban is preempted by the Federal Family Smoking Prevention and Tobacco Control Act ("TCA"), and thus violates the Supremacy Clause. Prior to the TCA's enactment, tobacco regulations were almost exclusively the province of states and municipalities. See R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles, 29 F.4th 542, 547 (9th Cir. 2022). But through the TCA, Congress sought to give the Food & Drug Administration a role in adopting and enforcing nationwide regulations on the tobacco manufacturing and labeling processes. Id. at 550. One area reserved to federal regulation is setting "tobacco product standards." Id. at 551. Plaintiffs argue that the Flavor Ban is a tobacco product standard, and thus the TCA preempts Utah from enacting it.

Utah's 2024 amendments also included an "Inspection Program" to assist in the enforcement of the Flavor Ban. Specifically, it authorized local health departments to search tobacco retailers' entire premises during business hours for evidence of violations. Plaintiffs argued that this Inspection Program violated their Fourth Amendment rights to be free from unreasonable searches.

Plaintiffs brought suit against Defendants, those state entities and officials responsible for enforcing the Act, in the federal district court for the District of Utah. While litigation proceeded, Plaintiffs sought preliminary injunctions against both the Flavor Ban and the Inspection Program. The parties agreed to a Temporary Restraining Order ("TRO") while the district court considered the preliminary injunction requests. After a hearing on both, the district court denied preliminary injunctive relief to the Plaintiffs with respect to the Flavor Ban but requested supplemental briefing on the Inspection Program. The district court later granted preliminary injunctive relief to the Plaintiffs with respect to the Inspection Program. But the district court determined that the Inspection Program was severable from the rest of the Act, so it did not enjoin any other part of the Act.

Both parties appealed. Plaintiffs appealed the district court's denial of preliminary injunctive relief as to the preemption issue. Plaintiffs also appealed the district court's severability finding, arguing instead that if the Inspection Program was unconstitutional, the entire Act should be enjoined. Meanwhile, Defendants cross-appealed the district court's grant of preliminary injunctive relief as to the Inspection Program, arguing that it did not violate the Fourth Amendment.

Notably, on May 6, 2026, an amendment to the Act took effect, changing the Inspection Program such that both parties agree it no longer presents a Fourth Amendment issue. Therefore, Defendants' cross-appeal of the Inspection Program ruling is moot, and Plaintiffs' appeal of the severability finding is moot. Defendants filed a stipulated motion to dismiss these two moot issues, which we already granted. All that remains of the appeal, then, is the question of whether the TCA preempts the Flavor Ban.

II. JURISDICTION

Typically, under 28 U.S.C. § 1291, courts of appeals have jurisdiction to review only "final decisions" of district courts. See Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1147 (10th Cir. 2011). An exception exists, however, for interlocutory orders granting or denying motions for preliminary injunctive relief. Id.; 28 U.S.C. § 1292(a)(1). These interlocutory orders are immediately appealable. Crowe, 640 F.3d at 1147.

Like all appeals, though, there are rules that govern when and how a party must file an appeal of such an order. As relevant here, Plaintiffs' notice of appeal had to identify the appealable district court orders that they were challenging. FED. R. APP. P. 3(c)(1)(B). And because this is a civil case, rather than criminal, compliance with this rule is jurisdictional and not waivable, meaning failure to comply strips this court of authority to address the appeal. Bowles v. Russell, 551 U.S. 205, 214 (2007); Emann v. Latture (In re Latture), 605 F.3d 830, 834–35 (10th Cir. 2010).

III. DISCUSSION

Before entertaining the merits of Plaintiffs' preemption argument, we must first assure ourselves that we have jurisdiction to address it. We conclude that

Plaintiffs' appeal fails at the jurisdictional step because their notice of appeal did not identify the district court's order denying a preliminary injunction of the Flavor Ban. Thus, we cannot proceed to the merits.[1] We write further to clarify how litigants appealing separate, appealable interlocutory orders must proceed.

Federal Rules of Appellate Procedure 3 and 4 direct the filing of appeals. Specifically, Rule 3, which sets out the contents of a notice of appeal, requires a notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." FED. R. APP. P. 3(c)(1)(B). "Compliance with Federal Rule of Appellate Procedure 3, specifying the contents of a notice of appeal, is jurisdictional and cannot be waived." Constructora Andrade Gutierrez, S.A. v. Am. Int'l Ins. Co. of Puerto Rico, 467 F.3d 38, 43 (1st Cir. 2006) (citing Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 (1988)), superseded by rule on other grounds as recognized in Gonpo v. Sonam's Stonewalls & Art, LLC, 41 F.4th 1, 9–12 (1st Cir. 2022).

Though "the requirements of the rules of [appellate] procedure should be liberally construed and . . . mere technicalities should not stand in the way of consideration of a case on its merits," Torres, 487 U.S. at 316 (internal quotation marks omitted), we note here that Plaintiffs' notice of appeal made no mention of the district court's order on the Flavor Ban. Plaintiffs' notice of appeal states it is an

[1] Four of our sister circuits have addressed the same preemption argument, all rejecting Plaintiffs' contention. See Nat'l Ass'n of Tobacco Outlets, Inc v. City of Providence, 731 F.3d 71 (1st Cir. 2013); U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013); R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles, 29 F.4th 542 (9th Cir. 2022); R.J. Reynolds Tobacco Co. v. City of Edina, 60 F.4th 1170 (8th Cir. 2023) (per curiam).

> appeal to the United States Court of Appeals for the Tenth Circuit from (1) the district court's Order Granting in Part Motion for Temporary Restraining Order and Preliminary Injunction [ECF No. 55] entered on March 24, 2024; (2) the district court's Order Granting Preliminary Injunction [ECF No. 56] entered on March 24, 2024; (3) the district court's Docket Text Order (Dissolving Temporary Restraining Order) [ECF NO. 57] entered on March 24, 2024; and (4) any and all underlying issues, rulings, decisions, and orders of the district court ancillary, subsidiary, or merged thereto.

Pls.' Notice of Appeal, ECF No. 61 (Apr. 21, 2025) (emphasis added). Absent from this list is the district court's order denying a preliminary injunction of the Flavor Ban, ECF No. 44, entered on February 13, 2024. Therefore, the notice of appeal fails even this circuit's "functional equivalent" test, which overlooks a "filing that is technically at variance with the letter" of Rule 3 so long as "it contains the . . . elements of notice required by Rule 3(c)." Berrey v. Asarco Inc., 439 F.3d 636, 642 (10th Cir. 2006) (internal quotation marks, alteration omitted).[2]

As in Kotler v. American Tobacco Company, the notice "makes no reference to the district court's" February 13 order and "[i]nstead, it specifically references the district court's entirely separate order of" March 24, 2024. 981 F.2d 7, 11 (1st Cir. 1992). "Omitting the preemption order while, at the same time, designating a

[2] "When a notice of appeal fails to designate the order from which the appeal is taken, our jurisdiction will not be defeated if other papers filed within the time period for filing the notice of appeal provide the 'functional equivalent' of what Rule 3 requires." Denver & Rio Grande W. R.R. v. Union Pac. R.R., 119 F.3d 847, 849 (10th Cir. 1997) (quoting Torres, 487 U.S. at 317). Given the lack of any timely filing relating to the preemption issue, however, we have no other source to which to look.

completely separate and independent order loudly proclaims plaintiff's intention not to appeal from the former order." Id.

It is true that "a notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment." McBride v. CITGO Petroleum Corp., 281 F.3d 1099, 1104 (10th Cir. 2002) (emphasis added). That is because generally "'all earlier orders . . . merge in the final judgment,'" such that "[h]aving appealed from the judgment, the appellant is free to attack any nonfinal order or ruling leading up to it." Montgomery v. City of Ardmore, 365 F.3d 926, 934 (10th Cir. 2004) (quoting McBride, 281 F.3d at 1104). That general rule is not implicated here because this appeal related to two separate interlocutory orders, not to an interlocutory order and a final judgment. The commentary to the appellate rules describes the concept of merger as "a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment." Fed. R. App. P. 3 advisory committee's note to 2021 Amendment. But while "because of the merger principle, it is appropriate to designate only the [final] judgment" when a prior interlocutory order merges into a final judgment, "where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order." Id.

Ultimately, the parties leave this court with nothing capable of review. Future plaintiffs facing similar circumstances are advised to file a notice of appeal that identifies explicitly each appealable interlocutory order that they seek to challenge.

IV. CONCLUSION

Because we lack jurisdiction to address the only remaining issue presented to us, we DISMISS the appeal.