09-2271

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

US AIRWAYS, INC.,

Plaintiffs-Appellants

v.

O'DONNELL, et al,

Defendants-Appellees

On appeal from the United States District Court for the District of New Mexico No. 07-cv-1235 (MCA/LFG) (The Honorable M. Christina Armijo)

BRIEF OF THE AMERICAN BEVERAGE LICENSEES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

Anthony S. Kogut
Willingham & Coté, P.C.
333 Albert Avenue
Suite 500
East Lansing, MI 48823
(517)351-6200
akogut@willinghamcote.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

NEW MEXICO STATUTES

Corporate Disclosure Statement

The American Beverage Licensees is a New York non-profit corporation. It does not have any parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

INTERESTS OF AMICUS CURIAE

A. The American Beverage Licensees

American Beverage Licensees (ABL) was created in 2002 after the merger of the National Association of Beverage Retailers (NABR) and the National Licensed Beverage Association (NLBA).

The ABL is an association representing licensed off-premises retailers (such as package liquor stores) and on-premises retailers (such as bars, taverns, restaurants) across the nation.

ABL has nearly 20,000 members in 34 states (some of which are within the jurisdiction of the Tenth Circuit Court of Appeals). Many of ABL's members are independent family owned operations who assure that beverage alcohol is sold and consumed responsibly by adults in conformity with the laws of the state in which each member does business.

ABL continually monitors federal legislation and trends of concern to beverage alcohol retailers. ABL is strongly committed to working with others under effective regulation toward the responsible sale of beverage alcohol products.

ABL supports the defendants-appellees and urges affirmance of the District Court decision.

B. The authority for filing this brief is FRAP 29(a).

All parties, through their respective counsel, have consented to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

As an exercise of its Twenty-first Amendment core powers, New Mexico has established a comprehensive regulatory system for beverage alcohol. This regulatory system is unquestionably legitimate. See, *Granholm v Heald*, 544 U.S. 460, 488-489 (2005) and *North Dakota v United States*, 495 U.S. 423 (1990). Among other things, New Mexico requires that those trafficking in beverage alcohol -- including airlines operating *in* New Mexico -- must be licensed and comply with New Mexico law.

The federal statutes that US Airways relies upon to pre-empt New Mexico's regulatory authority do not expressly, or even impliedly, evidence a Congressional intent to oust New Mexico from its traditional police powers or from its Twenty-first Amendment sanctioned role of overseeing the traffic in alcoholic beverages within its borders. Congress has never seen fit to "deregulate" the traffic in alcoholic beverages. Nor has Congress ever expressed the intent to replace primary state regulation of alcohol with a comprehensive federal regulatory system. Rather, Congress has repeatedly affirmed that it recognizes the states are the primary regulators of beverage alcohol.

The consequences that can flow from excessive use of alcohol (whether that alcohol is dispensed by bar owners or airlines) are evidenced by the tragic deaths

which give rise to this litigation. Consequences such as the death of five innocent persons as a result of drunk driving make clear the need for State-based regulation. Protecting public health and safety from excessive consumption of alcohol is a "core" concern of New Mexico shielded by the Twenty-first Amendment.

US Airways complains that it may have to bear some state regulatory obligations as a dispenser of beverage alcohol in New Mexico, but that is the obligation of all who are involved in the legal distribution of alcohol. US Airways listing of possible problems airlines may face if states continue to perform their traditional regulatory function and require licensure of airlines operating within their state borders is exaggerated and not supported by the record.

The District Court's decision should be affirmed.

ARGUMENT

Introduction

It has long been recognized that "liquor" is "a lawlessness unto itself"[1] and that the Twenty-first Amendment gives states the primary responsibility for regulating traffic in wine, beer and spirits for use within their borders.

Nevertheless, US Airways argues it is exempt from New Mexico's enforcement of its Twenty-first Amendment sanctioned authority to license those who traffic in alcohol. It claims federal law pre-empts state regulation of airlines that provide alcohol to passengers even within the boundaries of the state. Implicitly, US Airways claims alcohol should be treated like any other product, that the Twenty-first Amendment has no meaning in this case, and that the Court should substitute its judgment for that of the New Mexico Legislature.

[1] *Duckworth v Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result). (In the words of Justice Jackson: "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special, constitutional provision." *Id*.)

Although the Federal Aviation Act[2] (FAAct) and the Airline Deregulation Act[3] (ADA) do not use the words "alcohol" or "liquor" in relation to preemption, US Airways asserts Congress expressly pre-empted state regulation of alcohol. In the alternative, US Airways claims that pre-emption should be implied, even though it is clear federal statutes and regulations do not occupy the field of the traffic in alcohol.

US Airways' position flies in the face of the settled consensus that beverage alcohol requires strict state-based regulation for which Congress has expressed support.

The last seventy-five years have demonstrated the utility and effectiveness of state-based regulation of beverage alcohol. Before and during National Prohibition, abuse of beverage alcohol was an acute problem generating constant public outcry. Because of effective state regulation, since repeal of National Prohibition it has been no more than a chronic problem.

Regulation, while no longer the constant subject of debate, remains necessary. Public concern with both intemperate and underage consumption is obvious and justified. State enforcement powers are needed in order to curb

[2] Federal Aviation Act of 1958, Pub. L. No. 85-72r, 72 Stat. 731, 49 U.S.C. § 1301 *et seq*.
[3] Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705.

excessive sales, underage sales and intemperate consumption. This is true whether alcohol products originate from a package store or a bar operating within the state or from an alcohol-serving airline operating within the state as a bar with wings.

Analysis

I.

The District Court correctly stated: "'the Twenty-first Amendment grants states virtually complete control over whether to permit importation of sale of liquor and how to structure the liquor distribution system' *Granholm [v. Heald]*, 544 U.S. [460] at 488 [2005] (*quoting [California Retail Liquor Dealers Ass'n. v] Midcal [Aluminum]*, 445 U.S. [97] at 110 (1980)."

This broad reach of the Twenty-first Amendment has been confirmed in numerous Supreme Court decisions going back to the repeal of National Prohibition through the recent decision in *Granholm, supra*. See, e.g., *Capitol Cities Cable, Inc. v. Crist,* 467 U.S. 691, 712, 715 (1983) ("The States enjoy broad powers under Section 2 of the Twenty-First Amendment to regulate the importation and use of intoxicating liquor within their borders." and exercising state control over whether to permit "importation or sale of liquor and how to structure the liquor distribution system" is "the central power reserved by Section 2 of the Twenty-First Amendment."); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* Inc., 445 U.S. 97, 110 (1980) ("The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); and, *Hostetter*

v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333 (1936) (recognizing a state's right to "regulate or control the transportation of . . . liquor . . . from the time of its entry into the State… in the interest of preventing unlawful diversion into her territory").

The broad reach of state regulation of beverage alcohol is recognized and confirmed by numerous Acts of Congress.[4] For example, the Webb-Kenyon Act, 27 U.S.C. § 122 was first enacted in 1913 and then re-enacted in 1935 after the repeal of National Prohibition.[5] The 1935 re-enactment serves as explicit post-Twenty-first Amendment Congressional recognition that states are the primary regulators of beverage alcohol within their borders and that state law must be obeyed.

---

[4] The "Federal Alcohol Administration Act", 27 U. S. C. § 201 *et. seq.*, supplements and supports state regulation with its anti-tied house provisions. One of the purposes of the Federal Alcohol Administration Act was to help enforce the Twenty-First Amendment and thus to support state law.

[5] The Webb-Kenyon Act states:

> "The shipment or transportation…of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State…into any other State…which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interest therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State…is prohibited."

More recently, in 2000 Congress enacted the "Twenty-first Amendment Enforcement Act", 27 U.S.C. § 122a(b) giving state Attorneys General the ability to avail themselves of federal court jurisdiction and injunctive relief to enforce state laws dealing with alcohol. In 2006, Congress passed the "Sober Truth in Preventing Underage Drinking Act", 42 U.S.C. § 290bb-25b. In that Act, Congress recognized that "alcohol is a unique product and should be regulated differently than other products" and that "states have primary authority to regulate alcohol distribution and sale, and the Federal Government should supplement and support these efforts." 42 U.S.C. at § 290bb-25b(b)(7).

Given the language of the Twenty-first Amendment and the longstanding recognition by Congress that beverage alcohol is a "unique" product and that states "have primary authority to regulate alcohol distribution and sale", it is inconceivable that Congress actually intended to pre-empt state law regarding beverage alcohol and airlines without an explicit declaration of that intent. The federal statutes relied on by US Airways do not contain such an explicit declaration of the intent to pre-empt traditional state regulation of "intoxicating liquor".[6] In

[6] As noted by the District Court (at page 7 of its opinion), there is a split of authority as to whether the scope of the phrase "rates, routes or service" and the federal statutes pre-empt state law dealing with such things as service of beverages. The correct analysis (and the one adopted by the District Court) was that of the Ninth Circuit in *Charas v Trans World Airlines, Inc.* 160 F.3d 1259 (continued)

fact, the words "alcohol" or "liquor" do not even appear in the provisions at issue here.

As the District Court recognized at page 22 of its opinion, regulations such as 14 C.F. R. § 121.575, do nothing more than supplement state law and do not replace it. Indeed, if it is correct, as US Airways claims, that state laws regulating alcohol are pre-empted, there would be no statute or rule prohibiting an airline from selling or serving alcohol to a minor in New Mexico (or anywhere else). Certainly, a Congress which encouraged states to raise their drinking age to twenty-one[7] did not intend to permit the sale or service by airlines to persons under the age of twenty-one. Yet that would be the effect of US Airways preemption argument.

(9th Cir. 1998). In *Charas*, 160 F.3d at 1261,the Court held that the providing of food and beverages is not a "service" which is pre-empted:

> [W]e hold that Congress used the word 'service' in the phrase 'rates, routes or service' in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail. In the context in which it was used in the Act, 'service' was not intended to include airline's provision of in-flight beverages…. *Id.* at 1261.

[7] 23 U.S.C. § 158 directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allowable from states "in which the purchase or public possession…of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." See also, *South Dakota v Dole*, 483 U.S. 203 (1987) (upholding the inducement to states to raise their drinking age under the "spending power".)

The absence of any statutory reference to the provision of alcohol to airline passengers, the absence of any reference to "alcohol" or "liquor" in the preemption provision of the federal statutes, as well as the absence of a *comprehensive federal* regulatory scheme for alcohol and airlines compels one conclusion: Congress knew state laws are comprehensive and primary, therefore, Congress had no need to address alcohol regulations, including sales to minors. Indeed, the administrative agency charged with regulation of airlines has implicitly recognized this Congressional intent as confirmed by the *lack* of meaningful, comprehensive regulations. In particular, it has made no reference to underage sales, an inconceivable omission for a comprehensive regulatory scheme.

In contrast, New Mexico (like other states) has developed a comprehensive regulatory system which among other things requires that within its borders those dispensing alcohol, including airlines, must be licensed. See, e.g., New Mexico Liquor Control Act, N.M. Stat. § 60-6A-1, *et seq*; N.M. Stat. § 60-6B-1, *et seq*; N.M. Stat. § 60-6C-1; N.M. Stat. § 60-6E-1; N.M. Stat. § 60-7B-1.

II.

In finding that there was no preemption the trial court recognized that preemptive intent may "be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law". *Altria Group, Inc. v Good*, 129 S.Ct. 538, 543 (2009). The District Court also recognized the principle that in analyzing whether implied preemption exists there is an "'assumption that the historic police powers of the States [are] not to be superseded … unless that was the clear and manifest purpose of Congress'". *Altria Group, supra,* 129 S. Ct. at 543 citing *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also, *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 432-433 (2002).

The District Court, at page 22 of its opinion, was correct that the single regulation of alcohol in 14 C.F.R. 121.575 "in contrast to New Mexico's extensive regulation" of alcohol shows there can be no implied pre-emption here because there is no showing of a Congressional intent to "occupy an entire field of regulation and …[thereby leave] no room for the States to supplement federal law…." To the contrary, as discussed above, it is state law that has for decades occupied the field of alcohol regulation pursuant to the States' traditional police powers and the Twenty-first Amendment.

III.

It is important to keep the genuine issue presented by this case in focus and not to allow petitioner and its amici to conjure up a parade of concerns, none of which is implicated by New Mexico's narrow effort to control the sale and provision of beverage alcohol in its territory, on land or above it, to those who will be landing, or might be returning to the gate, to reduce the likelihood of exactly the kind of horrific, drunk-driving collision that befell the Gonzales family.

Airplanes may be technological marvels. Air travel may or may not be convenient these days. All this is irrelevant. New Mexico is not trying to, nor is it actually, interfering with federal regulation of airline safety nor federal determination of – or deregulation of – routes, rates, landing patterns, or the hours of operation of airports. *Compare, City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). New Mexico merely wants to assure itself that when US Airways is in New Mexico, delivering passengers to its airport and functioning as a bar with wings that US Airways has the appropriate license and understands and complies with New Mexico's rules governing the provision of alcoholic beverages, as other airlines do.

Indeed, the lower court record indicates that other airlines have obtained and have been able to operate with a New Mexico liquor license (See Memorandum in

Support of Defendant's Motion for Summary Judgment, p. 13 and portions of the record cited therein). The record also discloses that US Airways maintains liquor licenses in nineteen other states. (*Id.*) As pointed out by the appellees, there has been no showing that this has resulted in less air safety or undue burden. See Defendants-Appellees' Response Brief, p 20.

US Airways' position impermissibly minimizes and even denies the significance of the Twenty-first Amendment which clearly shields New Mexico's regulation from federal preemption is this case. The Twenty-first Amendment did not simply restore to the States their historic powers to regulate the distribution, sale, and consumption of beverage alcohol in the internal market without altering the balance of state and federal power with regard to the regulation of alcoholic beverages. Restoring state regulation of the internal market did not require Section 2 of the Twenty-first Amendment. Once National Prohibition was repealed by Section 1, States resumed their inherent police powers to regulate beverage alcohol. Section 2 constitutionally restricts the scope of federal limitations on the State's exercise of their police powers, particularly limitations asserted in the name

of Congress' power to regulate interstate commerce. See *Capital Cities, supra*, 467 U.S. at 712.[8]

But to decide this case and uphold New Mexico's position, the Twenty-first Amendment does not even need to be considered. It is not, under any fair reading of the relevant statutes, Congress' intent to challenge or restrict New Mexico's ability to protect its citizens from excessive over-consumption of alcohol. It is simply inconceivable to think that Congress actually considered, or could have concluded had it actually considered, that tragic deaths caused by drunk drivers -- such as what happened to the Gonzales family here -- were an unfortunate but necessary cost justified by the benefits Congress anticipated from the deregulation of airline routes and rates.

There is absolutely no reason to believe that Congress considered the sale and provision of alcoholic beverages to be a matter the terms and conditions of which should be determined by competition among members of the airline industry.

[8] The *Capital Cities* Court noted that the Twenty-first Amendment did not operate to repeal the Commerce Clause. But, the Court also noted that "§ 2 [of the Twenty-first Amendment] reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Id.* And, the Court analyzed the issue there (a federal statute which directly contradicted state law) by balancing the state and federal interests.

It is also unsupportable to conclude that Congress, without explicitly stating anything to this effect, intended to supplant state regulation of alcoholic beverages in airplanes with its own.[9]

Federal Aviation Administration (FAA) regulation of the sale and provision of alcoholic beverages in airlines cannot, by any stretch of the imagination, be characterized as comprehensive and intricate. Indeed, it is significant that the FAA never interpreted the federal statutes, which themselves were silent on the question of the regulation of alcoholic beverages in airplanes, as a call for comprehensive federal regulatory scheme to supplant that by the States.[10]

In the context of the history of state regulation of the sale and provision of alcoholic beverages, of Congressional awareness and acceptance of it, of a broad

[9] Congress has only once attempted to preempt State alcoholic beverage regulation – in the case of the mandatory health warning on containers – and in that instance it did so explicitly. See 27 U.S.C. § 216. The explicit language of 27 U.S.C., § 216 stands in stark contrast to the statutory language at issue here.

[10] The decision in *Chevron USA, Inc., v National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) does not (as suggested by US Airways at p. 33 of its Brief) require a different result. If anything, *Chevron* supports the decision of the District Court. This is because the lack of a comprehensive set of regulations concerning the provision of alcohol to passengers demonstrates that the administrative agency did not interpret the statutes as instruction to draft comprehensive regulations, including prohibiting sale or service of alcohol to minors, not did it consider such regulations necessary to effectuate the statutory purposes. The agency's minimal reference to alcohol in 14 C.F.R. § 121.575 merely indicates some effort to supplement (but not to contradict or to replace) the more comprehensive state regulation.

federal policy to support rather than limit at least "core" State regulation of alcoholic beverages, it makes no sense to conclude that Congress meant for its preemption provision in the airline legislation to apply *sub silencio* to state alcoholic beverage regulation. It also makes no sense to conclude that Congress implicitly preempted New Mexico regulation since Congress and the FAA have made no meaningful effort to comprehensively supplant State law with federal regulation. Moreover, there is no conflict between State and federal law. New Mexico's regulation does not obstruct any federal purposes in a "significant" way (*cf Rowe v New Hampshire Motor Transp. Assoc.*, 552 U.S. 364, 371(2008)) but only, if at all, in a "tenuous, remote, or peripheral…manner." *Morales v Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae* American Beverage Licensees

BY: *s/Anthony S. Kogut*
Anthony S. Kogut
333 Albert Avenue; Suite 500
East Lansing, MI 48823
(517)351-6200
E-Mail: akogut@willinghamcote.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Fed. R. App. P. 29(C) that the foregoing *amicus* brief was prepared in 14-point Times New Roman proportionally typeface and contains 3,498 words, according to the count of Microsoft Word Office Suite 2000.

BY: *s/Anthony S. Kogut*
Anthony S. Kogut
Attorney for *Amicus Curiae* American Beverage Licensees
Dated: April 14, 2010

ANTI-VIRUS CERTIFICATION FORM

Case Name: *US Airways, Inc. v O'Donnell, et al*

Docket Number: 09-2271

I, Heather Harte, certify that I have scanned for viruses the PDF version of the *Amicus Curiae* Brief of the American Beverage Licensees that was submitted in this case by using Symantec AntiVirus, 10.1.0.394, and found it to be virus free.

BY: *s/Heather Harte*
Heather Harte

Dated: April 13, 2010

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order of March 18, 2009, I hereby certify as follows:

(1) In the foregoing brief, no privacy redactions were required;

(2) The electronically filed version of this brief is an exact copy of the paper version apart from the digital signatures.

Respectfully submitted,

WILLINGHAM & COTÉ, P.C.
Attorneys for *Amicus Curiae* American Beverage Licensees

BY: *s/Anthony S. Kogut*
Anthony S. Kogut
333 Albert Avenue; Suite 500
East Lansing, MI 48823
(517)351-6200
E-Mail: akogut@willinghamcote.com

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2010, I caused the foregoing *amicus* brief to be filed electronically with the Court via the CM/ECF system and by U.S. mail to Kenneth W. Starr, Kirkland & Ellis, LLP, 555 California Street, San Francisco, CA 94104, and Alexandra Freedman Smith, Freedman Boyd Hollander Goldberg & Ives, PA, 20 First Plaza, Suite 700 (87102), PO Box 25326, Albuquerque, NM 87125, with paper copies to follow in accordance with the Court's rules. Pursuant to this Court's General Order of March 18, 2009, the resulting Notice of Docket Activity generated by the ECF system constitutes service on counsel for the appellees.

Willingham & Coté, P.C.
Attorneys for *Amicus Curiae*
American Beverage Licensees

BY: *s/Anthony S. Kogut*
Anthony S. Kogut
333 Albert Avenue
Suite 500
East Lansing, MI 48823
517-351-6200
E-Mail: akogut@willinghamcote.com

I:\Team_c\Kogut\09782 US Airways\09782amicus.brief.doc