No. 09-2271

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

US AIRWAYS, INC.,

Plaintiff-Appellant,

v.

KELLY O'DONNELL, in her official capacity as Superintendent of the New Mexico Regulation and Licensing Department, and GARY TOMADA, in his official capacity as Director, New Mexico Regulation and Licensing Department, Alcohol and Gaming Division

Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Mexico, Cause No. 1:07-CV-1235-MCA-LFG
The Honorable M. Christina Armijo, United States District Judge

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BRIEF OF THE STATES OF INDIANA, COLORADO, FLORIDA, IDAHO, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, OHIO, TENNESSEE, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE OF THE DECISION BELOW

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, the states of Indiana, Colorado, Florida, Idaho, Louisiana, Maryland, Michigan, Mississippi, Ohio, Tennessee, Texas, Utah, and Wyoming, have a compelling interest in protecting public health and welfare by preventing underage consumption of alcoholic beverages and by promoting temperance. The *amici* states further these interests by implementing and enforcing comprehensive regulatory schemes that deter sellers of alcohol from overserving their customers.

As part of such regulatory schemes, the State of New Mexico and at least 36 other states have adopted laws or regulations requiring anyone selling alcoholic beverages to passengers on common carriers within their respective states to obtain a license or permit from that state. The states' regulatory authority under these laws to revoke and suspend permits and implement fines serves as a powerful deterrent to prevent common carriers from overserving passengers. Passengers who become intoxicated while onboard airplanes, trains, boats, and other vehicles are a danger to themselves, their fellow passengers, and innocent bystanders on the ground once the passengers de-board the common carriers. It is important that the states maintain the ability to exert regulatory authority in order to prevent such a threat to public safety.

Furthermore, throughout the history of the Nation, the states have been the primary regulators of alcohol. Both Congress and the Supreme Court have long

recognized state primacy in the field of alcohol regulation. Accordingly, the *amici* states have a strong interest in ensuring that their state regulatory schemes are not preempted by federal law.

SUMMARY OF THE ARGUMENT

For over 150 years, states have been regulating the importation, sale, and use of alcohol within their borders. Through the enactment of the Wilson and Webb-Kenyon Acts and, ultimately, the Twenty-first Amendment, Congress has repeatedly affirmed that states have remarkably broad authority in enacting such regulations. Likewise, the United States Supreme Court has long recognized this authority. *See Craig v. Boren*, 429 U.S. 190, 205 (1976) (noting that as early as the 1847 *License Cases*, the Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders . . . .").

New Mexico, along with 36 other states, has exercised this authority by enacting regulatory schemes that, among other things, require interstate common carriers to possess a license or permit in order to serve alcohol to passengers on common carriers within their state. These laws, intended to deter common carriers from overserving their passengers, fall within the "core" of the states' power under the Twenty-first Amendment to promote temperance in furtherance of public safety. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990).

Nevertheless, US Airways argues that New Mexico's interest in requiring a public service liquor license for "every person selling alcoholic beverages to travelers on trains or airplanes within the state," NMSA 1978, § 60-6A-9, is outweighed by the federal interest underlying the Federal Aviation Act of 1958 ("FAA"), Pub. L. No. 85-726, 72 Stat. 731, and the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705. Because, however, US Airways has never alleged that New Mexico's law is protectionist or challenged it under any provision of the Constitution, balancing of state versus federal interests is not appropriate. Furthermore, the federal interest in public safety is not served by preempting New Mexico's regulation which is more stringent and capable of enforcement than its federal counterpart.

Furthermore, states have been regulating service of alcohol onboard common carriers within their jurisdictions since the end of the Prohibition Era and courts in this circuit have previously upheld precisely this type of regulation with respect to railroads. *See Nat'l R.R. Passenger Corp. v. Harris*, 490 F.2d 572 (10th Cir. 1974); *Nat'l R.R. Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D. Kansas 1973), *aff'd* 414 U.S. 948 (1973) (mem.). As these decisions illustrate, the "patchwork problem" US Airways and its *amici* complain of—whereby airlines must comply with a host of varying liquor laws in each state rather than one uniform federal law—is nothing more than a straw man. Indeed, as of 2007 when

US Airways first applied for a New Mexico liquor license, it had already secured liquor licenses from 19 other states. Thus, US Airways clearly is capable of complying with varying state laws. Moreover, no amount of "need for uniformity" could ever suffice to overcome a state's interest in exercising its core Twenty-first Amendment power to license the sale of alcohol by the drink in its jurisdiction.

ARGUMENT

I. In Light of History and the Twenty-First Amendment, States Have Remarkably Broad Authority to Regulate the Transportation, Importation, and Use of Alcohol

A. State primacy in the area of alcohol regulation is deeply rooted in the Nation's history

In 1847, Massachusetts, Rhode Island, and New Hampshire became the first states to attempt to reduce alcohol consumption by passing laws requiring a license to sell alcohol. Russ Miller, *The Wine is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 Vand. L. Rev. 2495, 2503 (2001). In the *License Cases*, 5 How. 504, 579, 12 L.Ed. 256 (1847), sellers of alcohol challenged these laws, arguing that they violated the Commerce Clause by burdening the movement of interstate commerce. The Court unanimously rejected this argument, although the Justices could not agree on a single rationale for their holding. *Id*. Each of the opinions did, however, "recognize[] a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the

Commerce Clause." *Craig v. Boren*, 429 U.S. 190, 205 (1976) (discussing the *License Cases,* 5 How. 504).

The temperance movement grew stronger during the late 1800s and, in 1880, Kansas took the unprecedented step of amending its state constitution to prohibit the manufacture and sale of liquor within the state. Kan. Const. art. XV, § 10 (repealed 1947). The Supreme Court upheld the amendment, finding that it was within the state's police power to prohibit the production and sale of alcohol in the state. *Muglar v. Kansas*, 123 U.S. 653, 657 (1887). Thus, in the wake of the *License Cases* and *Muglar*, the states appeared to have total control over the regulation of alcohol: *Muglar* held that states could outlaw the sale of in-state alcohol and the *License Cases* allowed states to restrict the import and sale of all out-of-state alcohol.

Just a few years later, however, the Court undercut the theoretical underpinnings of those cases in *Leisy v. Hardin*, 135 U.S. 100, 124 (1890), holding that alcohol was an article of interstate commerce outside a state's regulatory reach so long as the alcohol stayed in its original package (*i.e.*, an unopened container). Within four months of the *Leisy* decision, Congress responded by reinvigorating the states' regulatory role through the passage of the Wilson Act. The Wilson Act provides that all alcoholic beverages transported into a state shall, upon arrival in the state, "be subject to the operation and effect of the laws of such State . . .

enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State . . . ." 27 U.S.C. § 121. Senator Wilson, the bill's author, stated that the Act was designed to give states the power "to do as they please in regard to the liquor question." Miller, *supra*, at 2507-08 (quoting Cong. Rec., 50th Cong., 2d Sess., at 2882 (1888)).

The Supreme Court unanimously upheld the constitutionality of the Wilson Act in *In re Rahrer*, 140 U.S. 545, 562 (1891); however, the Court later found that the Act contained a loophole. Specifically, the Court noted that the Act gave states the ability to regulate alcohol "upon arrival" into the state, and that alcohol did not "arrive" in a state until it was received by the consignee. *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898). This provided an end-run around the regulatory scheme wherein out-of-state sellers could simply ship alcohol directly to consumers' homes and thus avoid the prohibited in-state sale. Miller, *supra*, at 2509.

Congress closed this loophole with the enactment of the Webb-Kenyon Act in 1913. The Webb-Kenyon Act prohibits the shipment or transportation of alcohol from one State into another for the purpose of being received, possessed, sold, or used in violation of the laws of that State. 27 U.S.C. § 122. The Supreme Court upheld the constitutionality of the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311, 324 (1917) (holding that the

purpose of the Act was to "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught."). Thus, by the early part of the Twentieth Century, state primacy in the area of alcohol regulation was firmly established.

For prohibitionists, however, total state control over alcohol was not enough. Accordingly, the Eighteenth Amendment, uniformly prohibiting the manufacture and sale of alcohol throughout the country, passed in 1917, and the National Prohibition Act, implementing the Amendment and providing an enforcement mechanism, was enacted by Congress two years later. Miller, *supra*, at 2512.

The Eighteenth Amendment gave the states concurrent power with the federal government to enforce the ban on the sale and manufacture of alcohol. U.S. Const. amend. XVIII, § 2 (1919, repealed 1933). However, the federal government took the lead in enforcing Prohibition to disastrous effect. Sidney J. Spaeth, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161, 176 (1991). For example, federal efforts to prevent alcohol smuggling failed; during a three-year period during the Prohibition Era, the volume of whiskey smuggled from Canada to the United States increased more than 75 percent. *Id.* at 177.

In addition, the Prohibition Bureau functioned essentially as a party spoils system fueled by patronage. *Id.* at 178. A federal grand jury for the Southern District of New York investigating a liquor raid said of the Prohibition Bureau agents in 1921: "Almost without exception the agents are not men of the type of intelligence and character qualified to be charged with this difficult and important duty and Federal law." *Id.* at 179 (citing N.Y. Times, Apr. 2, 1921, at 9, col. 1). President Harding reported to Congress a few weeks later that "conditions relating to Prohibition enforcement . . . savor of nationwide scandal. It is the most demoralizing factor in public life." *Id.*

As a consequence, support for Prohibition waned, and in 1933 the Twenty-first Amendment repealed the Eighteenth Amendment and ended Prohibition. The operative provision of the Twenty-first Amendment, Section 2, provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. This language closely tracks the language of the Webb-Kenyon Act and cements the role of the states in regulating alcohol.[1] Indeed, several Senators at the time were concerned

[1] Following the enactment of the Twenty-first Amendment, there was some concern that the enactment of the National Prohibition Act had implicitly repealed the Webb-Kenyon Act. Todd Zywicki, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J. L. & Liberty 609, 622-24 (2005). To make certain Webb-Kenyon remained in effect, Congress reenacted it in 1935. *Id.* at 625.

that Webb-Kenyon was vulnerable to attack since, from its very inception, there had been aggressive legislative and litigation efforts to overturn it. Todd Zywicki, *Wine, Commerce, and the Constitution*, 1 N.Y.U. J. L. & Liberty 609, 623 (2005). As Senator Blaine explained, in order to "assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id*. (quoting 76 Cong. Rec. 4141 (Feb. 15, 1933) (statement of Sen. Blaine)).

More broadly, the intent of Section 2 was to protect certain core interests of the states in "promoting temperance, ensuring orderly market conditions, and raising revenue" through regulation of the production and distribution of alcoholic beverages. *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). *See also Granholm v. Heald*, 544 U.S. 460, 484 (2005) ("The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use."). To this end, the Supreme Court has held that Section 2 "grants the States *virtually complete control* over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 455 U.S. 97, 110 (1980)) (internal quotation marks omitted) (emphasis added).

Indeed, since the Court's decision in *Granholm* five years ago, lower courts have mostly upheld state alcohol distribution laws. *See Siesta Village Market, LLC. V. Steen*, 595 F.3d 249 (5th Cir. 2010) (upholding Texas statutes allowing in-state liquor retailers to make local deliveries within their counties but barring out-of-state retailers from shipping to Texas, and placing limit on quantity of alcoholic beverages an individual can purchase out-of-state and bring to Texas); *Arnold's Wines, Inc. v. Boyle,* 571 F.3d 185 (2d Cir. 2009) (upholding various provisions of New York's alcohol distribution regulatory scheme); *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008) (upholding Indiana's face-to-face transaction requirement but striking down wholesale clause of Indiana statute authorizing direct sales of wine), *cert. denied*, 129 S.Ct. 2382; *Black Star Farms, LLC. V. Oliver,* 544 F. Supp. 2d 913 (D. Ariz. 2008) (upholding in-person and gallonage cap exceptions to Arizona's three-tiered distribution system); *Cherry Hill Vineyard, LLC. V. Baldacci,* 505 F.3d 28 (1st Cir. 2007) (upholding Maine statute allowing small wineries to bypass wholesalers and sell directly to consumers in face-to-face transaction but prohibiting direct shipping from wineries to consumers).

Nonetheless, state regulatory authority under the Twenty-first Amendment is not unlimited. State policies are only protected under the Twenty-first Amendment to the extent that they treat alcohol produced out of state the same as its domestic equivalent. *See Granholm*, 544 U.S. at 489. "The [Twenty-first] Amendment did

not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-85. In addition, state alcohol regulatory schemes may not violate other provisions of the Constitution besides the Commerce Clause. *See, e.g., Craig*, 429 U.S. at 206 (striking down Oklahoma statute prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18 because it constituted gender-based discrimination in violation of the Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, (1971) (striking down as a violation of due process a Wisconsin statute authorizing designated officials to post notices forbidding the sale of alcohol to individuals whose excessive drinking poses a danger to themselves or their families).

If a state law is discriminatory within the meaning of the Commerce Clause or conflicts with another provision of the Constitution, courts will apply a balancing test to determine whether the state's right to exercise its core Twenty-first Amendment power is outweighed by the burden placed on the Constitution. *See, e.g., Granholm*, 544 U.S. at 460; *Craig*, 429 U.S. at 190; *Constantineau*, 400 U.S. at 433.

However, a nondiscriminatory state law that does not conflict with any Constitutional provision is *not* subject to a balancing test. Such a law will be upheld under the Twenty-first Amendment if it is "closely related to the powers

reserved by [that] Amendment . . . [and] may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984). Thus, in keeping with the historic primacy of states in this area, there is a strong presumption in favor of the validity of state alcohol regulations.

B. New Mexico's regulatory scheme is a reasonable exercise of authority to regulate alcohol sales and consumption to protect public safety

The Supreme Court has recognized that promoting temperance in furtherance of public health and safety "fall[s] within the *core* of the State's power under the Twenty-first Amendment."). *North Dakota*, 495 U.S. at 432 (emphasis added). Safety issues related to alcohol consumption are especially acute when air travel is involved. Consuming two to three alcoholic drinks at altitudes of approximately 10,000 to 12,000 feet has the same physiological effect as consuming four to five drinks on the ground. Catherine Stone Bow, "*May I Offer You Something to Drink From the Beverage Cart?": A Close Look at the Potential Liability for Airlines Serving Alcohol*, 54 J. Air L. & Com. 1013, 1013-14 (1989). An intoxicated passenger represents a potential danger both to fellow passengers and to innocent third-parties on the ground. *See, e.g., PSNI Officer Tackled 'Air Rage Passenger*, Belfast Telegraph, Apr. 3, 2010, *available at* 2010 WL 6929098 (intoxicated passenger onboard a Continental Airlines flight from New York to

Belfast was apprehended after becoming "aggressive and violent towards passengers and staff during a drunken rampage."). As the sad facts of this case—where U.S. Airways overserved a customer who then killed nearly an entire family (and himself) in a horrendous automobile accident—illustrate, public safety demands that states provide a strong regulatory presence when it comes to serving alcohol on airplanes.

New Mexico has exercised its "core" power in this area by enacting a comprehensive, stringent regulatory scheme to deter businesses, including airlines, from overserving their customers while within the State's borders. The New Mexico regulatory scheme prohibits the sale of alcohol to intoxicated persons (NMSA 1978 § 60-7A-16); or to minors (NMSA 1978 § 60-7B-1); specifies training for servers (NMSA 1978 § 60-6E-1ff); and provides for investigation and enforcement mechanisms (NMSA 1978 §§ 60-4B-4ff; 60-6B-1ff), including both administrative and criminal penalties (NMSA 1978 §§ 60-7A-4.1, -4.2, -5). Sanctions include suspension or revocation of the liquor licenses of licensees who serve alcohol in violation of the law. New Mexico's even-handed law is applicable to anyone wishing to sell alcoholic beverages to travelers on trains or airplanes within the state. *See* NMSA 1978, § 60-6A-9.

US Airways argues that state interests in temperance and public safety are outweighed by the *federal* interest in air travel safety underlying the FAA and the

ADA. Br. of Appellant at 46. First, however, while federal laws may preempt state laws, State alcohol regulations are not subject to being counterbalanced by mere federal *interests*. As discussed in Part I.A., *supra*, balancing is only appropriate where the state alcohol regulation discriminates against interstate commerce in violation of the Commerce Clause or conflicts with another provision of the Constitution. US Airways has made no allegations that New Mexico's law is protectionist or is in any other way unconstitutional. They have argued only that it is preempted by federal law. Under these circumstances, balancing the State's exercise of its core Twenty-first Amendment power against federal interests would be unprecedented.

Second, US Airways does not explain how the federal interest in public safety is served by preempting state alcohol regulations, particularly since federal regulation of alcoholic beverage sales by airlines lacks the teeth of many state laws, including New Mexico's law. The sole FAA regulation on alcoholic beverage service by airlines, 14 C.F.R. § 121.575, prohibits boarding of or service of alcohol to passengers who appear intoxicated and also prohibits consumption of alcohol not served by airline personnel. The regulation requires an airline to report "any disturbance by a person who appears to be intoxicated aboard any of its aircraft." 14 C.F.R. 121.575(d). The FAA regulation does not define "intoxication," does not provide for training programs for airline personnel serving

alcohol, does not prohibit service to minors, and does not require airlines to report intoxicated passengers to the FAA unless the passenger causes a "disturbance" on the aircraft.

Finally, unlike New Mexico, the FAA regulation does not require that airlines secure and maintain licenses to serve alcohol, so there is no tool to enforce the minimal alcohol regulations that are on the federal books. Without state regulations like New Mexico's there would be no serious regulation of airline alcohol sales to passengers.

II. Many States License Alcohol Sales By Interstate Common Carriers, and US Airways Has Long Demonstrated That it is Able to Comply With Such Requirements

New Mexico is certainly not alone in requiring a liquor license for any person or business selling alcoholic beverages to passengers on airplanes within its state borders. Ever since the end of Prohibition State governments have enacted statutes asserting regulatory control of alcohol aboard interstate common carriers. Massachusetts enacted laws regulating the sale of alcoholic beverages on trains and boats in 1933 and added airplanes in 1975. Mass. Gen. Laws. Ann. Ch. 138 § 13 (West 2009). Illinois and Nebraska soon followed by enacting laws regulating the sale of alcohol on trains and boats in 1934 and 1935 respectively and added airplanes in 1955 and 1957. 235 Ill. Comp. Stat. Ann. 5/5-1 (West 2009); Neb. Rev. Stat. § 53-123-05 (1967, 1942).

During the decades that followed, more than two dozen states enacted statutes requiring licenses for airlines wishing to serve alcohol. *See* Table 1, *infra*. In addition, more than 20 states, including Indiana, enacted laws requiring licenses to sell alcohol on passenger trains and commercial watercraft. *See* Table 1, *infra*. Some states, including Washington and Minnesota, impose regulatory requirements on *all* passenger common carriers. *See* Wash. Admin. Code 314-27-010 (2003); Minn. Stat. Ann. § 340A.407.

What is more, courts in this circuit have previously upheld state regulation of alcohol sales by interstate common carriers. In *National Railroad Passenger Corporation v. Miller*, 358 F. Supp. 1321 (D. Kansas 1973), *aff'd* 414 U.S. 948 (1973) (mem.), a three-judge panel, affirmed by the Supreme Court, held that Rail Act preemption of state laws "relat[ing] to rates, routes, or service" did not preempt laws requiring licenses to serve alcohol on passenger trains. *Miller*, 358 F. Supp. at 1321. A year later this Court held that that Amtrak trains receiving and discharging passengers in state are subject to state liquor laws notwithstanding Amtrak's assertion that federal law governing train rates routes and service preempted state alcohol regulations. *See Nat'l R.R. Passenger Corp. v. Harris,* 490 F.2d 572, 573 (10th Cir. 1974).

The Amtrak cases notwithstanding, US Airways and its *amici* argue that subjecting airlines to state alcohol regulations will impose undue burdens. Holding

that New Mexico has the authority to regulate liquor moving through its territory, they say, will release the flood gates and hasten a "patchwork problem" whereby flight attendants must constantly re-focus their attention on varying applicable liquor laws of the states and localities they pass enroute to their destinations. *See* Br. of the United States at 16; Br. of Former Secy's of the Dep't of Transp. at 17-18.

The fact is, however, that by 2007, when it first applied for a New Mexico alcohol license, US Airways had already secured alcohol sales licenses from 19 states. *See* A1012. Some of those states have regulated alcohol service on commercial flights for more than a quarter of a century. *See* Table 1, *infra*. Indeed, not until US Airways faced license termination for enabling a multiple-fatality drunk-driving accident did it complain that abiding by state alcohol laws is too hard. The convenient timing of this new-found burdensomeness, combined with US Airways' general lack of evidence supporting its burden theory, eviscerates the credibility of this argument.

More to the point, no amount of "need for uniformity" could ever suffice to overcome a state's interest in exercising its core Twenty-first Amendment power to license the sale of alcohol by the drink in its jurisdiction. What US Airways and its *amici* are proposing is that the core of states' rights under the Twenty-first Amendment be jettisoned because it poses an inconvenience to the airlines and

undermines uniformity. This would, in effect, read the Twenty-first Amendment out of the Constitution with respect to airlines. Congress surely did not contemplate such a result when it enacted the FAA and ADA acts.

Nor would it have contemplated the other possible ramifications of US Airways' theory. For example, if airlines cannot be subject to individual state alcohol laws because of the "patchwork problem", does this mean that airlines are free to serve alcohol to minors? There is no federal regulation prohibiting service of alcohol to minors; thus, if airlines cannot be subject to non-uniform state laws, then this would seem to be permissible. However, surely US Airways would not argue that it is permitted to serve under-age passengers. Is it their position, then, that it is permissible to enforce state laws against serving minors but not state licensing laws? It cannot be the case that airlines and other interstate common carriers are allowed to select which portions of integrated state licensing and alcohol control schemes they will abide by.

* * *

State regulation of alcohol sales on interstate common carriers has been around for a long time. The only threat to the status quo is US Airways' argument that it should be able to operate free from any meaningful regulation of alcohol sales to its customers. There is no basis for undoing decades of statutory and case

law precedent establishing state authority to restrict airlines and other common carriers in their sales of alcohol while within the borders of the state.

CONCLUSION

The Court should affirm the judgment of the District Court.

Dated: April 14, 2010

Respectfully submitted,

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Table 1: States Regulating Common Carrier Alcohol Service			
State	**Airplanes**	**Trains**	**Boats**
Alaska	Alaska Stat. § 4.11.180	Alaska Stat. § 4.11.180	Alaska Stat. § 4.11.180
Arizona	Ariz. Rev. Stat. § 4-209(B)(8)	Ariz. Rev. Stat. § 4-209(B)(8)	Ariz. Rev. Stat. § 4-205.07
California	Cal. Bus. & Prof. Code § 23320(27)	Cal. Bus. & Prof. Code § 23320(24)	Cal. Bus. & Prof. Code § 23320(26)
Colorado	Colo. Rev. Stat. Ann. § 12-47-419(1)	Colo. Rev. Stat. Ann. § 12-47-419(1)	Colo. Rev. Stat. Ann. § 12-47-419(1)
Connecticut	Conn. Gen. Stat. Ann. § 30-28(a))	Conn. Gen. Stat. Ann. § 30-28	Conn. Gen. Stat. Ann. § 30-29
Florida	Fla. Stat. Ann. § 565.02(3)(a)	Fla. Stat. Ann. § 565.02(2)	Fla. Stat. Ann. § 565.02(3)(a)
Georgia	Ga. Code Ann. § 3-9-1	Ga. Code Ann. § 3-9-1	Ga. Code Ann. § 3-9-1
Idaho	Idaho Code Ann. § 23-906	Idaho Code Ann. § 23-906	Idaho Code Ann. § 23-906
Illinois	235 Ill. Comp. Stat. Ann. 5/5-1	235 Ill. Comp. Stat. Ann. 5/5-1	235 Ill. Comp. Stat. Ann. 5/5-1
Indiana		Ind. Code § 7.1-3-6-6	Ind. Code § 7.1-3-6-12
Iowa		Iowa Code Ann. § 123.133	
Kentucky		Ky. Rev. Stat. Ann. § 243.300	
Maine	Me. Rev. Stat. Ann. tit. 28 § 1077	Me. Rev. Stat. Ann. tit. 28 § 1077	Me. Rev. Stat. Ann. tit. 28 § 1077

State	Airplanes	Trains	Boats
Maryland	Md. Ann. Code, art. 2B § 6-503	Md. Ann. Code, art. 2B § 6-502	Md. Ann. Code, art. 2B § 6-501
Massachusetts	Mass. Gen. Laws. Ann. Ch. 138 § 13	Mass. Gen. Laws. Ann. Ch. 138 § 13	Mass. Gen. Laws. Ann. Ch. 138 § 13
Michigan	Mich. Admin. Code r.436.1147		Mich. Admin. Code r.436.1145
Minnesota	Minn. Stat. Ann. § 340A.407	Minn. Stat. Ann. § 340A.407	Minn. Stat. Ann. § 340A.407
Mississippi	35-002-002 Miss. Code R. § 8	35-002-002 Miss. Code R. § 8	35-002-002 Miss. Code R. § 8
Missouri			Mo. Ann. Stat. § 311.091
Montana	Mont. Code Ann. § 16-4-302	Mont. Code Ann. § 16-4-302	
Nebraska	Neb. Rev. Stat. § 53-123.05	Neb. Rev. Stat. § 53-123.05	Neb. Rev. Stat. § 53-123.05
New Hampshire		N.H. Rev. Stat. Ann. § 178:20(II)	N.H. Rev. Stat. Ann. § 178:20(II)
New Jersey	N.J. Rev. Stat. § 33:1-12(4)	N.J. Rev. Stat. § 33:1-12(4)	N.J. Rev. Stat. § 33:1-12(4)
New York	N.Y Alco. Bev. Cont. Law § 106(2)	N.Y Alco. Bev. Cont. Law § 106(2)	N.Y Alco. Bev. Cont. Law § 106(2)
North Carolina	N.C. Gen. Stat. Ann § 18B-107	N.C. Gen. Stat. Ann § 18B-108	N.C. Gen. Stat. Ann § 18B-106
Ohio		Ohio Rev. Code Ann. § 4303.19	Ohio Rev. Code Ann. § 4303.181(e)

State	Airplanes	Trains	Boats
Oregon	Or. Admin. R. 845-006-0463(2)	Or. Admin. R. 845-006-0463(3)	Or. Admin. R. 845-006-0463(4)
Pennsylvania	47 Pa. Stat. Ann. § 4-408	47 Pa. Stat. Ann. § 4-408	47 Pa. Stat. Ann. § 4-408
South Dakota	S.D. Codified Laws § 35-4-2(9)	S.D. Codified Laws § 35-4-2(9)	S.D. Codified Laws § 35-4-2(9)
Tennessee	Tenn. Code Ann. § 57-4-102(16)	Tenn. Code Ann. § 57-4-102(16)	Tenn. Code Ann. § 57-4-102(16)
Texas	Texas Alcoholic Beverage Code Ann. § 34.01	Texas Alcoholic Beverage Code Ann. § 48.01	
Utah	Utah Code Ann. § 32B-10-303	Utah Code Ann. § 32B-10-303	Utah Code Ann. § 32B-10-303
Vermont		Vt. Stat. Ann. Tit. 1.7 § 228	Vt. Stat. Ann. Tit. 1.7 § 228
Virginia	Va. Code Ann. § 4.1-209(d)	Va. Code Ann. § 4.1-209(b)	Va. Code Ann. § 4.1-209(c)
Washington	Wash. Admin. Code 314-27-010	Wash. Admin. Code 314-27-010	Wash. Admin. Code 314-27-010
Wisconsin			Wis. Stat. § 125.27(2)
Wyoming		Wyo. Stat. Ann. § 12-2-202(a)	

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because, according to the word-count function of the word-processing program in which it was prepared (Microsoft Word), the brief contains 4,256 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

/s Thomas M. Fisher
Thomas M. Fisher

CERTIFICATE OF SERVICE

I certify that on this 14th day of April, 2010, I filed the foregoing brief via the Court's electronic case filing (ECF) system. 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 and Appellants.

s/ Thomas M. Fisher
Thomas M. Fisher

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order of March 18, 2009, I certify that in the foregoing brief, no privacy redactions were required and hence no such redactions were made. I further certify that electronic version of the brief has been scanned for viruses by McAfee Virus Scan Enterprise version 8.5i (updated continuously) and is, according to that program, free of viruses. I further certify that the electronically filed version of the brief is an exact copy of the paper version filed with the clerk, except that the electronic version is signed in the manner required by the General Order whereas the paper version is signed by hand.

s/ Thomas M. Fisher
Thomas M. Fisher