No. 09-2271

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; GARY TOMADA, in his official capacity as Director, New Mexico Regulation and Licensing Department, Alcohol & Gaming Division,

Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico (The Honorable M. Christina Armijo)

BRIEF *AMICI CURIAE* FOR WINE & SPIRITS WHOLESALERS OF AMERICA, INC. AND SAZERAC COMPANY IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Wine & Spirits Wholesalers of America, Inc. and Sazerac Company state that they have no parent corporations and that no publicly held corporations own 10% or more of their stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Wine & Spirits Wholesalers of America, Inc. ("WSWA") is a national trade organization and the voice of the wholesale branch of the wine and spirits industry. Founded in 1943, WSWA represents nearly 330 companies that hold state licenses to act as wine and/or spirits wholesalers and/or brokers. WSWA's members operate in all 50 States and the District of Columbia and distribute more than 70% of all wine and spirits sold at wholesale in the United States.

Sazerac Company is a privately held, family-owned manufacturer and marketer of distilled spirits that sells its products in all 50 States, exports to over ten countries and has 350 employees. Sazerac Company has been in business since 1850 and also owns the Buffalo Trace Distillery, which has been in continuous operation since 1773.

Amici, as national trade associations for and participants in the beverage alcohol industry, have a fundamental interest in issues concerning federal and state regulation of the distribution of alcohol to consumers. Accordingly, *amici* are concerned about the proper boundaries between federal and state regulation of such distribution, as governed by the Twenty-first Amendment. The issue presented in this case – whether federal law preempts New Mexico's efforts to apply certain of its laws regulating alcohol to appellant – is of vital concern to *amici* because

alcohol products raise related but legally separate and distinct regulatory issues for both state and federal officials.

The district court held that federal law does not preempt New Mexico's efforts to apply certain provisions of its alcoholic beverage code to appellant. In conducting its preemption analysis, the district court properly considered the Twenty-first Amendment and properly recognized that the New Mexico laws at issue implicate New Mexico's core interests under that Amendment. *Amici* therefore have a vital interest in the appeal of this ruling and respectfully submit that their experience with and perspective on the alcohol industry will assist the Court in resolving the legal issues presented.

Counsel for all parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amici defer to the statement of the case presented by the State.

SUMMARY OF ARGUMENT

This brief does not directly analyze the express and implied preemption questions presented by the federal and state statutes at issue in this case; those questions will be briefed ably by others and particularly by the parties. Instead, this brief focuses on three points concerning the Twenty-first Amendment that bear on the preemption analysis and that will inform the Court's judgment about how to resolve the Supremacy Clause issue.

First, the district court properly rejected appellant's argument that the Twenty-first Amendment is not implicated in this case at all. Because it is undisputed that appellant serves alcohol on its airplanes while they are on the ground in New Mexico prior to departure and also while they are flying in the air space within New Mexico's borders on flights to and from New Mexico, New Mexico's actions fall within its regulatory authority granted by the plain language of the Amendment. This conclusion is confirmed both by decisions of the United States Supreme Court and precedent from this Circuit.

Second, because New Mexico's Twenty-first Amendment powers and interests are implicated here, the district court properly recognized that Supreme Court precedent requires it specifically to consider these interests as part of its preemption analysis. Alcohol is fundamentally different from other commodities because the Twenty-first Amendment grants the States plenary authority to regulate its distribution and transportation. State laws governing the distribution of alcohol therefore stand on a unique constitutional footing. As a result, the Supreme Court has held that ordinary principles of federalism do not apply in cases that address the appropriate federal-state balance in the area of alcohol regulation. In particular, in the context of resolving federal preemption questions, the Supreme Court has held that courts must specifically consider and analyze the State's

interests under the Twenty-first Amendment that are served by the state law at issue.

Third, contrary to the assertions of appellant, the powers and interests of New Mexico at stake in this case are core powers and interests recognized by the Twenty-first Amendment. The history of the Twenty-first Amendment makes plain that Congress and the States were deeply concerned about the manifest problems that are caused by intemperance and the irresponsible service of alcohol to intoxicated persons – problems which they viewed as local problems because of their profound effects on local communities. The Framers of the Amendment therefore concluded that the States needed maximum authority to combat these problems to protect their citizenry. New Mexico's efforts to promote temperance and protect the health and safety of its citizens by keeping intoxicated persons off its roads and out of its communities therefore implicate an area in which the State's Twenty-first Amendment interests are at their zenith.

ARGUMENT

I. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S ARGUMENT THAT THE TWENTY-FIRST AMENDMENT IS NOT IMPLICATED IN THIS CASE AT ALL.

The district court properly rejected the argument of appellant and its *amici*[1] that the Twenty-first Amendment is not implicated in this case because New

[1] *See, e.g.*, Brief for Appellant US Airways, Inc. ("US Airways Br.") at 42-45; *but*

Mexico's actions fall outside the scope of its authority under that Amendment. *See US Airways, Inc.* v. *O'Donnell*, No. 07-1235, slip op. at 14 (D.N.M. Sept. 30, 2009) ("District Court Opinion") ("this Court is satisfied that US Airways' activity is encompassed by the strictures of the Twenty-first Amendment"); *id.* at 18 ("the Twenty-first Amendment is directly implicated by US Airways' conduct"). New Mexico's actions fall within the plain language of the Amendment's text. In addition, the district court's determination is supported by decisions of the United States Supreme Court and precedent from this Circuit.

Section 2 of the Twenty-first Amendment 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.

Here, it is undisputed that appellant brings alcohol into New Mexico and that it "typically" serves alcohol to some passengers "before takeoff," US Airways Br. at 8, *i.e.*, while the passengers are on the ground in New Mexico at the Albuquerque airport. Therefore, under the plain terms of the Amendment, US Airways "transports" or "imports" alcohol into New Mexico for "delivery or use *therein*" (emphasis added). As a result, the Twenty-first Amendment authorizes New

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see id. at 45 (suggesting that New Mexico's interests may "mark the outermost boundary of the Amendment's reach"); Brief for the United States ("US Br.") at 24-29; Brief of the Air Transport Association ("ATA Br.") at 20-32.

Mexico to regulate this service of alcohol through licensing and other measures, just as it would authorize New Mexico to regulate appellant's service of alcohol in an airport lounge located on the same airport premises or elsewhere in the State. *Cf.* US Airways Br. at 49 (arguing that the Twenty-first Amendment is not implicated because appellant did not serve alcohol "in the Sunport").

In addition, it is undisputed that appellant serves alcohol to passengers while its airplanes are flying within New Mexico's territorial borders on flights to and from New Mexico. Such service of alcohol is "in" New Mexico for purposes of the Twenty-first Amendment because it occurs within the State's borders. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984) ("[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor *within their borders*") (emphasis added); *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) ("the core of [a] State's power under the Twenty-first Amendment" is to "establish[] a comprehensive system for the distribution of liquor *within its borders*") (emphasis added).[2] For instance, it is

[2] Some of appellant's *amici*, but not appellant itself, assert that airplanes, at least while in flight, are "federal enclaves." *See, e.g.*, ATA Br. at 30. No court has so held, however, and privately owned and operated airplanes bear none of the attributes of national parks and other federal enclaves, which are within the "territorial jurisdiction" of the United States and therefore "under a distinct sovereignty." *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938). Moreover, appellant acknowledges that other national airlines have been obtaining New Mexico alcohol licenses for "decades," US Airways Br. at 52, apparently

quite implausible to think that Arizona could not regulate the consumption of alcohol on helicopter rides over the Grand Canyon simply because the alcohol is being consumed above the State.

This imminently logical conclusion not surprisingly is supported by this Court's decision in *National Railroad Passenger Corp.* v. *Harris*, 490 F.2d 572 (10th Cir. 1974) (per curiam), where it adopted the holding of a Kansas district court that States can apply their alcohol laws to the service of alcohol on interstate Amtrak trains that move through and stop in their territory. *See id.* at 573 (citing *National Railroad Passenger Corp.* v. *Miller*, 358 F. Supp. 1321 (D. Kan.), *aff'd*, 414 U.S. 948 (1973)). In *Miller*, Kansas sought to apply its alcohol laws, including its prohibition against serving alcohol by the drink, to Amtrak's service of alcohol on passenger trains that moved through and stopped in Kansas. 358 F. Supp. at 1323-25. The record revealed that all alcohol sold on trains operated by Amtrak – which was "created and organized" by an act of Congress – was "consumed on the trains" and that alcohol on the trains that moved through Kansas was loaded in

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without ever challenging New Mexico's authority under the Twenty-first Amendment to require them. *See also* Defendants' Reply Memorandum In Support Of Their Motion For Summary Judgment at 8, *US Airways, Inc.* v. *O'Donnell* (D.N.M. Dec. 10, 2008) (No. 07-1235) (noting that appellant has subjected itself to the alcohol licensing requirements of 19 other States). This widespread and long-standing submission by private airlines (including US Airways) to state regulation confirms that they do not consider aircraft to be "federal enclaves."

another State. *Id.* at 1324-25. The district court held that "the language" of the Twenty-first Amendment "compelled" it to conclude that Kansas' regulatory authority under the Twenty-first Amendment empowered it to apply its laws to Amtrak's activities because those activities were plainly "the importation and possession for delivery or use of liquor *in the State*." *Id.* at 1328 (emphasis added).

This Court's adoption in *Harris* of the Kansas court's holding should be controlling here. If alcohol served and consumed wholly within the confines of an interstate train that is inside a State's borders is delivered and used "in" the State for purposes of the Twenty-first Amendment, then alcohol served and consumed wholly within the confines of an interstate airplane that is inside a State's borders is delivered and used "in" the State for purposes of the Twenty-first Amendment.[3] Indeed, the *Miller* court found that Kansas' actions were within its authority under the Twenty-first Amendment notwithstanding the fact that Amtrak, the operator of the train, is a federal corporation. If anything, privately owned and operated

[3] There is no merit to appellant's attempt to distinguish *Miller* by asserting that trains are different from airplanes for Twenty-first Amendment purposes because they travel along the ground and therefore present a greater risk of diversion of on-board alcohol products to in-state markets. US Airways Br. at 56. Appellant offers no support for its assertion about the relative risks of diversion. In any event, the *Miller* court's conclusion that Kansas' application of its alcohol laws was authorized by the Twenty-first Amendment was based on the language of the Amendment and its conclusion that Amtrak's service of alcohol occurred in the State, and did not rely on any assessment of the risk of diversion.

airlines, such as appellant, have an even weaker claim to exemption from state alcohol laws while they are serving alcohol within the borders of a State.[4]

For these reasons, appellant's assertion that New Mexico's broad powers under the Twenty-first Amendment have no bearing on this case is unavailing. The district court quite properly recognized that New Mexico's interests under the Twenty-first Amendment are squarely implicated and must be addressed in this case.

II. THE DISTRICT COURT PROPERLY RECOGNIZED THAT SUPREME COURT PRECEDENT REQUIRES IT TO CONSIDER NEW MEXICO'S TWENTY-FIRST AMENDMENT INTERESTS AS PART OF ITS PREEMPTION ANALYSIS.

Because New Mexico's Twenty-first Amendment powers and interests are implicated in this case, the district court properly recognized that Supreme Court precedent requires it specifically to consider the Amendment and these powers and interests as part of its preemption analysis. State laws that govern alcohol distribution, including licensing requirements, stand on a unique constitutional

[4] Appellant argues that the Supreme Court's summary affirmance in *Miller* "does not control this case," US Airways Br. at 54-55, but *Miller* itself has never been overruled and this Court has never disavowed its adoption of *Miller*'s holding in its *Harris* decision. In addition, as the district court noted, District Court Opinion at 16, although the *Miller* court's discussion of the relationship between the Twenty-first Amendment and the Commerce Clause may be "out of step with current law," US Airways Br. at 58, that discussion did not impact the *Miller* court's holding that Kansas' actions fell within its regulatory authority under the Twenty-first Amendment in the first instance.

footing and present unique legal issues because the Twenty-first Amendment grants the States plenary authority to regulate the distribution and transportation of alcohol within their borders. Because alcohol is singled out in the Constitution – alone among commodities – as a product over which States have unparalleled and plenary authority, the Supreme Court has held that ordinary principles of federalism do not apply in cases that address the appropriate federal-state balance in the area of alcohol regulation. Thus, whatever standards of preemption apply to the federal statutes at issue with respect to state laws that regulate other commodities or activities do not necessarily control where, as here, the state law falls within a State's plenary authority under the Twenty-first Amendment to regulate the distribution of alcohol.

The Supreme Court has held that 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." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Supreme Court recently reaffirmed its adherence to this language in *Granholm* v. *Heald*, 544 U.S. 460, 488 (2005), and further held that "[t]he 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." *Id.* at 484; *see also id.* at 494 ("our Constitution has placed commerce in alcoholic

beverages in a special category") (Stevens, J., dissenting). The Supreme Court has further recognized that state alcohol distribution systems adopted pursuant to the Twenty-first Amendment serve vital state interests in "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. Accordingly, "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *Id.* at 433. Thus, the ordinary respect accorded to state regulation, which is substantial, is given particularly special weight where, as here, the subject at issue is alcohol transportation and distribution.

It is therefore not surprising that the Supreme Court has held that § 2 of the Twenty-first Amendment necessarily constrains Congress' power to regulate the distribution and transportation of alcohol in ways that might interfere with comprehensive state schemes. Specifically, the Supreme Court has held that although "§ 2 does not abrogate Congress' Commerce Clause powers with regard to liquor," *Granholm*, 544 U.S. at 487, Congress' interstate commerce power "is directly qualified by § 2." *Midcal*, 445 U.S. at 108; *see also 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987) ("§ 2 directly qualifies the federal commerce power").

Given the interplay between the Commerce Clause and the Twenty-first Amendment, the Supreme Court has held that the resolution of questions concerning the proper boundaries between federal and state regulation of alcohol requires consideration of both constitutional provisions:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other . . . .

Hostetter v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *Midcal*, 445 U.S. at 110 (state and federal regulatory concerns must be considered "only after careful scrutiny of those concerns in a 'concrete case.'") (quoting *Hostetter*, 377 U.S. at 332).

In the specific context of federal preemption questions that involve state alcohol laws, the Supreme Court has held that courts must expressly consider and analyze the State's interests under the Twenty-first Amendment. In *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the Court addressed whether provisions of federal communications laws preempted Oklahoma's requirement that Oklahoma cable television operators delete advertisements for alcoholic beverages contained in the out-of-state signals that they retransmitted to their subscribers. The Court engaged in a two-step analysis to resolve the conflict preemption issue presented in that case. First, it "consider[ed] whether the Oklahoma statute does in fact conflict with federal law." *Id.* at 698. After concluding that a conflict existed,

it then "assess[ed] the impact of the Twenty-first Amendment." *Id.* (noting that the Court had employed a similar two-step analysis in *Midcal*, where it concluded that a California wine-pricing program violated the Sherman Act and then addressed whether the Twenty-first Amendment nevertheless barred application of the Sherman Act in the particular case); *see also id.* at 712 (the Court must "consider whether § 2 permits Oklahoma to override the federal policy").

In conducting the second step of the analysis in *Crisp* – the Twenty-first Amendment analysis – the Supreme Court stated that the "central question" is

> whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Id. at 714 (citing *Midcal* and *Hostetter* for the proposition that this "central question" must be resolved "within the context of the issues and interests at stake in each case"). The Supreme Court further noted that the force of the Twenty-first Amendment is greatest when the state regulation at issue "directly implicate[s]" the State's "*central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold*." *Id.* at 716 (emphasis added). After examining the purposes, operation and effects of Oklahoma's advertising provision in *Crisp*, the Court concluded that it "only indirectly" implicated Oklahoma's central power under the Twenty-first

Amendment and, therefore, held that enforcement of the provision was barred by the Supremacy Clause. *Id.* at 715; *see also 324 Liquor Corp.*, 479 U.S. at 346-52 (concluding that the Twenty-first Amendment did not bar application of the Sherman Act to New York's statutory scheme governing alcohol prices, where New York failed to establish that the scheme furthered its stated interests either in stabilizing the retail market by protecting small retailers or promoting temperance).

The foregoing Supreme Court precedent establishes that federal preemption questions that involve state alcohol laws present unique Twenty-first Amendment issues that require fact-intensive analysis. Specifically, in circumstances where a federal court might otherwise determine that traditional preemption principles prescribe that federal law preempts a state alcohol law, the court must go further and examine the state interests that are "implicated by [the] state regulation" and determine whether those interests "are so closely related to the powers reserved by the Twenty-first Amendment" that they must prevail over the countervailing federal interests. *Crisp*, 467 U.S. at 714.

In sum, courts addressing preemption questions that involve state alcohol laws must be mindful that such laws stand apart from laws that address other products and therefore require a separate Twenty-first Amendment analysis. This consideration is particularly vital in a case, such as this one, that "directly implicate[s]" the State's "central power under the Twenty-first Amendment" to

regulate, through licensing requirements, "the times, places, and manner under which liquor may be imported and sold" directly to consumers, *id.* at 716 – an area where the States' powers under the Twenty-first Amendment are at their zenith. The district court properly considered these interests and this Court must do so as well.

III. THE INTERESTS OF NEW MEXICO AT STAKE IN THIS CASE ARE CORE INTERESTS RECOGNIZED BY THE TWENTY-FIRST AMENDMENT.

Although appellant and its *amici* repeatedly attempt to minimize the importance of the interests of New Mexico that are at stake in this case,[5] those interests are vital concerns that implicate the fundamental purposes of the Twenty-first Amendment. The history of the Twenty-first Amendment makes plain that Congress and the States were deeply concerned about the manifest problems that are caused by intemperance and the irresponsible service of alcohol to intoxicated individuals. Moreover, they viewed these problems as fundamentally local problems because of their profound and deleterious effects on local communities. As a result, there was broad consensus that the States needed maximum authority to develop effective and comprehensive solutions to protect their citizenry. New Mexico's efforts here to promote temperance and protect the health and safety of

[5] *See, e.g.*, US Airways Br. at 48-49 (characterizing New Mexico's interests as "insubstantial" and having "little heft"); US Br. at 29 (asserting that New Mexico's interests are "at most tangentially affected").

its citizens by keeping intoxicated persons off its roads and out of its communities therefore implicate an area in which the State's Twenty-first Amendment interests are at their zenith.

The Twenty-first Amendment not only ended Prohibition by repealing the Eighteenth Amendment, but also granted the States plenary authority to regulate the distribution and transportation of alcohol. The adoption of this Amendment reflected recognition by both Congress and the States that the difficult problem of regulating alcohol, a socially sensitive product that can be misused and thereby give rise to numerous problems for local communities, required that the States have maximum authority to develop comprehensive solutions. The Supreme Court consistently has recognized the broad scope of the States' powers under the Twenty-first Amendment. *See Midcal*, 445 U.S. at 110 ("[t]he 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"); *Crisp*, 467 U.S. at 712 ("[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders"); *Granholm*, 544 U.S. at 484 (the purpose of the Twenty-first Amendment is "to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use").

The unprecedented social consensus that led to the adoption of the Twenty-first Amendment – "the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures," *Granholm*, 544 U.S. at 497 (Stevens, J., dissenting) – was largely attributable to the widespread problems caused by excessive alcohol consumption that the nation experienced prior to Prohibition, in conjunction with the subsequent failure of Prohibition itself. During the pre-Prohibition era, "such evils and excesses as intemperance and disorderly marketing conditions . . . had plagued the public and the alcoholic beverage industry." *Actmedia, Inc.* v. *Stroh*, 830 F.2d 957, 959 n.1 (9th Cir. 1986) (internal quotation marks omitted). It was recognized that "[v]irtually all the individual and social evils of the liquor traffic [arose] from an inadequately regulated and overstimulated retail sale." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 65 (1933). This environment of inadequately regulated sales and stimulated demand resulted not only in excessive alcohol consumption, but also a host of social problems for local communities. *Id*. at 16 ("Behind [the saloon's] blinds degradation and crime were fostered, and under its principle of stimulated sales[,] poverty and drunkenness, big profits and political graft, found a secure foothold").

Much of the criticism of retail alcohol sales in the pre-Prohibition era was spawned by the existence of a "tied" system between producers and the retailers

who exclusively sold their products. Prior to Prohibition, suppliers often owned or indirectly controlled retailers, creating so-called "tied houses." It was widely recognized that these tied houses were a root cause of alcohol abuse and related social problems because retailers were pressured to sell their products by any means, including overselling to intoxicated patrons, as well as selling to minors and selling after hours. *Id.* ("The saloon, as it existed in pre-prohibition days, was a menace to society and must never be allowed to return"). Moreover, this system "had all the vices of absentee ownership," whereby local retail establishments were under obligation to distant producers who "cared nothing about the community." *Id.* at 43; *see also id.* ("non-resident" alcohol sellers "[see] none of the abuses" that they create and are "beyond local social influence"). Thus, a key problem with the tied house system was that the entities that put alcohol into the hands of consumers had essentially no accountability to the local communities that bore the brunt of their irresponsible practices.

When Prohibition ended and the States were faced with the formidable task of designing alcohol distribution systems that would prevent the re-emergence of the socially irresponsible retailers and resulting abuses that had prompted Prohibition in the first place, a study done at the request of John D. Rockefeller, Jr. recommended that States either: (1) establish a state monopoly on alcohol distribution, *see id.* at 63-93; or (2) establish a licensing system for entities that

handle alcohol, *see id.* at 35-62. Both of these strong regulatory alternatives recognized that vigorous state supervision of sales and distribution to ultimate consumers was necessary to avoid the social harms, including intemperance, that had resulted from less structured systems. Most States, including New Mexico, adopted the latter alternative and implemented a detailed and comprehensive licensing system for entities that handle alcohol, including entities engaged in the socially sensitive practice of selling or serving alcohol to the public. By requiring alcohol businesses to obtain licenses, this regulatory system ensures that entities that handle alcohol are subject to local laws and are therefore accountable for the local problems that their activities can generate. Such licensing systems therefore serve the critical purpose of ensuring that the entities that put alcohol into the hands of consumers are socially responsible businesses that answer to the communities that they impact.

New Mexico's effort to require appellant to obtain a state license in order to serve alcohol within its borders serves the same critical purposes. As this case illustrates, appellant's service of alcohol within New Mexico's borders to individuals who will soon enter its communities and may drive on its roads can have grave effects on the health and welfare of the State and its citizens. Accordingly, New Mexico's efforts to protect its citizens from the consequences of intemperance, including drunk driving, will be undermined if airlines can engage

in irresponsible practices with respect to the service of alcohol and then discharge passengers in New Mexico without any accountability to the local communities that are placed at risk.

Just as the "absentee" owners of retail establishments during the pre-Prohibition era lacked accountability to the local communities that suffered the consequences of their irresponsible behavior, appellant and other national airlines – if wholly beyond the reach of state alcohol regulation systems – will lack meaningful accountability to the local communities that they can harm through irresponsible practices with respect to alcohol. The Twenty-first Amendment was designed to empower the States to prevent just such injury to their citizens, for example, by wielding the threat of revocation of a locally-issued license to encourage responsible behavior.[6] Accordingly, New Mexico's interests at stake in this case are core Twenty-first Amendment interests, and this Court should not treat them as anything less.

[6] It is no answer, as appellant argues, US Airways Br. at 50-51, that New Mexico may have other means to protect its citizens from airline passengers who disembark while intoxicated. The Twenty-first Amendment grants New Mexico plenary authority to determine the most effective means to promote temperance and the safe distribution of alcohol. Courts should not second-guess the State's permissible legislative choices.

CONCLUSION

Amici respectfully request that the Court affirm the district court's rulings.

Respectfully submitted,

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Date: April 14, 2010

CERTIFICATIONS

CERTIFICATION OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Brief of *Amici Curiae* in Support of Appellees and Affirmance complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 4,719 words.

/s/ Carter G. Phillips
Carter G. Phillips

Dated: April 14, 2010

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order of March 18, 2009, I certify that (1) no privacy redactions were required in this brief; (2) the electronically filed version of the brief is an exact copy of the paper version to be filed with the clerk, apart from the substitution of digital signatures; and (3) prior to it being filed, the electronic version of the brief was scanned for viruses with McAfee v. 8.5i, VirusScan Enterprise 8.5.0i and found to be free from computer viruses.

/s/ Carter G. Phillips
Carter G. Phillips

Dated: April 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2010, I caused the foregoing Brief *Amici Curiae* in Support of Appellees and Affirmance to be filed electronically with the Court via the CM/ECF system, with an original and seven 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 parties with active ECF filing status. In addition, I have served two copies of the brief on the following parties via U.S. Mail:

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