IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 09-2271

US AIRWAYS, INC.

Plaintiff-Appellant,

vs.

FILED UNDER SEAL

KELLY O'DONNELL, in her official capacity as Superintendent of the New Mexico Regulation and Licensing Department, 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)

DEFENDANTS-APPELLEES' RESPONSE BRIEF

Julie Ann Meade
New Mexico Regulation
& Licensing Department
PO Box 25101
Santa Fe, NM 87504-5101
(505) 476-4663

FREEDMAN BOYD HOLLANDER
GOLDBERG IVES & DUNCAN, P.A.
Joseph Goldberg
John W. Boyd
Michael L. Goldberg
Molly Schmidt-Nowara
20 First Plaza, Suite 700 (87102)
P.O. Box 25326
Albuquerque, NM 87125
(505) 842-9960

Attorneys for Defendants/Appellees

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Counterstatement of Facts

Before the events giving rise to this litigation, USAirways had secured alcohol licenses in 19 other States in which it operates (A1012), and USAirways (as well as other air carriers) has maintained its schedules and operated its business for years while subject to those State requirements.[1] Other airlines have secured and maintained liquor licenses from the New Mexico Regulation & Licensing Department ("RLD"), A704-705, as well as from other States. Based on U.S. Department of Transportation data, cessation of alcoholic beverage service has had no discernable impact on USAirways' passenger loads or fares. A829-830; 1004-1005. USAirways did not even bother to conduct a study of any such effect. A819.

The events giving rise to this litigation underscore New Mexico's essential interest in licensing commercial air carriers' service of alcoholic beverages on flights to and from this State. On November 11, 2006, Dana Papst, driving the wrong way on I-25, north of Santa Fe, crashed head-on into a vehicle in which six members of the Gonzales family were heading home, killing himself and five members of the Gonzales family. A547, 589. Mr. Papst's blood alcohol content

[1] USAirways merged with America West, and for part of the applicable period, operated flights under both names. A831. For simplicity, the airline will be called USAirways throughout.

("BAC") was .329 – more than four times the legal limit. A589.[2]

The State's investigation revealed that Mr. Papst had disembarked from a USAirways flight at the Albuquerque Sunport only hours earlier (A546; 549; 589); and that although obviously intoxicated (probably before he boarded in Phoenix), he had been served two alcohol drinks while on the one-hour flight[3](A33; A548, A522-544). Mr. Papst was so drunk on the flight to Albuquerque that midflight, and while the fasten seat-belt sign was on due to turbulence, Mr. Papst got up, removed his luggage from the overhead and walked to the front of the plane to disembark. A548. A flight attendant stopped him and directed him back to his seat, acknowledging being frightened by the incident. A594. The State investigation also revealed that USAirways did not have a license to serve alcoholic beverages in New Mexico, although required by State law to have one. A814.

Subsequent events revealed that the Papst incident was not an isolated lapse

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[2] New Mexico law defines "intoxication" as a BAC of .08 or more. NMSA 1978 § 66-8-102(c)(1). After leaving the airport already intoxicated, Mr. Papst purchased beer at a convenience store, and may have consumed as many as three beers before the accident. A549. It is unlikely that his extraordinarily high BAC was due solely to the beers he may have consumed after deplaning. A609.

[3] USAirways' New Mexico operations consists of only three flights daily between Phoenix and Albuquerque (A813).

in USAirways' service of alcoholic beverages to its passengers. On May 18, 2007, another USAirways passenger, Mr. Ernest Wright, was stopped an hour after landing in Albuquerque. Breath tests revealed a BAC of .15 and .16 – twice the legal limit. A991-994. USAirways was cited for serving alcohol to an obviously intoxicated person. A995-998. On November 6, 2007, an RLD employee on a USAirways flight from Phoenix to San Diego encountered a passenger reeking of alcohol, who tried to order a beer even before takeoff. Notwithstanding obvious intoxication, the attendant later sold the passenger four mini-bottles of Jack Daniels. A679-680; 683-684. Significantly, despite these repeated incidents of serious violations of FAA's own regulation, the FAA took no action. A32.

The effects on its citizens and communities from alcohol abuse have been long-standing, serious problems for New Mexico. For years, New Mexico ranked among the worst states for alcohol-related deaths. A711-715. In recent years, New Mexico's governor launched a campaign to address this serious health and safety issue; enacting a comprehensive statutory scheme; regulating sales and establishing an independent enforcement mechanism. And it has been successful; New Mexico's ranking in alcohol-related motor vehicle fatalities has improved from sixth in the nation to fourteenth. A716. New Mexico's statutory and enforcement scheme to deter service to intoxicated persons is now considered

among the nation's best. A620; 628.

New Mexico law requires that anyone serving alcoholic beverages be licensed; and specifies that those serving to travelers on airplanes or trains secure a public service license. NMSA 1978 § 60-6A-9. The New Mexico statute prohibits sale to intoxicated persons (*id*. § 60-7A-16); or to minors (§ 60-7B-1); specifies training for servers (§ 60-6E-1ff); and provides investigation and enforcement mechanisms (§§ 60-4B-4ff; 60-6B-1ff) including both administrative and criminal penalties. *Id*. §§ 60-7A-4.1; 4.2; 5. Sanctions include suspension or revocation of the liquor license of licensees who serve alcohol in violation of statute. USAirways never sought to rebut RLD's expert's opinion that the ability to suspend or revoke licenses is the most effective way to control service to intoxicated persons. A626-628.[4]

The sole FAA regulation on alcoholic beverage service by airlines (14 CFR § 121.575) is far less comprehensive, simply prohibiting consumption of alcohol not served by airline personnel, boarding or serving alcohol to passengers who "appear" intoxicated and requiring an airline to report "any disturbance by a person who appears to be intoxicated aboard any of its aircraft." 14 CFR

[4] There is no comparable enforcement tool under the federal regulation. A1332.

121.575(d).[5] The FAA regulation does not define "intoxication" or the "appearance" of intoxication; does not specify training programs for airline personnel serving alcohol (A1023; 1326)[6] nor does it require that airlines secure and maintain licenses to serve alcohol. A1332. There is no prohibition of service to minors. Airlines are not required to report to the FAA or anyone that a passenger has become intoxicated, even grossly intoxicated, unless the passenger causes a "disturbance" on the aircraft. A1313.

On January 29, 2007, RLD cited USAirways for serving alcohol to an intoxicated person, Papst, (A33) and ordered USAirways to cease and desist from unlicensed alcohol sales and service. A878-881. On March 2, 2007, USAirways applied for a license. A889-890. On March 14th, RLD issued USAirways a 90-

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[5] The FAA regulation doesn't define "disturbance" and USAirways apparently applies it narrowly. *See*, A1315. USAirways did not report to the FAA the incident of the drunken Mr. Papst attempting to deplane while the plane was airborne. A1317. Nonetheless, the FAA conducted its own investigation, A687, but limited it to collecting statements from USAirways employees. It did not interview passengers or otherwise investigate. A594-605; 817-818. On December 28, 2006, the FAA notified USAirways that it had closed its files on the matter. A32.

[6] The FAA reviews and approves airlines' individual training programs. USAirways includes just 3 hours and 30 minutes of alcohol training during the five week initial training of flight attendants and provides a 20-30 minute "take home" segment in recurring training (A1326-1327), even though 73% of all passenger misconduct incidences reported by airlines to the FAA in 2006 involved alcohol. A634.

day, temporary license, pending its application for a permanent license. A51; 814.

On June 13, 2007, after a public hearing, RLD declined to extend USAirways' temporary license – in part because the Wright citation was unresolved. A610. The temporary license expired the next day. As a result of the loss of license and hence removal of permission to serve alcoholic beverages on its flights, USAirways instructed its Phoenix-based caterer not to load alcohol on service carts for flights to Albuquerque. A1007-1010. USAirways incurred no additional operational complexity as a result of cessation of alcohol service. A830.

On November 15, 2007, RLD denied USAirways' application for a permanent license. A404-405. USAirways failed to appeal to the New Mexico district court, as provided by New Mexico statute (NMSA 1978 § 39-3-1.1). Instead, USAirways initiated this suit. A1000.

Summary of Argument

I. New Mexico's Ability to Require USAirways to Obtain a License in Order to Dispense Alcoholic Beverages Within the State of New Mexico Is Not Preempted.

New Mexico's right to regulate the importation into and consumption of alcohol in the State is guaranteed by the Twenty-first Amendment. Because this is a "core" power under the Twenty-first Amendment, there can be no federal preemption. Even disregarding the Twenty-first Amendment, preemption would require a clearly articulated Congressional intent to do so. Neither of the federal statutes at issue here – the Airline Deregulation Act ("ADA") or the Federal Aviation Act ("FAA") – evinces a Congressional intent to preempt the States' ability to require licensure of commercial air carriers.

The FAA contains no language expressing any intent to preempt. Nor is there any basis for "implied" preemption. There is no "field" preemption because the federal regulations do not totally occupy the field of airline alcohol service. The single federal aviation alcohol regulation is non-specific, not comprehensive and does not "totally occupy the field". And there is no "conflict" preemption because the New Mexico law's objective – which includes, *inter alia*, promoting temperance and the health and safety of its residents by forestalling alcohol service to those who are intoxicated or appear intoxicated – is consistent with that of the

federal regulation. The New Mexico law does not require USAirways to do anything that federal regulations prohibit. It is not impossible for USAirways to comply with both the federal regulation and the New Mexico law.

The preemption clause of the Airline Deregulation Act ("ADA") does not express an intent to preempt New Mexico's ability to require licensure here. The purpose of this preemption language was to prevent the states from interfering with the ADA's objective of encouraging the development of the air transport industry based on competitive and market forces.

Construing the ADA preemption language to extend to the licensure here would violate the Twenty-first Amendment. *National Railroad Passenger Corp. v. Harris,* 490 P.2d 572, 573 (10th Cir. 1974), *citing National Railroad Passenger Corp. v. Miller,* 358 F.Supp. 1321, *affirmed* 414 U.S. 948 (1973)(mem.). *See also Capital Cities Cable, Inc.* v. *Crisp,* 467 U.S. 691, 713 (1984). Correctly interpreted and applied, the phrase "relating to . . . service" found in the ADA preemption language does not evince a Congressional intent to preempt New Mexico's exercise of a core power under the Twenty-first Amendment. There is no controlling construction of the term "service" by the United States Supreme Court and the better reasoned cases from the Circuits support a limited construction, consistent with the ADA's limited purpose. Any broad construction

of "relating to" by the Supreme Court is undermined by later developments.

II. The Twenty-first Amendment Permits New Mexico to Exercise its Core Power to Require Airlines Serving Alcoholic Beverages on Flights Originating or Landing in this State to Obtain and Maintain Liquor Licenses.

The district court correctly held that no balancing of state and federal interests was required because New Mexico's licensing requirement is within its core power under the Twenty-first Amendment. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 110 (1980). This recognition is established by the decisions in *Miller* and *Harris,* which remain controlling law. Where, as here, a state regulation implicates a core power under the Twenty-first Amendment, the state regulation will prevail over a competing federal interest, so long as the state law is not facially protectionist, which New Mexico's is not.

Even if balancing were required, it would favor the State's interest. The State's core interest in temperance springs from its duty to protect its citizens. Record evidence establishes the importance of licensing to achieve this objective. The record evidence is contrary to USAirways' argument that an exemption from the grant of this Twenty-first Amendment power to license is necessary to enhance aviation safety, or that such exemption would enhance the federal interest in a strong, vibrant and competitive aviation industry. The undisputed evidence is that

compliance with New Mexico law had no effect on USAirways ability to compete.

Argument

I. New Mexico's Ability to Require USAirways to Obtain a License in Order to Dispense Alcoholic Beverages Within the State of New Mexico Is Not Preempted.

USAirways argues that Congress intended – through two statutes: the Federal Aviation Act of 1958 ("FAA") P.L. 85-726, 72 Stat. 731, and the Airline Deregulation Act of 1978 ("ADA") P.L. 95-504, 92 Stat. 1705 – to preempt the States' ability, conferred on them by the Twenty-first Amendment, to license provision of alcoholic beverages on commercial air carriers. The district court correctly held that neither statute preempted New Mexico's ability to require USAirways to obtain a license in order to serve alcoholic beverages on flights coming to or leaving New Mexico. A1287.

The touchstone of any preemption analysis is Congress's intent. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). "In determining congressional intent on preemption questions, we look for 'clear and manifest' indicators." *Cleveland* v. *Piper Aircraft Corp.*, 985 F.2d 1438, 1445 (10th Cir. 1993), quoting *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990). Analysis begins with the "presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield* v. *Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Rice* v.

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The obvious place to start in determining Congress's intent is with the language of the statutes. The FAA does not contain express preemption language, but it does have a savings clause:

> Nothing ... in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C.app. § 1506 (recodified at 49 U.S.C. ¶ 40120(c)). The ADA was an amendment to the FAA, enacted "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety and price of air services ...." House Conference Report No. 95-1779 (Oct. 12, 1978) at 1.[7]

The ADA does contain a preemption clause:

> [N]o State or political subdivision thereof ... shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to the rates, routes or *services* of any air carrier ....

49 U.S.C. § 41713(b)(1). (Emphasis added).[8]

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[7] The purpose of the FAA was much broader than that of the ADA: to foster safety of civil aviation and "to provide for the safe and efficient use of the airspace."

[8] The ADA preemption provision was recodified in the 1994 FAAAA at 49 U.S.C. § 41713(b) and the language was changed to prohibit enforcement of any

In determining Congress's intent with respect to the language it employs, context is important. *See Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (1998) ("we are mindful that principles of statutory construction require us to consider the term within its context," interpreting ADA preemption language); *see also Hillsborough County, Florida* v. *Automated Med. Labs. Inc.*, 471 U.S. 707, 718 (1985). Here, there are two contextual aspects that are significant in construing any intent to preempt. The first is the backdrop of the Twenty-first Amendment. In construing whether Congress had an intent to preempt a State's ability to require licensure of commercial air carriers who dispense alcoholic beverages within the States' jurisdictions, the courts must assume that Congress was aware of the broad delegation to the States, through the Twenty-first amendment, of just this core power. Second is the particular sequence and purposes of the federal legislation at issue. The first statute relevant here (FAA) (which authorized federal agencies to undertake the particular regulation that USAirways claims is interfered with by New Mexico's licensure requirement), contains no preemption language. The preemption language that USAirways relies on is found instead in the later enactment (ADA) with a much narrower Congressional purpose (to deregulate and move commercial air transportation to a

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state law "related to price, route, or *service* of an air carrier." (Emphasis added.)

competitive market). As we show below, both these contextual aspects strongly support the conclusion of the district court that neither federal statute preempts New Mexico's ability to require licensure.

A. New Mexico's Liquor Control Act is not implicitly preempted by the FAA.

Despite the absence of any language in the FAA expressing any intent on the part of Congress to preempt, the existence of savings language in that statute preserving a State's ability to regulate, and the backdrop of the Twenty-first amendment expressly conferring on the States the power to license (precisely at issue here), USAirways insists that New Mexico's ability to require licensure here is preempted by the FAA. Because the core Twenty-first Amendment power of licensure is at issue here, this Court need look no further than that amendment to hold that there can be no preemption. In *Capital Cities,* 467 U.S. at 713, the Supreme Court stated that preemption as to State regulation conferred on the States by the Twenty-first Amendment could be found only where "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 is not directly implicated ...." Because such a "central" or core power is implicated here, there can be no preemption. This Court, a three judge panel and the Supreme Court

have all agreed on this point. *See Harris,* 490 F.2d 572, *Miller,* 358 F.Supp. 1321. But, even under traditional preemption analysis, USAirways argument fails for the reasons set forth below.

1. There is no field preemption.

"[F]ield preemption occurs when Congress indicates in some manner an intent to occupy a given field to the exclusion of state law." *Montalvo* v. *Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007). There is a strong presumption against implied preemption. *Hillsborough County*, 471 U.S. at 718 ("Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety."); *De Buono* v. *NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 814 (1997)(preemption "bear[s] the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" Quoting *Travelers*, 514 U.S. at 654). *Somes* v. *United Airlines, Inc.*, 33 F.Supp.2d 78, 85 (D.Mass. 1999).[9]

[9] US Airways' reliance on *United States* v. *Locke*, 529 U.S. 89, 108 (2000) for the proposition that there is no presumption of nonpreemption when the state regulates in an area that traditionally has been fully regulated by the federal government (AOB, 24) is misplaced. Any reading of *Locke* to authorize preemption of state regulation of alcoholic beverages would run afoul of the

While USAirways argues that such intent is manifest by the FAA's comprehensive regulation of virtually all aspects of commercial aviation safety (AOB, 33ff), this is not the test.

> Following [*City of*] *Burbank* [v. *Lockheed Air Terminal*, 411 U.S. 624 (1973)] the circuits have generally analyzed FAA preemption by looking to the pervasiveness of federal regulations in the specific area covered by the tort claim or state law at issue.

Martin ex rel. Heckman v. *Midwest Express Holdings, Inc.*, 555 F.3d 806, 809 (9th Cir. 2009). The correct focus is on the comprehensiveness of the FAA's regulation of alcohol service by airlines. That regulation is neither comprehensive nor evinces an intent by Congress fully to occupy the field. The FAA has promulgated a single regulation on airline alcohol service that only prohibits passengers from drinking their own alcohol and boarding or serving passengers who appear intoxicated. Yet, the FAA regulation does not define "intoxication" or establish standards for the appearance of intoxication, and it prescribes no

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Twenty-first Amendment. Moreover, in *Locke*, the state regulation went to the primary thrust of the federal regulation, the at-sea operation of maritime vessels. *Id*. at 105-06. New Mexico is not attempting to regulate the operation or navigation of airliners. Nor is the primary thrust or purpose of the federal law here directed at regulating the service of alcohol. Here, New Mexico is regulating an area well within traditional state regulation of health and safety, and an area not central to the federal regulatory scheme.

licensing standards, no minimum training requirements[10] and no enforcement mechanism.[11] The lack of intent to occupy the entire field is manifested by the absence of any prohibition of sales to miners. Quite clearly, the FAA's narrow regulation, sketching out policy in only the most general terms, does not evince an intent to fully occupy the field of safe airline alcohol service.

In an analogous situation, the Ninth Circuit in *Martin* rejected the argument that field preemption precluded a State-law tort action alleging defective design on an airplane's stairs, noting that "[a]irstairs are not pervasively regulated; the only regulation on airstairs is that they can't be designed in a way that might block the emergency exits." *Martin,* 555 F.3d at 812.

In areas such as aircraft safety, where the FAA has regulated in far greater detail than with respect to alcohol service, this Court in *Cleveland*, 985 F.2d 1438, determined that the FAA regulations did not preempt a State law action based on negligent design of an airplane:

> The mere fact that Congress has enacted detailed legislation addressing a matter of dominant federal interest does not indicate an

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[10] USAirways provides less than 4 hours of initial training on service of alcoholic beverages. A1326-1327.

[11] Airlines are not even required to report all violations to the FAA, but rather only those violations accompanied by undefined passenger "disturbances". 14 CFR § 121.575(d).

> intent to displace state law entirely.

Id. at 1441.

The comprehensiveness of the federal regulation does not end the inquiry. To determine whether the particular State activity is preempted, the Court must look also at the purpose and intent of the State law. The Supreme Court observed in *English*, 496 U.S. at 84, that in its earlier decision in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190 (1983), it had "defined the pre-empted field, in part, by reference to the motivation behind the state law." In *Stone ex rel. Estate of Stone* v. *Frontier Airlines, Inc.*, 256 F.Supp.2d 28, (D.Mass. 2002), the court discounted the airline's argument that the comprehensive federal regulation of virtually all aspects of airline safety preempted State law negligence claims based on the airlines failure to have an on-board external defibrillator.

> Even if Congress did intend to preempt the field of "air safety," Mrs. Stone's claims do not trespass upon that field. The safety with which Congress was primarily concerned is the operational and functional integrity of an aircraft – internally and externally – as it affects passengers and the public.

Id. at 42.

Similarly, in *DiFiore* v. *American Airlines, Inc.*, 483 F.Supp.2d 121 (D.Mass. 2007), the issue was whether the airline's implementation of a charge of

$2.00 for each bag checked at curbside at Boston's Logan Airport that the airline retained violated the Massachusetts Tip Law, which declared that all tips belonged to the employee. The airline argued preemption pointing to federal regulations and statute permitting airlines to impose reasonable fees and conditions on the transportation of passenger baggage, as evincing a Congressional intent to occupy the field. The court concluded: "Whatever the merits of that argument, the Massachusetts Tips Law does not enter that field." *Id*. at 127.

The FAA has not regulated extensively in the field of service of alcoholic beverages on airplanes. New Mexico's interests, reflected in its alcohol licensing laws necessarily include, *inter alia*, the safe and lawful consumption of alcohol by whomever and wherever it is consumed. New Mexico's interest is different than the objective of the federal regulation, which is safe operation of aircraft. There is no "field" preemption.

2. There is no "conflict" preemption.

Implied "conflict" preemption is found only "where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.**"** *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995); *see also Emerson* v. *Kansas City Southern Ry. Co.*, 503 F.3d 1126,

1129 (10th Cir. 2007). The first inquiry is whether compliance with New Mexico's law actually makes it impossible for USAirways to comply with the federal regulation. Clearly it does not. While the New Mexico law imposes more requirements than the federal regulation, the New Mexico law is consistent with the commands of the federal regulation – no service of an alcoholic beverage to a person who appears to be intoxicated and not permitting persons appearing to be intoxicated to board. There is no "actual conflict" between the New Mexico law and the federal regulations – they both prohibit service to persons who appear to be intoxicated. In *Somes*, the court found no conflict preemption where State law would require an external defibrillator while the FAA regulation specifying the contents of an onboard emergency medical kit did not require a defibrillator. The court noted that until the FAA declined to approve defibrillators there was no conflict with the FAA regulation. *Somes,* 33 F.Supp.2d at 87-88.

While USAirways speculates that application of State liquor control laws would require flight attendants to learn the requirements of the laws of several States and could distract flight crews, Appellant and *amici* are confusing a supposed potential for inconvenience with impossibility. While adherence to the requirements of State laws might add to the airlines' safety strategies, it would hardly make aviation safety impossible. If anything, the opposite. The proof of

the pudding: USAirways held liquor licenses in 19 other States in which it operated at the time it applied for the New Mexico license (A1012), with no evidence that complying with these other liquor laws has hindered USAirways' efforts to provide safe and reliable transportation

Nor is there a conflict under the alternative inquiry: airline compliance with and State enforcement of the New Mexico law does not present an obstacle to accomplishing the full purpose and objective of the FAA. Even if it were true, as USAirways insists, that controlling the consumption of alcohol to airborne passengers is a matter of flight safety, then surely compliance with the New Mexico law will assist USAirways in accomplishing that purpose of the FAA. USAirways points to no logic or record evidence that compliance with the New Mexico law interferes with that objective.

B. The preemption language of the ADA does not address New Mexico's ability to require licensure of USAirways service of alcoholic beverages on flights within New Mexico's jurisdiction.

The preemption language in the ADA prohibits state regulation "relating to ... rates, routes, or service ...." 49 U.S.C. § 41713(b)(1). The question, then, is whether New Mexico's requirement that USAirways obtain a license in order to dispense alcoholic beverages on flights to and from New Mexico "relate[s] to" the type of "service" that the ADA contemplated. There are two reasons why the

ADA preemption language should not be construed broadly to reach the licensing requirement at issue here. *First*, New Mexico's ability to require USAirways to have a license in order to serve alcoholic beverages on its flights to and from New Mexico is a core power under the Twenty-first Amendment and this Court should construe the preemption language to avoid a conflict with that Amendment. *Second*, given the limited purposes of the ADA, the most reasonable construction of the preemption language would not extend it to the licensure and regulation at issue here.

This Court has already held that nearly identical language in the federal statute addressing interstate rail carriage, the Rail Passenger Act, 45 U.S.C. § 546(c), should not be construed broadly to reach Oklahoma's requirement that Amtrak obtain a license to serve alcoholic beverages on trains within Oklahoma. *Harris,* 490 P.2d at 573, citing *Miller,* 358 F.Supp. 1321, *affirmed* 414 U.S. 948 (1973)(mem.).[12] In *Miller*, the three-judge district court held that the Rail Act language preempting any state laws "as it relates to rates, routes, or service" could not be read to apply to the licensure requirement there because "if so construed,

[12] USAirways argues that (1) the pertinent language from the Rail Passenger Act is different from the preemption language in the ADA and (2) that neither *Miller* nor *Harris* have any authoritative weight. AOB, 54-57. As to the first argument, a comparison of the language employed by the two acts shows them to be substantially identical. We address the second argument in Point II.C.

[it] would amount to a circumvention of the clear provisions of the Twenty-First Amendment." 358 F.Supp. at 1329.

Moreover, given the limited purpose of the ADA (promoting competition among commercial air carriers), the ADA preemption language of "relating to ... service" does not address the New Mexico licensure requirement. This conclusion is reinforced by the sequence of the legislation. The earlier legislation, the FAA (with the broad purpose of assuring safety in commercial air transportation), did not preempt the state licensure requirements at issue here. It was only in the subsequent amendment to that statute, the ADA (with a much more limited purpose of promoting market-based competition), that Congress inserted the preemption language. Would Congress, not intending preemption initially in the FAA, now seek to preempt regulation that had nothing directly to do with competition in the commercial airline market, the limited purpose of the ADA? The answer is "no".

The Supreme Court has twice examined the scope of the ADA preemption language without on either occasion defining the meaning of the word "service". In *Morales*, 504 U.S. 374, the issue was whether the States could enforce their deceptive practices laws to address airline advertising of fares. Concluding that they could not, the Court focused on the words "relating to," noting that the term

in the ADA was identical to that in the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. § 1144(a)). Although it noted that the reach of the term was not unlimited ("[s]ome state actions may affect [rates, routes and services] in too tenuous, remote or peripheral a manner to have preemptive effect" 504 U.S. at 390, quoting *Shaw* v. *Delta Airlines, Inc.,* 463 U.S. 85, 100, n.21 (1983) (internal quotation marks deleted)), the Court gave the "related to" language in the ADA the same broad meaning that it had given the "related to" language in ERISA. *Morales,* 504 U.S. at 383-84. With this broad definition of "relating to," the Court concluded that State efforts to apply unfair practice laws to airline fare advertisements could indirectly affect fare determination and was preempted.

In *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995), the question was whether the ADA preempted Illinois' efforts to apply its deceptive practices laws to address unilateral changes in the airline's frequent flyer program. Relying on "the full text of the preemption clause" and its previous expansive reading of the "related to" language in *Morales*, the Court held that enforcement of the Illinois laws was preempted. *Id*. at 220, 228.

In neither *Morales* nor *Wolens* did the Supreme Court explicate the concept of "service" in the ADA preemption provision ("rates, routes or service") and the circuit courts have disagreed as to the meaning of "service" and the reach of the

"relating to" language in the ADA preemption provision. The Fifth Circuit in *Hodges* v. *Delta Airlines, Inc.*, 44 F.3d 334 (1995) (*en banc*) took an expansive view, interpreting "service" to mean "useful labor that does not produce a good" (*id*. at 337, n.3), suggesting that this could include virtually any aspect of a flight, including alcoholic beverage service. *Id*. at 337 nn. 4, 5.[13] Other courts have adopted the Fifth Circuit's interpretation. *See, e.g.*, *Air Transport Ass'n of America* v. *Cuomo*, 520 F.3d 218 (2d Cir. 2008).

The contrary interpretation of what "related to" a "service" was first articulated by the Ninth Circuit, *en banc*, in *Charas*, 160 F.3d 1259 (1998) and adopted by the Third Circuit in *Taj Mahal Travel, Inc.* v. *Delta Airlines, Inc.*, 164 F.3d 186 (1998). *Charas* involved airline passengers who brought tort suits for injuries sustained as a result of luggage mishaps, encounters with service carts, and airline negligence in disembarking. Focusing on the purpose of the ADA to achieve economic deregulation of the airline industry and promote development of the industry through competitive market forces, the Ninth Circuit looked at the word "service" in its statutory context with an eye toward the Congressional

[13] The *Hodges* court warned that the analogy to ERISA preemption if taken too far could include "all aspects of the air carrier's 'utility' to its customers" and was inappropriate because taken to that illogical limit, "any state tort claim may 'relate to' services as a result of its indirect regulatory impact on the airline's practices." *Id*. at 337-38.

purpose and concluded that –

> "service," when juxtaposed to "rates" and "routes" refers to such things as the frequency and scheduling of transportation and to the selection of markets to and from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.")

Charas, 160 F.3d at 1265-66.[14]

The court noted that "[t]he purpose of preemption is to avoid state interference with federal deregulation" and observed that nothing in the ADA or its legislative history indicated an intent to displace State law that only affects the deregulation goal of the ADA in a peripheral way. *Charas,* 160 F.3d at 1265, citing *Morales*, 504 U.S. at 390.[15] Harking back to the Supreme Court's warning in *Morales*, the *Charas* court stressed the importance of interpreting the words of the critical phrase in context.

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[14] USAirways points out that this Court alluded to the *Hodges* definition of "services" in *Arapahoe County Public Airport Authority* v. *FAA*, 242 F.3d 1213, 1222 (10th Cir. 2001). AOB, 21. But the Court's decision in that case focused on scheduling flights, something close to the essential purpose of the ADA, not on alcohol service to passengers.

[15] USAirways incorrectly asserts (AOB, 23) that the Supreme Court in *Rowe* v. *New Hampshire Motor Transport Ass'n.*, 552 U.S. 364, 372-73 (2008) rejected the argument that Congress intended to preempt only State laws that would adversely affect the competition goal of the ADA. What the Court rejected there was the argument that there was an exception from preemption for state laws addressing public health issues that otherwise would have been preempted.

> To interpret "service" more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended.

Charas, 160 F.3d at 1266.

The Third Circuit agreed that the purpose of the ADA preemption provision was "[t]o ensure that the states would not *re*-regulate what Congress had decided to *de*-regulate ...." *Taj Mahal*, 164 F.3d at 191, citing *Morales*, 504 U.S. at 378-79 (emphasis in original). The Third Circuit held that a State law defamation action based on the airline advising passengers who had purchased tickets through the plaintiff travel agency that the tickets were considered to be stolen could go forward since it did "not frustrate Congressional intent" and because it was "'too tenuous, remote, or peripheral' to be subject to preemption, even though Delta's statements refer to ticketing, arguably a 'service.'" *Id.* at 195.[16] *See also Alasady* v. *Northwest Airlines Corp.*, Civ.02-3669 (RHK/AJB) 2003 WL 1565944 (D.Minn, March 3, 2003) (adopting *Hodges* interpretation of "service" to include procedures for boarding passengers, but concluding that enforcement of State Human Rights Act was not preempted in a case of Muslim passengers denied

[16] While the First Circuit has not itself spoken, the District of Massachusetts has embraced the *Charas* definition of "service" in *Somes*, 33 F.Supp.2d at 83.

boarding because preempting State laws that ensure equal access to public accommodations would do nothing to further the purpose of the ADA).

The holdings by the Ninth and Third Circuits of a more limited construction of the term "relating to ... service" is reinforced by subsequent developments in the interpretation of the similar language in ERISA. Recall that the Supreme Court's expansive reading of the term "related to" in *Morales* and *Wolens* was based on the expansive reading the Court had given to the same term ("related to") in the ERISA preemption provision. But in the fifteen years since the Supreme Court last looked at the ADA preemption clause, the high Court's ERISA preemption jurisprudence has substantially evolved.[17] In *Travelers,* the

[17] The ADA preemption did enter into the Court's consideration of the preemption clause in the trucking deregulation act in *Rowe*, 552 U.S. 364. There, the question was whether the trucking deregulation act preempted a Maine law that required truckers delivering tobacco products to obtain the signature of a recipient of appropriate age. Concluding that the Maine statute (unlike the New Mexico statute in the instant case) would require carriers "to offer a system of services that the market does not now provide" (*id*. at 372), the Court held that the Maine statute was preempted by the federal scheme that was, like ADA preemption, intended to prevent the States from re-regulating the interstate trucking industry. The Court noted that the preemption language in the trucking deregulation law was lifted from that in the ADA, and so it determined that the same broad interpretation of the term "rates, routes and services" as articulated in *Morales* should apply. *Id*. at 370-71. In determining that the term "rates, routes and services" in the trucking law should have the same meaning as it does in the ADA, the Court could not have included alcohol service, since there is no such service for over-the-road truckers. The Court did repeat its warning from *Morales*, that some State regulations could be "too tenuous, remote or peripheral" to be

Court considered whether a New York State law requiring that hospitals add surcharges to charges paid by certain insurance coverage purchased by employee benefit plans was preempted by ERISA. The Court focused on the term "related to" in the ERISA preemption clause, noting that while clearly expansive, there were limits:

> If "relate to" were taken to extend to the furthest stretch of indeterminacy, then for all practical purposes, pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere."

514 U.S. at 655, quoting H. James, Roderick Hudson xli (New York ed., World's Classics 1980).

The Court observed that an expansive reading of the phrase could not have been Congress's intent, because such an interpretation would render limiting language in the statute a nullity and would "read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Id.* The Court noted that such an interpretation "would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that '[p]re-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general

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preempted. *Id*. at 390.

applicability.'" *Id.* at 661, quoting *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1 (1992) (alteration in the original). The Court found just that – that the State surcharge plan did not bind plan administrators and thus did not function as a regulator of any ERISA plan, and did not preclude uniform plan administration.

In *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997), the question was whether a State wage and hour law prescribing higher wage rates for apprentices taken from unapproved apprenticeship programs was preempted by ERISA. The Court found that there was no preemption. The Court noted that (like here) apprenticeship programs had long been regulated by the States and that (like here) the wages and training standards of the programs were "quite remote from the areas with which ERISA is expressly concerned." *Id.* at 330. Accordingly, the Court addressed the substance of the California statute "with the presumption that ERISA did not intend to supplant it." *Id*. at 331. From that perspective, the Court held no preemption, finding that prevailing wage bound no ERISA plan and that the effect of the California law was merely to provide economic incentive to use apprentices who could be paid the lower wage. *Id*. at 332. "The prevailing wage statute alters the

incentives but does not dictate the choices facing ERISA plans." *Id.* at 334.[18]

In *De Buono*, 520 U.S. 806, the Court found that a State gross receipts tax on health care facilities was not preempted because it also applied to facilities operated by an ERISA plan. The Court noted that this was not a case where the State law has mandated something forbidden by ERISA, or a case where the State law required employers to provide certain benefits. It was not a State law that was dependent on the existence of a pension plan or that makes specific reference to a pension plan. *Id.* at 814-15. It merely was a tax of general application to the industry that incidentally also affected ERISA plans.[19]

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[18] Accordingly, USAirways' suggestion that State regulations that increase costs (thus potentially affecting fares) must be preempted (AOB, 27) is too broad and incorrect. USAirways cannot seriously contend that State wage and hour laws are preempted because they would increase airline costs and thus drive fare-setting decisions. *See*, *Duncan* v. *Northwest Airlines, Inc.*, 208 F.3d 1112, 1115-16 (9th Cir. 2000), permitting flight attendants' suit seeking damages and to enjoin airline from permitting smoking on trans-Pacific flights based on State health laws to go forward, and dismissing airline's argument that such could force airline to drop such flights departing from Washington State as insufficient to invoke preemption. *See also*, *Californians for Safe & Competitive Dump Truck Transp.* v. *Mendonca*, 152 F.3d 1184 (9th Cir. 1998).

[19] *Amicus* United States asserts that the ADA cases permitting law suits to go forward based on the Ninth Circuit's definition of "service" were run-of-the-mill tort suits and are non-instructive here because New Mexico is enforcing its law of general application, not State law tort rights. *Amicus* brief of United States, 16-17. But the recent ERISA cases (*Travelers*, *Dillingham* and *De Buono*) all involved preemption in the face of State laws of general application, not tort suits. And the FAA savings clause saves State "remedies now existing at common law

In the more than fifteen years since the Supreme Court has last looked at the ADA preemption language, federal courts, taking their lead from these developments in the law of ERISA preemption, increasingly have considered the scope of the ADA's preemption provision in light of the effect of the putative State action on achieving the underlying purpose of the ADA itself; and have found no preemption where the State action would have no or only marginal effect on achieving the primary purpose of the ADA, the movement of commercial air carriers to a competitive market. In *Abdu-Brisson* v. *Delta Airlines, Inc.*, 128 F.3d 77 (2nd Cir. 1997), the issue was whether ADA preempted application of State age discrimination laws to the integration of Delta's and PanAm's pilot rosters after the airlines merged. The court said "no." The court found little guidance from the Supreme Court after *Morales* and *Wolens*. *Id.* The court instead turned to the developing ERISA preemption law for guidance. Noting that its "'ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole'" (*id*. at 83, quoting *Gade* v. *National Solid Wastes Management Ass'n.*, 505 U.S. 88, 98 (1992)) the court concluded that complying with the State's age discrimination law would not interfere with the airline's ability to comply with the ADA, and the State law was

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or by statute." 49 U.S.C. § 40120(c) (emphasis added).

not preempted. *Id*. at 84.

Alasady, 2003 WL 1565944, similarly looked at State law of general application – there, a law insuring equal access to public accommodations – concluding that even though the law impacted airline service, it was not preempted. There, three Muslim men of Middle-Eastern descent were denied boarding. While the court adopted *Hodges'* definition of "service" to include boarding procedures, it concluded that the mere impact of application of State law on "service" (as well as on passenger safety and security procedures) was insufficient to invoke preemption. Looking at the underlying objective of the ADA (to promote development of the industry based on competition and market factors) and the purpose of the ADA preemption provision (to prevent the States from re-regulating the industry after the Congress had de-regulated it), the court concluded that the impact of enforcement of the State anti-discrimination law on airline safety or boarding procedures was "too tenuous to warrant preemption under the ADA." 2003 WL 1565944 at *10.

Thus, the evolving decisional law under both the ADA and ERISA demonstrates that the concept of "related to" does not stretch to the point of preempting New Mexico's enforcement of its liquor control laws. Through those laws, New Mexico seeks to regulate in an area of health and safety specifically

delegated to state regulation by the Twenty-first Amendment. In determining the reach of ADA preemption, the presumption is that Congress did not intend to preempt State laws – especially in areas such as temperance and health and safety in which the States traditionally have had a strong interest.

Further, New Mexico's liquor control laws are neither directed to airlines alone nor are they premised on the existence of airlines; and they do not reference and are not dependent on the ADA. They apply across the board to anyone who chooses to serve alcohol. They do not interfere with any airline's ability to compete and they do not promote an avenue of competition that is not contemplated by the ADA. The *Alasady* court focused on the objective of the ADA – to foster reliance on competition – and observed that enforcement of the State anti-discrimination would not impose a theory of competition on the industry; "refraining from the violation of individuals' civil rights is not a theory of competition." *Id*. Similarly, which airline can serve the most alcohol to passengers on a one-hour flight from Phoenix to Albuquerque is not a theory of competition that the ADA was enacted to promote.[20]

> [A]ir carriers compete in only a limited range of contexts, *e.g.* fares, routes, timing, etc., which constitute the bargained-for elements of its

[20] The evidence is that New Mexico's actions have had no deleterious competitive effect on USAirways operations in any event. A829-830.

> service. Accordingly, to pre-empt state law claims concerning other elements of airline operations that are not bargained for plainly would not further the goal of promoting competition in the airline industry.

Branche v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1256 (11th Cir. 2003)(retaliatory discharge claim under State whistleblower protection law not precluded by ADA).

> [T]hose elements of air carrier operations over which airlines do not compete are not "services" within the meaning of the ADA's pre-emption provision, and state laws related to those elements are not pre-empted.

Id. at 1258.

Nor do the New Mexico laws prevent an airline from complying with the ADA and its regulations. As USAirways points out (AOB, 20), New Mexico's policy is similar to that of the FAA's only alcohol-related regulation, 14 C.F.R. § 121.575 – not serving intoxicated persons. Of course, New Mexico law goes beyond merely articulating a policy. Still, compliance with the New Mexico law will not prevent US Airways from complying with the federal regulation. It demands nothing that the FAA regulations prohibit.

Thus, USAirways' *in terrorem* argument (AOB, 26-29) misses the point because it overstates the objective of the ADA. Since the purpose of ADA, including its preemption language, is to encourage competition in the commercial airline industry, Congress could not have contemplated preemption of State

regulation that was peripheral to, and only tenuously related to, the market competition that the ADA was intended to foster. The quality of headsets, number of blankets and type of soap that USAirways pretends it fears States might attempt to regulate (AOB, 26), while tangential to economic and market competition, are not the stuff of traditional State regulation, especially that conferred by the Twenty-first Amendment. Concerns for health and safety, while also tenuously related to airline market competition, *are* areas of traditional State regulation. If Congress did not intend preemption in the FAA, there is no reason to suppose that Congress did not contemplate that States would continue to regulate areas of traditional State regulation, such as health and safety, when such regulations were tenuous and peripheral to the underlying objective of the ADA.[21]

[21] USAirways can find no support in the language it quotes from House Committee Report 98-793 that eliminated the Civil Aeronautics Board. AOB, 28. There the committee was speaking of the need to maintain certain consumer protections established by the Civil Aeronautics Board that otherwise would have lapsed once the Board was eliminated; namely – "overbooking and denied boarding compensation, limitations[] on liability for lost or damaged baggage, smoking, discrimination against the handicapped, terms of charter service, and the notices which airlines must give passengers ...." H.R. Rep. 98-793 at 4. These are not areas of traditional State regulation.

II. The Twenty-first Amendment Permits New Mexico to Exercise its Core Power to Require Airlines Serving Alcoholic Beverages on Flights Originating or Landing in this State to Obtain and Maintain Liquor Licenses.

A. The District Court Applied the Twenty-First Amendment Consistent with Controlling Precedent.

USAirways insisted in the district court and continues here that the State's interest in requiring that USAirways hold a New Mexico liquor license should have been balanced against what USAirways contends to be the federal interest in the uniformity of all regulations affecting commercial airlines. The district court held that no balancing was required because New Mexico's licensing requirement was within its core power under the Twenty-first Amendment. A1281-82. The district court was correct.

First, the district court's acknowledged 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'" (A1281, quoting *Midcal,* 445 U.S. at 110).

Second, the court correctly held that the New Mexico licensing laws at issue involve "whether to permit importation or sale of liquor and how to structure the liquor distribution system" and are therefore within the core power of a State under the Twenty-first Amendment. A1282, citing *Midcal,* 445 U.S. at 110.

Third, the district court correctly applied Supreme Court decisions that carefully distinguish between State regulations that implicate a State's "central" power under the Twenty-first Amendment and those that do not. A1281-82. If a State regulation implicates a central or core power under the Twenty-first Amendment, the State regulation will prevail over a competing federal interest, so long as the State law is not facially protectionist.[22]

B. New Mexico's Power to License and Hence Directly Regulate the Importation and Sale of Alcoholic Beverages Within Its Borders is a Core Power Under the Twenty-First Amendment.

USAirways and its *amici* construct arguments to circumvent the factual and legal heart of this case: that the Twenty-first Amendment gives the States the exclusive authority to license and regulate the retail sale of alcoholic beverages within their borders, U.S. Const. amend XXI, § 2, and this case involves New Mexico's exercise of that authority. This central constitutional fact – that New Mexico's power to license the importation and sale within the State of alcoholic beverages is at the core of Twenty-first Amendment powers – is the starting point

[22] As explained at Point II,B, State liquor laws that are in the exercise of core powers under the Twenty-first Amendment are generally not subject to balancing, the only exceptions being if they are facially protectionist of in-state manufacturers or violate constitutional provisions other than the Commerce Clause. USAirways makes no claims here that New Mexico's laws are protectionist or that they violate any other relevant constitutional provisions.

of the correct application of the constitutional principles here. We can find no reported decision in which any court has held that a State's power under the Twenty-first Amendment to license the retail sale of alcohol within its borders can be preempted by a federal statute or be diluted by a competing federal interest, except where the licensing scheme is protectionist or the alcohol is being served inside a federal enclave.[23] Neither of these exceptional conditions is present here.

Even the Supreme Court decision that USAirways relies on heavily, *Capital Cities,* 467 U.S. at 713*,* recognized this foundational principle, although finding its application inapposite there: "[W]hen a State has *not* attempted directly to regulate the sale or use of liquor within its borders - *the core § 2 power* - a conflicting exercise of federal authority *may* prevail." *Capital Cities,* 467 U.S. at 713 (emphasis added).[24]

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[23] *See Granholm* v. *Heald*, 544 U.S. 460, 485 (2005) (Twenty-first Amendment does not save protectionist laws that favor in-state wine producers); *North Dakota* v. *United States*, 495 U.S. 423, 424 (1990) (recognizing that liquor sales in "federal enclaves" such as military bases are subject to some but not all State liquor laws.

[24] *See also, North Dakota,* 495 U.S. at 424 (regulating the distribution of alcohol within its borders is at the core of a State's powers under the Twenty-first Amendment); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 42 (1966) ("[A] State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."). *Seagram* was later limited in other respects, but not in its characterization of the absolute power of States to

USAirways argues that its sale of alcoholic beverages within New Mexico[25] "[l]ies at or beyond the periphery of the Twenty-first Amendment." AOB, 42. USAirways argues that the sale of alcoholic drinks on a commercial aircraft operating in New Mexico is different from sales at a bar or at the airport or on a train and therefore somehow is beyond the Twenty-first Amendment. USAirways and its *amici* (*see, e.g*., *amicus* brief of United States, 26), make this assertion in the teeth of controlling Supreme Court decisions that hold the opposite. *See Capital Cities,* 467 U.S. at 713.

There, the Supreme Court expressly recognized that a State's power "to regulate the sale or use of liquor within its borders" is "*the* core [Twenty-first Amendment] power." *Capital Cities,* 467 U.S. at 713 (emphasis added), a power that is "virtually complete." *Midcal,* 445 U.S. at 110; *see also Department of Revenue* v. *James B. Beam Distilling Co.,* 377 US. 341, 346 (1964)(holding that a

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control the sale of alcohol within their borders. *Healy v. Beer Institute, Inc*., 491 U.S. 324, 325 (1989) (recognizing the limitation of *Seagram* as to "retrospective affirmation statutes," which "have the inherent practical extraterritorial effect of regulating liquor prices in other States.")

[25] Citing *Braniff Airways v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590, 595 (1954) the district court held that New Mexico and federal government have concurrent jurisdiction "over events occurring in [New Mexico's] airspace." A1277. USAirways does not contest this portion of the district court's ruling.

State's authority under the Amendment includes the "*plenary* power to regulate and control ... the distribution, use, or consumption of intoxicants within her territory after they have been imported.") (Emphasis added.) The Court reiterated this in *North Dakota*, 495 U.S. 423, addressing the applicability of North Dakota's labeling and reporting regulations to alcohol sold on a military base:

> The two North Dakota regulations fall within the core of the State's power under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate.

Id. at 432. Justice Scalia, in his concurring opinion, emphasized that the Twenty-first Amendment unquestionably empowered North Dakota to require that all wholesalers be licensed. *Id*. at 447 (Scalia, J., concurring).

If a State has the power to require that all wholesale sales of alcoholic beverages be licensed, it has the power to require the same of all retail sales. This conclusion is consistent with the Supreme Court's recognition that it is through licensing that the ends of the Twenty-first Amendment are achieved: "facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability" can be "achieved through...an evenhanded licensing requirement." *Granholm,* 544 U.S. at 492.

Until the case at bar, no one other than Amtrak (at least as far as we have found) had ever challenged a State's authority to license the consumption of alcohol within its borders, and Amtrak failed in both its attempts. *Miller*, 358 F.Supp. 1321; *Harris,* 490 F.2d 572. As we show at Point II,C, cases like this one, involving core powers of licensing do not require balancing under the Twenty-first Amendment, unless the State laws are facially protectionist of in-state economic interests. *See, e.g.*, *Granholm,* 544 U.S. 460.

C. The District Court Correctly Concluded that Balancing of Interests is Not Called for in this Case Because New Mexico is Exercising its Core Powers Under the Twenty-First Amendment.

The Supreme Court has long recognized that the State's authority over the importation and sale of intoxicants within its borders under the Twenty-first Amendment "is transparently clear," *Craig v. Boren*, 429 U.S. 190, 207 (1976), and that this authority "created an exception to the normal operation of the Commerce Clause." *Id.* at 206.[26] Courts do not balance federal and State interests

[26] In addition to recognizing "core powers" under the Twenty-first Amendment, the Court recognizes a State's "core interests" to include "'promoting temperance, ensuring orderly market conditions, and raising revenue' through regulation of the manufacture, distribution, and sale of alcoholic beverages." *Brooks v. Vassar,* 462 F.3d 341, 351 (4th Cir. 2006), *citation omitted,* quoting *North Dakota*, 495 U.S. at 432.

where a State is exercising a core power such as licensing the sale of alcohol within its borders, except in the following situations, neither of which is present here:

1. Courts will apply a balancing test if the State law, albeit a core power under the Twenty-first Amendment, facially discriminates against interstate commerce in violation of the dormant Commerce Clause. See, e.g., *Granholm,* 544 U.S. 460. There is no claim here that New Mexico's licensing laws are discriminatory or protectionist.[27]

2. Courts will apply a balancing test if the State law conflicts with a provision of the Constitution *other* than the Commerce Clause. See, e.g., *City of Newport, Ky. v. Iacobucci,* 479 U.S. 92 (1986) (State's Twenty-first Amendment licensing power sufficient, over First Amendment challenge, to permit State to deny liquor licenses to nude dancing establishments); *Craig,* 429 U.S. 190 (State interests insufficient under the Fourteenth Amendment to perpetrate gender-based discrimination in the sale of alcohol in violation of the Equal Protection Clause);

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[27] USAirways tentatively asserts (AOB, 52-53) that New Mexico's requirement that new applicants for licenses fill out a "long form" application rather than completing the "short form" that was formerly required somehow manifests disparate treatment. For reasons discussed at Point II,E, this argument is insubstantial and does not touch on any of the protectionist concerns that the Supreme Court has identified as casting a State's liquor licensing laws into question. *Granholm*, 544 U.S. at 486-88.

Wisconsin v. Constantineau, 400 U.S. 433 (1971) (Twenty-first Amendment interest insufficient to excuse due process violation). As the Supreme Court made clear in *Capital Cities:*

> The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders. At the same time ... the Amendment does not license the States to ignore their obligations under other provisions of the Constitution. Indeed, "[t]his Court's decisions ... have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." Thus ... § 2 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.

467 U.S. at 712. (Citations omitted.)

New Mexico's licensing of the sale of alcohol within its borders, including on aircraft within its airspace destined for, coming from, and on the ground in Albuquerque, is in the exercise of a core power (licensing) and reflects core interests (temperance, orderly - i.e., licensed - market conditions, and raising revenue through licensing).

Central to USAirways' argument for exemption from State regulation of alcohol service is that the decisions in *Miller*, 358 F.Supp. 1321, and *Harris,* 490 F.2d 572, are no longer good law. AOB, 58-9. These two cases are close in point to this case because they involved the enforcement of State liquor license laws on

the sale of alcoholic beverages on interstate common carriers, in these cases Amtrak trains, passing through Kansas (*Miller*) and Oklahoma (*Harris*). The decisions of this Court in *Harris* and the three-judge panel in *Miller* (affirmed by the Supreme Court) were that the Twenty-first Amendment protected State licensing of the service of alcoholic drinks on Amtrak trains passing through those States:

> Under the Twenty-First Amendment, a State has the right to legislate concerning intoxicants brought from without the State for use and sale therein, unfettered by the commerce clause. A State is totally unconfined by traditional commerce clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.

Miller, 358 F.Supp. at 1327. (Emphasis added.) The three-judge court took this language from *Seagram*, 384 U.S. at 41, where the Supreme Court restated its view that, when it came to controlling the sale and distribution of alcohol within a State, the State's power was unconstrained by the Commerce Clause. *Id*.

USAirways argues that subsequent Supreme Court decisions have made the decisions in *Miller* and *Harris* obsolete. AOB, 58-59. This is incorrect. Nothing in the Supreme Court's subsequent decisional law respecting the States' core power to regulate the sale of alcohol within their borders alters the fundamental

holdings in *Miller* or *Harris*.[28] The legal developments that have occurred do not relate to the facts of *Miller* or *Harris* or this case because: 1) New Mexico's licensing laws at issue here (just as in *Miller* and *Harris*) are not protectionist; 2) New Mexico's licensing laws here (just as in *Miller* and *Harris*) are in the exercise of New Mexico's core powers under the Twenty-first Amendment;[29] and 3) New Mexico's licensing laws at issue here (like those in *Miller* and *Harris*) are not in conflict with any constitutional provision *other* than the Commerce Clause (which is not implicated since New Mexico's licensing laws are not protectionist).

Furthermore, the Supreme Court decision that USAirways argues (AOB, 43-44) withdrew from the States the plenary power to regulate all matters relating to

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[28] The cases that USAirways relies on for its assertion that subsequent Supreme Court developments undermine the holdings in *Miller* and *Harris* (AOB, 59) do not address the facially neutral application of core powers under the Twenty-first amendment. Neither the holdings nor the reasonings of those cases undermine the *Miller* or *Harris* holdings, and as discussed in the text, language in those decisions recognizes the continued vitality of the settled law that facially neutral application of States' core powers under the Twenty-first Amendment are protected without the need for balancing any competing interests. *Seagram*, 384 U.S. at 41.

[29] USAirways' argues (AOB, 42-45) that New Mexico's interests are at the periphery of the interests protected by the Twenty-first Amendment because the liquor USAirways serves in New Mexico is served in a closed airplane under the supervision of flight attendants. This argument ignores *Miller* and *Harris* and disregards consistent decisional authority, *see, e.g., North Dakota,* 495 U.S. at 432; *Granholm,* 544 U.S. at 492, confirming that a State has the power to require a license for the sale of alcoholic drinks within its jurisdiction.

alcohol, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964), was decided before *Miller* and *Harris.* The *Miller* court addressed the holding in *Hostetter* and noted that in the later *Seagram* decision, the Court had reaffirmed the power of the States, under the Twenty-first Amendment, to impose licensing requirements on the sale of alcohol within their borders: "'[A] State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'" *Miller,* 358 F.Supp. at 1327, quoting *Seagram,* 384 U.S. at 41.

USAirways argues that this Court need not heed the Supreme Court's affirmance in *Miller* because, lacking an opinion, it is of diminished precedential value and can only be deemed to speak to the "precise issues presented" in those cases which, according to USAirways, is not the precise issue in this case. AOB, 55. USAirways overstates the limited precedential value of summary affirmances. It is true that issues that "merely lurk in the record" are not resolved by a summary affirmance, "and no resolution of them may be inferred." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (citation omitted). "[A]ppropriate, but not necessarily conclusive, weight" is to be given summary dispositions by the Supreme Court. *Mandel v. Bradley*, 432 U.S. 173, 179 (1977) (Brennan, J., concurring). Summary affirmances "do prevent lower courts from

coming to opposite conclusions on the precise issues presented and necessarily decided" by the Supreme Court. *Id*. at 176. "Summary actions … should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Id*.

The holding in *Miller* was that because the Twenty-first Amendment gave States control over the distribution and sale of alcohol within their borders, Amtrak needed a Kansas liquor license if it wanted to sell liquor on its trains as they traveled through Kansas. To distinguish *Miller,* USAirways argues that this case is different because trains are different than airplanes: 1) trains are on the ground and have bar cars (apparently as opposed to commercial aircraft where the entire airplane is a bar car) and; 2) airports are more secure than train stations, making diversion less likely. AOB, 55-56.[30] The only development in the law that impacted a State's control over the distribution and consumption of alcohol within

[30] As to this latter argument, the record evidence provides the rebuttal – within months, there were at least two incidents of drunk drivers on New Mexico roadways as a result of unlawful provision of alcoholic beverages by USAirways alone, one of those incidents leading to the tragic deaths of nearly an entire family. A52; 546-551. In straining to find other reasons why the Supreme Court's affirmance of *Miller* should not control the outcome here, USAirways argues that the Amtrak preemption language addressed in *Miller* ("rates, routes or services") is so different from the preemption language in the ADA ("price, route or service") as to make *Miller* inapplicable. AOB, 56-57. There is no significant difference between the two preemption provisions at issue. 45 U.S.C. § 546(c)(1970) (currently codified at 49 U.S.C. § 34301(g)) and 49 U.S.C. § 41713(b)(1).

its borders is reflected in the anti-protectionism holding in *Granholm.* Protectionism was not at issue in *Miller* and is not at issue here.

Recent decisions in other circuits confirm that where core interests under the Twenty-first Amendment are involved, there generally is no balancing of interests. In *Arnold's Wines, Inc.* v. *Boyle,* 571 F.3d 185, 189 (2d Cir. 2009), the court assessed a challenge by an out-of-state seller to a New York law requiring that all beverages entering the State do so through a licensed wholesaler. In upholding the law as integral to New York's alcoholic beverage distribution system, the court analyzed the interplay between the Commerce Clause and the Twenty-first Amendment:

> [T]he Supreme Court has made clear that the Twenty-first Amendment alters dormant Commerce Clause analysis of State laws governing the importation of alcoholic beverages. *** The purpose of section 2 [of the Amendment] 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.
>
> * * *
>
> But State powers under the Twenty-first Amendment are not without limitation; the Amendment does not immunize all regulation of alcoholic beverages from Commerce Clause scrutiny. State policies are only "protected under the Twenty-first Amendment when they treat liquor produced out of State the same as its domestic equivalent."

* * *

> ... If the state measure discriminates in favor of in-state producers or products, the regulatory regime is not *automatically* saved by the Twenty-first Amendment simply by virtue of the special nature of the product regulated. Rather, if the court finds the law discriminatory, it will only be upheld if it reasonably advances legitimate State interests "that cannot be adequately served by reasonable nondiscriminatory alternatives."

Id. at 188 -189, (emphasis added, citations omitted). In an analysis that closely tracks the Supreme Court's Twenty-first Amendment jurisprudence, once the court in *Arnold's Wines* found that the New York law articulate a core power that was non-discriminatory, it (like the district court here) rejected any balancing of interests:

> Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce Clause principles.

Id. at 191.

Similarly, in addressing a challenge to Tennessee's alcohol distribution system that did not permit direct sales of wine to consumers, the Sixth Circuit in *Jelovsek* v. *Bredesen,* 545 F.3d 431, 436 (6th Cir. 2008), recognized that "Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds" (citing *Granholm*, 544 U.S. at

489). Because provisions of the Tennessee law facially discriminated against non-residents, however, the court remanded the case to the district court to conduct the balancing test.

The Fourth Circuit, in *Beskind* v. *Easley,* 325 F.3d 506, 513 (4th Cir. 2003) recognized these same principles, holding that the "Commerce Clause could not be construed to prevent the enforcement of State laws regulating the importation of alcoholic beverages and the manufacture and consumption of alcoholic beverages within State borders" so long as they do not "directly regulate extraterritorially" and are not motivated by "mere economic protectionism." 325 F.3d at 514, quoting *Bainbridge* v. *Turner*, 311 F.3d 1104, 1112 (11th Cir. 2002). *See also*, *Stein Distributing Co., Inc.* v. *Dep't of Treasury Bureau of Alcohol, Tobacco & Firearms,* 779 F.2d 1407, 1411 (9th Cir. 1986) (applying balancing test because State interest in allowing wholesalers to restock the wine shelves of retailers not an exercise of a Twenty-first Amendment "core power.").[31]

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[31] There is no suggestion that New Mexico's three-tier system of licensing and regulating distribution of alcoholic beverages in the State discriminates or seeks to regulate extra-territorially. All it does is require that vendors of alcoholic beverages in New Mexico, including airlines and railways, be licensed. NMSA 1978 § 60-3A-1, *et seq*. In New Mexico, it is a fourth-degree felony for anyone to sell alcoholic beverages in New Mexico without a license. NMSA 1978 § 60-7A-5. Under *Braniff,* and under New Mexico law, federal law does not preempt State criminal laws committed in a State's airspace. *See Marsh* v. *State,* 95 N.M. 224, 225, 620 P.2d 878, 879 (1980) (explaining that legislative history of Federal

USAirways insists that the Commerce Clause is the "counterweight" to New Mexico's power under the Twenty-first Amendment (AOB, 53-54), citing *Capital Cities* for the proposition that the Commerce Clause can overcome a State's power under the Twenty-first Amendment. AOB, 53. But *Capital Cities* was a case under the Supremacy Clause, not the Commerce Clause, and the Court's ruling reflects its view that the same "core powers" analysis under the Commerce Clause applies when the analysis is under the Supremacy Clause:

> As in *Midcal Aluminum*, therefore, we hold that when, as here, a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, *and 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 is not directly implicated*, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause.

Capital Cities, 467 U.S. at 716. (Emphasis added.) New Mexico's licensing of USAirways provision of alcoholic beverages within the State undeniably involves the core power of New Mexico to license the retail sale of alcohol. Accordingly, neither the Commerce Clause nor the Supremacy Clause can alter the result.

Aviation Act, 49 U.S.C. § 1472(k), makes clear that federal and State governments have joint jurisdiction and that where, as here, there is no analogous federal crime, "there is absolutely no question" that State law is not preempted.).

D. Any Balancing of Interests Would Result in a Determination that New Mexico's Strong Twenty-First Amendment Interests in its Licensing System and in Temperance, Including the Health and Safety of its Citizens, Visitors and Residents, Outweigh the Minimal Effects of Licensing and Regulation on USAirways.

The core interests that any State has in exercising its powers under the Twenty-first Amendment are "promoting temperance, ensuring orderly market conditions, and raising revenue ...." *North Dakota,* 495 U.S. at 432 (1990). The Supreme Court agrees that "temperance" equates to "reducing alcohol consumption." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 504 (1996).

New Mexico's interest in temperance springs from any State's strong interest in protecting its citizens from death and injury. *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc*., 452 U.S. 264, 300 (1981) ("Protection of the health and safety of the public is a paramount governmental interest.") USAirways' suggestion that New Mexico's interest in controlling drunk driving by disembarking airlines passengers such as Dana Papst is at the fringes of New Mexico's interest in temperance (AOB, 42ff) ignores the Supreme Court's recognition of the terrible toll of drunk driving:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. "Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause

> nearly one million personal injuries and more than five billion dollars in property damage." For decades, this Court has "repeatedly lamented the tragedy." *See Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways ... now reaches the astounding figures only heard of on the battlefield").

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451(1990) (internal citations deleted; ellipsis in original). Thus, as to the relationship between these paramount interests and licensing, the Supreme Court already has spoken.

The connection between New Mexico's paramount interest in health and safety and licensing the sale of alcohol, is fully supported by the record here. James F. Mosher, a prominent national expert on the role of legal policy in preventing alcohol problems, established that

> New Mexico's licensing of retail alcohol outlets is a critical component of its strategy in preventing and reducing alcohol-related problems, including alcohol-related motor vehicle crashes. Omitting any type of commercial alcohol providers from New Mexico's licensing, enforcement and penalty structure for controlling commercial sales of alcoholic beverages would have an adverse effect on the State's strategy for reducing alcohol-related problems in the state. Requiring commercial airlines to obtain a license as a condition of dispensing alcohol in-flight and on the ground while in New Mexico is therefore a critical element in New Mexico's comprehensive prevention strategy, particularly in light of the large number of alcohol-related incidents that occur on airplanes.

A620. Research establishes that if licensing provisions are to be effective, they must be enforced. *Id*. Mosher's research also shows that USAirways' program of

preventing on-board intoxication is "seriously inadequate in numerous respects," (*id*. at A620-621), and that the FAA's oversight of alcohol service on flights is inadequate. *Id* at A621. Finally, he shows that the on-board overconsumption of alcohol presents a frequent and serious safety problem in flight and on the ground. *Id*. at A622. Many reforms have been proposed, but none implemented by the FAA or the airlines. *Id*. at A622-623.

USAirways insists that New Mexico's interests are "insubstantial" because the nature of alcohol service on aircraft makes the risk of diversion "into [New Mexico's] regulated, intrastate market" "almost non-existent." AOB, 48-49. But, USAirways is changing the nature of the interests New Mexico is advancing, from the threat to the safety of its citizens from drunk passengers deplaning from USAirways' planes in Albuquerque and wreaking carnage on New Mexico's roads (the interest New Mexico advances) to instead assuring that passengers don't smuggle minibottles of alcoholic beverages off of the plane and into New Mexico (the interest USAirways says New Mexico is advancing).

Having created this "straw-man" interest, USAirways relies on a case involving State labeling and reporting regulations imposed on wholesalers selling into a federal enclave. The regulations enabled the State to know if the wholesalers' goods were ending up off the enclave, in retail distribution. *North*

Dakota, 495 U.S. at 431. It did not involve the sale of alcohol by the drink within the State's jurisdiction. New Mexico may have a legitimate and enforceable concern that passengers will carry small bottles off with them after an unlicensed sale on the aircraft, but this is not the core interest New Mexico asserted below and reasserts here.[32]

Any interests of USAirways fall far short of matching New Mexico's interests. First, USAirways claims that the application of New Mexico's licensing laws will negatively impact the federal government's interest "in ensuring the safety of the traveling public." AOB, 46. There is no record evidence establishing

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[32] USAirways argues that there is no support in the record for New Mexico's claim that its application of licensing laws to USAirways helps to ensure "orderly market conditions." AOB, 48. USAirways is wrong. Mr. Mosher's testimony, just discussed in the text, is evidence of just that point. Further, the Supreme Court has identified licensing as the mechanism that States use to facilitate "orderly market conditions" as well as the State's other important interests. "[F]acilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability" can be "achieved through...an evenhanded licensing requirement." *Granholm,* 544 U.S. at 492. Finally, USAirways argues that while New Mexico might have an insignificant interest in licensing the sales of alcohol as to flights *arriving* in New Mexico, it has no interest at all in licensing the sales of alcohol on *departing* flights. AOB, 50. The record establishes that USAirways can serve alcoholic beverages on its planes in New Mexico before the plane departs. Passengers may deplane before departure and pose a threat to New Mexico's interests in temperance. Morever, New Mexico's interests are not limited to situations in which there is a likelihood of harm only in New Mexico and no court has ever suggested that this is the case. New Mexico has the right under the Twenty-first Amendment to enforce temperance, through licensing, wherever drinks are sold in this State.

that complying with New Mexico's licensing laws would compromise safety. USAirways abides by licensing laws in nineteen other States (A1012) with not a shred of evidence of compromised safety. In contrast, undisputed evidence in the Mosher Report establishes that New Mexico's enforcement of its licensing laws is key to addressing the significantly dangerous condition created by abuse of alcohol on commercial aircraft. A620-624.

Second, USAirways contends that there is a strong interest "in a vibrant and efficient airline industry." AOB, 46. Again, there is no support in the record that would establish that enforcement of State licensing requirements would make the airline industry less vibrant and efficient. The testimony of USAirways' 30(b)(6) witness regarding the ease with which USAirways was able to ensure that it does not fly aircraft loaded with alcohol into New Mexico refutes USAirways' argument. A1007; 1320-1321.

Third, USAirways contends that enforcement of New Mexico's licensing laws complicates the federal interest in fostering competition and avoiding delays. AOB, 47. The record evidence, which includes an analysis of the effect of USAirways' inability to serve alcohol on its flights into and out of New Mexico, is that there has been no effect: 1) on fares; 2) on switching of passengers away from USAirways; 3) on delays, or; 4) on operational complexity. Oster Report,

A829-830.

Balanced against USAirways' speculation is the actual evidence of overservice of alcohol by USAirways and its deadly consequences to people in New Mexico. No balancing test should occur. But if it does, the record establishes that New Mexico's interests far outweigh both USAirways' and the federal government's.

E. USAirways' "Selectivity" Argument is of no Import.

USAirways halfheartedly argues that New Mexico's interest in imposing its licensing laws on USAirways is undermined by New Mexico's supposed "selectivity" in the application of its laws. AOB, 52. The purported basis for this argument is that New Mexico changed its policies after the Papst incident and began requiring airlines newly applying for licenses to complete "long form" applications instead of the"short forms" previously used. AOB, 52-53. USAirways provides no support for this argument other than reference to *Capital Cities*.[33] But, *Capital Cities* involved imposing a State censoring requirement on national cable television broadcasters that directly and significantly interfered with broadcasters' ability to do any business at all in Oklahoma, and it involved the

[33] This was not a selective enforcement nor in any way protectionist. Rather, the switch from short forms to long forms was a general change in policy. A1202-1205.

Twenty-first Amendment only indirectly. 467 U.S. at 716. That decision has no applicability here. The length of the application form had no such effect on USAirways.

Furthermore, if USAirways was aggrieved by the requirements of the RLD or its failure to approve the license application (whether unsupported by fact or law, arbitrary or capricious or otherwise unlawful), USAirways could have appealed to a New Mexico District Court and, from there, to the Court of Appeals and thence to the New Mexico Supreme Court. NMSA 1978 §§ 60-6B-2, 39-3-1.1. USAirways declined the appellate remedies New Mexico law provides; instead initiating this challenge. A license applicant waives any procedural due process claims if it fails to take advantage of an available State appeal from the licensing agency's decision. "[P]rocedural due process violations do not become complete 'unless and until the state refuses to provide due process.'" *Malone* v. *Parker,* 953 F.Supp. 1512, 1516 (M.D.Ala.,1996, quoting *Zinermon* v. *Burch*, 494 U.S. 113, 123 (1990)) (requirement of exhaustion of State remedies applies in the licensing context). *Id*. *See also*, *Burns* v. *Harris County Bail Bond Bd.,* 139 F.3d 513, 519 (5th Cir. 1998) (same).

Conclusion

The judgment of the district court should be affirmed.

FREEDMAN BOYD HOLLANDER
GOLDBERG IVES & DUNCAN, P.A.

s/ Joseph Goldberg
Joseph Goldberg
John W. Boyd
Michael L. Goldberg
Molly Schmidt-Nowara
20 First Plaza, Suite 700 (87102)
P.O. Box 25326
Albuquerque, NM 87125
(505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
mg@fbdlaw.com
msn@fbdlaw.com

Julie Ann Meade
New Mexico Regulation & Licensing Department
PO Box 25101
Santa Fe, NM 87504-5101
(505) 476-4663
julie.meade@state.nm.us

Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I CERTIFY that on the 7th day of April, 2010, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Howard Kass
Michael J. Minerva
US Airways, Inc.
1401 H Street N.W.
Suite 1075
Washington, DC 20005

Seth P. Waxman
Edward C. DuMont
Daniel S. Volchok
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006

s/ Joseph Goldberg
Joseph Goldberg

STATEMENT CONCERNING REQUEST FOR ORAL ARGUMENT

Defendants and Appellees Kelly O'Donnell and Gary Tomada respectfully request that the Court hear oral argument on this important case, which raises novel issues at the intersection of the Twenty-first Amendment to the U.S. Constitution and federal preemption law. Oral argument will help explicate this issue and make clear the extent of the rights of the States under the Twenty-first Amendment to protect the health and safety of their citizens and residents.

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response Brief submitted on behalf of Defendants/Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains a total word count of 13,803 per the word processing program of Wordperfect, is in Times New Roman 14-point font size and is proportionately spaced and in compliance with the rules of this Court.

s/ Joseph Goldberg
Joseph Goldberg

CERTIFICATE OF DIGITAL SUBMISSION

I further certify that this brief complies with the requirements set forth in the Court's March 18, 2009 General Order regarding electronic filing: any necessary redactions have been made, the hard copies of this brief mailed to the Clerk are identical to the ECF submission; and I scanned the ECS submission for viruses using Trend Micro Client/Server Security Agent, Version 16.0.1331, last updated on April 7, 2010, and, according to that program, the file is 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/ Joseph Goldberg
Joseph Goldberg