No. 09-2271

In The United States Court of Appeals For The Tenth Circuit

US AIRWAYS, INC.,

Plaintiff–Appellant,

v.

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

Defendants–Appellees.

On Appeal From The
United States District Court For The District Of New Mexico
Case No. 07-cv-1235 (MCA/LFG) (Armijo, J.)

BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT US AIRWAYS, INC. SEEKING REVERSAL

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February 10, 2010

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Air Transport Association of America, Inc., ("ATA") is a non–stock, non–profit trade association organized under the laws of the District of Columbia. The ATA has no parent company, and has issued no stock.

/s/ Jeffrey Bossert Clark
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INTEREST OF THE *AMICUS CURIAE*

Founded in 1936, the Air Transport Association of America, Inc., ("ATA") is the nation's oldest and largest airline trade association. Today, the ATA represents sixteen major U.S. cargo and passenger airlines and three foreign carriers. The ATA serves its members and their customers by transmitting technical expertise and knowledge to improve airlines' operational efficiency; develop industry initiatives for addressing the environmental impacts of commercial aviation; and advance the industry's efforts to further improve the safety of what is already the world's safest system of transportation. The ATA also represents its members in front of Congress, Executive Branch agencies, and federal courts, often as *amicus curiae*. *See, e.g.*, *Rowe v. New Hampshire Motor Transp. Assoc.*, 552 U.S. 364 (2008).

Although the Plaintiff below, US Airways, is an ATA member, the important issues this case raises affect every commercial airline operating in the United States. The district court's opinion, unless overturned, threatens to embolden misguided state regulatory efforts in any number of diverse regulatory areas that, like alcohol service, have up to now fallen squarely within the exclusive jurisdiction of the U.S.

Department of Transportation and its agency responsible for the regulation of air–travel, the Federal Aviation Administration ("FAA"). The ATA seeks via this brief to inform the Court of the overall industry impact of the decision below and the reasons why it believes the airline industry should continue to be regulated in the national interest and according to a single, uniform, consistent regime of nationwide regulations.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Airlines are perhaps *the* quintessentially national commercial industry. Airline flights continuously crisscross multiple state boundaries on their way to destinations from coast to coast, as individual passengers seamlessly transfer between flights, airports, and airlines. In this interstate marketplace, any crack in the federal regulatory structure that allows the fifty states to add their own individual layers of unique, shifting, and overlapping regulations on top of the FAA's now–uniform national regulation risks producing an infeasible patchwork of pre–flight training, in–flight operations, and aircraft–certification requirements. Moreover, given the precariousness

of airlines' profitability in years since September 11, 2001, the inevitable costs of complying with such a regulatory patchwork could well upset the industry's delicate economic balance. (*See* Section I, below.)

Despite today's challenging economic and operational circumstances, flying remains by far the safest way to travel. This unparalleled record of safety is due in large part to the FAA's pervasive regulation of the airline industry, which the FAA promotes through a uniform regime that involves the enforcement of regulations, assessment of penalties, and supervision of all aspects of airlines operations, including the sale of alcoholic beverages. (*See* Section II, below.)

The most immediate question this case presents is whether any or all of fifty states can simultaneously compel commercial airlines to adhere to their state–specific in–flight operations and cabin–staff training regulations. As explained below and in US Airways' brief, state regulation of alcohol service provided by federally licensed airlines to their passengers is expressly and impliedly preempted by federal law, notwithstanding the Twenty–First Amendment. Although alcohol

regulation has an unusual constitutional status under the Twenty–First Amendment, that Amendment cannot redeem intrusive state regulations that violate other constitutional norms such as the Supremacy Clause of Article VI § 2. (*See* Section III.A below.) Moreover, allowing the district court's ruling to stand would impermissibly authorize New Mexico to project its regulatory authority outside its own territory and into the federal enclave of the Nation's airspace. New Mexico may no more issue or revoke business licenses to serve alcohol in federal airspace than it may issue or revoke business licenses to serve alcohol in Texas. (*See* Section III.B below.)

ARGUMENT

This court should reverse the district court's decision below because its erroneous reasoning, if sustained, threatens the federal preeminence over commercial aviation established by the Airline Deregulation Act and Federal Aviation Act and would result in multi–state regulatory intrusions into our heretofore nationwide system of commercial aviation safety regulation.

I. Permitting Fifty States To Regulate Aircraft, The Training Of Airline Personnel, And Airline Flight Operations Would Harm The Airline Industry.

The decision below threatens to impose New Mexico's regulatory authority on commercial airlines in multiple different ways, including under theories that in–flight aircraft may be compelled to be licensed as "locations" where alcohol is to be served, N.M. Stat. § 60–6B–2(M); that cabin crew training and operations may be compelled to become licensed as alcohol servers, N.M. Stat. § 60–6E *et seq*.; and that pilots may be compelled to know and enforce New Mexico law as the managers of alcohol–serving establishments. Of course, New Mexico's authority in this regard is no greater or less than that of other states, so to permit New Mexico to enforce its alcohol licensing regulations

against commercial airlines is effectively to permit this same sort of regulation fifty times over.

The overarching factor that the decision below ignores is that airlines constitute a vitally important, highly competitive, national industry that cannot effectively and efficiently comply with overlapping, potentially contradictory, state regulatory requirements. As explained below, a patchwork of state regulation, such as that permitted by the district court, would wreak havoc on the U.S. airline industry — an industry still searching for a stable economic equilibrium in a post–September 11 operating environment.

The national character of commercial airlines is difficult to overstate. The ATA's member airlines conduct approximately 24,000 domestic passenger flights per day that depart from virtually every state and continuously cross state and international borders. On an average weekday, there are 274 round–trip flights from major east coast airports[1] to just five airports in the western part of the United

[1] These are Boston's Logan International Airport, New York's John F. Kennedy International Airport, Newark Liberty International Airport, Philadelphia International Airport, Dulles International Airport, Charlotte Douglas International Airport, Hartsfield-Jackson Atlanta International Airport, and Miami International Airport.

States.[2] To take just one example, a common flight plan from Boston to Los Angeles flies over 16 states and travels through Canadian airspace.

The airline industry's national reach makes it the most important method of long–distance travel, especially business travel. In 2008, approximately 578 million passengers flew in approximately 5.2 million commercial flights, flying approximately 731 million passenger miles. Air Transport Association, 2009 Economic Report, http://www.airlines.org/economics/review_and_outlook/annual+reports.htm. An estimated 40 percent of business trips are taken via air travel. Travel Industry of America, Domestic Travel Report (2007), at A18.

The planes providing this interconnecting web of coast–to–coast and international service are managed according to complicated logistical algorithms that seek to maximize passenger safety, timely arrivals and departures, and economic efficiency. Airlines' planes therefore fly many different routes and make many different stopovers in many different locations every week, without regard for state borders. The record below provides an example of these typical industry practices: in one week, a single US Airways aircraft serving

[2] These are Seattle-Tacoma International Airport, San Francisco International Airport, Los Angeles International Airport, Phoenix Sky Harbor International Airport, and Denver International Airport.

Albuquerque made 27 stops in 12 cities outside New Mexico, some as far away as Anchorage, Alaska, and Hartford, Connecticut. (*See* JA 167.) Also in line with industry practice, the record indicates that more than 64 different aircraft were used in March 2008 to fly the 129 round–trips between Phoenix and Albuquerque US Airways operated in that month. *Id.* In other words, on a route averaging four round–trips per day, a given plane might be used twice per month. This sort of aircraft routing and usage exemplifies how all commercial airlines manage aircraft; namely, without regard to state borders, but according to what makes the most sense from the perspective of the safety, timeliness, and efficiency of the service provided to airline customers.

Similarly, if New Mexico is permitted to force US Airways to train cabin crews to comply with New Mexico regulatory requirements, there is no guarantee other states will not do the same. *See Engine Mfrs. Assoc. v. South Coast Quality Air Mgmt. Dist.*, 541 U.S. 246, 255 (2004) ("[I]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme.")

The cabin crew working a plane flying the Boston–to–Los Angeles flight path described above, for example, would have to be trained in the alcohol regulations of, not just Massachusetts and California, but each of fourteen states in between. In fact, the crew would have to monitor carefully their aircraft's position so they would know which of the sixteen potential regulatory agencies enjoyed jurisdiction, and which of 16 regulatory regimes was in effect, at any given moment. The crew might also have to simultaneously track the time of day — at least in those instances where state alcohol regulations impose hour–of–service restrictions or similar requirements. Ground operations could also be affected, especially in a limiting case where a state decides to exercise its Twenty–First Amendment right to impose an outright ban on importing alcohol. Presumably in those circumstances, the catering carts that airlines employ today would have to be customized depending on whether a particular state's alcohol prohibition is expected to be encountered in flight.

The regulatory world the decision below contemplates thus includes training nearly every flight attendant to comply with the alcohol regulations of nearly every state over which they may be called

to work. As the record below indicates, it is established industry practice for flight attendants to bid for available trips based on seniority. This means cabin crews cannot be expected to work regular routes. (*See* JA 167:45.) Every flight attendant would therefore have to be trained in the state alcohol regulations for all of the states over which he or she might fly — in addition to their already rigorous FAA–approved safety and operations training.

Similarly, each and every physical aircraft would have to be certified to comply with the applicable "locations" or "premises" requirements of every jurisdiction it might be scheduled, or diverted, to fly to or over. Equally troubling, it is not inconceivable that New Mexico might seek to require pilots to undergo training as well. Kelly O'Donnell, Superintendent of the New Mexico Regulation and Licensing Department, stated in her deposition that in New Mexico's view, "The pilot as the manager or overseer should be aware of the laws in order that they can help ensure compliance with the laws by the people they oversee." (JA 168:46 n.56 (citing the O'Donnell deposition).)

For a national airline, the number of relevant jurisdictions for purposes of flight attendant training, aircraft certification, and pilot

training merely begins with its number of departure and arrival cities. In US Airways' case, this means 179 domestic airports in 48 different states. *See* US Airways, SCHEDULE OF FARES, http://www.trvlink.com/download/us/usschedules.pdf. For the industry as a whole, the figures are correspondingly larger, approximately 615 domestic airports operating in every state except Delaware.

But origin and destination cities are by no means the end of, or even the biggest part of, the matter. Planes routinely fly over states where they have no intention of landing. Their flight paths, highly variable, are typically set based on wind speed, the presence of inclement weather, air–traffic conditions, service priorities and a host of other factors. Aircraft, cabin crews and pilots thus frequently find themselves flying unplanned routes even when they are not diverted from their intended destination. And of course they can also, unfortunately, be diverted into making unscheduled stops. In one recent episode, a flight from Washington, D.C., bound for Las Vegas was unexpectedly diverted to Denver when an unruly passenger attempted to leave the aircraft at altitude. *See* Martin Weil and

Clarence Williams, *Dulles Flight to Las Vegas Diverted Because of Unruly Passenger*, WASHINGTON POST, Jan. 24, 2010, at C04.

Accordingly, under the district court's decision, aircraft, cabin crew, and pilots are at genuine risk of having to be certified to comply with the regulations of all states they might potentially depart from, be diverted to, fly over, or land in. Under current industry practices, this effectively means, at least for major airlines like US Airways, training for all fifty states, with certain possible exceptions for Alaska and Hawaii.

These complex requirements, even if possible to implement, would be senselessly expensive. The commercial airline industry employs approximately 92,000 flight attendants. Because of the importance of proper training, airlines routinely pay flight attendants to travel to and lodge at training sites where training classes are conducted. This entails out–of–pocket costs for students and instructors; the significant opportunity costs of paying employees to train for their jobs instead of performing them; plus the hard–dollar costs of having to hire more flight attendants to cover the passenger routes vacated by flight attendants attending training classes. US Airways' expert estimated

below the cost for only that airline to comply with just New Mexico's alcohol regulation at $1.22 million. (*See* JA 172:51.) If that figure were multiplied by a factor representing US Airways's domestic market share and then multiplied again to account for the potential for regulation by all fifty states, not just New Mexico, a first–order estimate of the industry's regulatory exposure might be set. Under any such calculation, the industry–wide costs would certainly run into the tens of millions for flight attendant training alone, plus millions more for aircraft certification, pilot training, ground operations complications, and the like.

Compliance cost escalations of the magnitude the district court's ruling contemplates would have a material financial impact on the industry and individual airlines, spelling the difference between profit and loss for most airlines in today's economic climate. Airlines face very high fixed costs for aircraft acquisition, aircraft maintenance, and regulatory compliance. Airlines therefore require significant volume if they are to achieve even razor–thin profit margins. Recent increases and variations in jet fuel prices, as well as the post–September 11 security climate, have made managing commercial airline operations

more challenging then it has been since the dawn of flight. In 2008 alone, nine airlines filed for bankruptcy. Seven of these are no longer in business. *See* Air Transport Association, Economics and Energy, Airline Bankruptcy and Service Cessations, http://www.airlines.org/economics/specialtopics/Airline+Bankruptcy+Overview.htm. In 2009 alone, the U.S. airline industry lost $3 to $5 billion, while since 2001 net losses for the industry have been approximately $60 billion.

The ATA is proud of our industry and our members, who strive daily to provide the safest and most economical flying experience in the world. But in the current economic and security climate, the airline industry is simply not positioned to meet both the demands for comfort and affordability of the traveling public and the shifting and individualized demands of fifty states, each with multiple regulatory agencies that might potentially seek to extend their jurisdiction over in–flight operations. Given the nearly infinite variety of potential state regulatory regimes the decision below appears to contemplate, any appellate ruling that allows that decision to stand would have a tangible, highly negative impact on the airline industry as a whole.

II. The Decision Below Threatens The Core Preemption Component Of The Airline Deregulation Act.

Despite the many logistical, operational, and economic challenges airlines have faced over the years, the landmark Airline Deregulation Act of 1978 has been an undoubted success. Since the ADA was enacted, inflation–adjusted airline fares have declined an average of 2.1% per year. *See* Air Transport Association, Economics & Energy, Annual Passenger Yields: U.S. Airlines, http://www.airlines.org/economics/finance/PaPricesYield.htm. At the same time, the number of destinations regularly served by our industry has increased dramatically as has the frequency of service to those destinations. These remarkable achievements have made air travel a convenient and affordable travel option available to individuals of modest means who, before the ADA, did not remotely enjoy the same freedom of movement they enjoy today.

The ADA's achievements have been enabled by both of the statute's essential aspects — aggressive deregulation of airline pricing and service plus pervasive, uniform, and preemptive regulatory supervision by the Department of Transportation and the FAA. Because of the ADA, the airline industry has operated for over 30 years

under a uniform and consistent set of federal regulatory controls. A fact of daily life for ATA members is the FAA's oversight of virtually every aspect of their operations, coupled with the FAA's even closer scrutiny of particular alleged safety violations — including the alleged violation of alcohol service rules by US Airways that triggered New Mexico's regulatory interest in this case. As our members are well aware, the FAA has the authority to assess fines up to $25,000 per safety violation. 49 U.S.C. § 46301(a). In unusually severe cases, the FAA may revoke an airline's license. *Id.* § 44709(b)(1)(A); 14 C.F.R. §§ 13.14, 13.19(b).

In the first three quarters of 2009, for example, the FAA assessed 251 penalties. Of these, 200 were for violating safety laws not including the Hazardous Materials Transportation Safety Act or regulations. The monetary amounts involved were approximately $5.4 million in situations not involving hazardous materials and $848,150 in hazardous–materials–related situations. The FAA also revoked 27 operators licenses during this time period. For all of 2008, the corresponding figures are a total of 407 FAA enforcement actions, approximately $7.6 million in fines, 28 operators license revocations, and 13 operators license suspensions. *See* Federal Aviation

Administration, Quarterly Enforcement Reports, http://www.faa.gov/about/office_org/headquarters_offices/agc/operations/agc300/Reports/Quarters/.

Having one very empowered, knowledgeable, on–the–job regulator constitutes a sensible arrangement for our complex industry. Under this regime airlines obey a single set of regulations; heed a single set of admonishments; consult a single set of authorities; and inform a central depository of critical information. When problems occur, one regulator investigates; one regulator decides; one regulator takes ownership of the problem. Moreover, in cases where incorporation of state law is appropriate, the Department of Transportation and the FAA can make their own informed decisions about which state laws should and should not be permitted to govern our industry.

Airplanes embody elegant, elaborate, and advanced technologies. Flying through midair entails obvious risk, and yet airlines provide the safest way to travel. *See* Air Transport Association, Economics & Energy, Safety Stats, http://www.airlines.org/economics/safety+stats/. Our industry's enviable safety record, compiled concurrently with very

dramatic cost reductions in recent years, has been achieved in part due to an efficient regime of uniform federal regulation.

Contrary to the opinion below, the Federal Aviation Regulations (FARs) leave no vacuum for state regulators to fill. Flight attendants must complete FAA–approved training covering a roster of FAA–prescribed subjects before they can work passenger flights for commercial airlines. 14 C.F.R. §§ 121.404, 121.405, 121.415, 121.417, 121.421, 121.427, 121.433. For example, flight attendants must receive instruction in emergency procedures and equipment, *id.* § 121.417(b)(1)(2), including situations involving fire and rapid decompression, *id.* § 121.417(b)(3). Flight attendants whose planes fly at high altitude must receive training on hypoxia and the physical phenomena associated with any sudden loss of cabin pressure. *Id.* § 121.417(e). Flight attendants must be trained in "[p]assenger handling, including the procedures to be followed in the case of deranged persons or other persons whose conduct might jeopardize safety." *Id.* § 121.421(a)(ii). And flight attendants must also receive aircraft–specific training on the operation of relevant communication and emergency systems. *Id.* § 121.421(a)(2). In addition, federal law

requires recurring training to ensure that flight attendants' knowledge remains up to date. *Id.* § 121.427.

The FAR governing alcohol service is part and parcel of this comprehensive training program. *See* 14 C.F.R. § 121.575. Airlines may not allow persons who appear intoxicated onto their planes. *Id.* § 121.575(c). Passengers may not carry on their own alcohol for consumption while in flight; nor may they be served additional alcohol by an airline if they appear to have become intoxicated while on board. *Id.* § 121.575(a), (b). These requirements aim directly at maintaining passenger and crew safety and tie directly into the training requirements for passenger handling in emergency situations. The regulations recognize that intoxicated persons are much more dangerous when confined to tight spaces, whether in flight or on the ground. In such circumstances, they can become unruly or even violent, and in extreme situations, they might attempt to gain access to the cockpit. In emergencies intoxicated persons almost certainly will be less cooperative than other passengers.

The comprehensive training flight attendants receive therefore closely aligns with the core Twenty–First Amendment objective

asserted by New Mexico in this case — promoting temperance. This FAA training, as well as the overall regulatory regime established by the FARs, reflects concern for both the intoxicated person and others who might be affected by that person's impaired judgment. The FARs thus confirm and put into action the federal interest in promoting alcohol safety, both in the air and on the ground, as tailored to the unique demands and circumstances of air travel. Empowering fifty more regulators to add in their own substantive requirements to preexisting FAA regulations on the same topics is a certain recipe for confusion and, ultimately, irreconcilable conflicts, as US Airways's briefing in this case rightly explains.

Against this backdrop, New Mexico's intrusive licensing initiative must be seen for what it is — a bold attempt, not to fill a regulatory void, but to displace a more experienced regulator who is already on the job.

III. Alcohol Served On Airlines Is Not Subject To State Regulation, Notwithstanding The Twenty–First Amendment.

The district court's decision reflects a misperception that the Twenty–First Amendment redeems New Mexico's preempted

regulations because somehow alcohol is "different." As demonstrated below, however, the Twenty–First Amendment trumps neither the Supremacy Clause nor the exclusivity of federal law within federal enclaves.

A. The Twenty–First Amendment Does Not Empower States To Evade Federal Preemption Or Other Constitutional Requirements.

Although the Twenty–First Amendment permits states to regulate alcohol distinctly from other products, the Supreme Court has repeatedly instructed that "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (collecting cases). The Amendment must instead "be considered in the light of the other [clauses], and in the context of the issues and interests at stake in the concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964).

Simply put, state alcohol regulations are not a constitutional trump card. They must comport with the other important provisions that appear in our Constitution, like the Equal Protection Clause, the First Amendment, and the Export–Import Clause. *See*, *e.g.*, *Craig v.*

Boren, 429 U.S. 190, 204-09 (1976) (invalidating a state age regulation for beer purchases that discriminated on the basis of gender); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating a state regulation of alcohol price advertising for violating the First Amendment); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964) (invalidating a state tax on liquor imported from abroad).

The Twenty–First Amendment therefore does nothing to invert the ordinary workings of the constitutional relationship between federal and state government. Under our Constitution, state alcohol regulations, like other state regulations, must be harmonized with federal law, which by the Supremacy Clause is "the supreme Law of the Land … any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. IV cl. 2.

If New Mexico or other states could unwrite federal law through alcohol regulation, any federal regulation touching alcoholic beverages could be placed in jeopardy or perhaps rendered null. Rejecting this expansive view of the Twenty–First Amendment, the Supreme Court has explained, for example, that federal telecommunications laws

preempt Oklahoma's alcohol advertising restrictions. *See Crisp*, 467 U.S. at 716. And it has invalidated California's price–posting scheme for wine under the Sherman Act and Supremacy Clause. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980); *see also Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 387 (1951) (invalidating under the Sherman Act Louisiana's resale price maintenance program, even though the plaintiffs sold alcohol). Against this backdrop, the court below clearly erred in failing to recognize that the Twenty-First Amendment does nothing to repeal or interfere with any part of the Airline Deregulation Act and Federal Aviation Act, including their preemptive effect on state laws like New Mexico's liquor regulations.

As an initial matter, the Twenty–First Amendment does not alter the comprehensiveness or exclusiveness of the FAA's safety regulations that include the alcohol–specific regulations described above. Under black–letter preemption law, those FAA regulations occupy and preempt the relevant field, leaving no room for supplementation by New Mexico law or that of any other state. Field preemption is marked by at least two elements separating it from other preemption doctrines.

First, regulation in the relevant field is comprehensive in nature. *See Fidelity Fed. Savs. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Congress' intent to supersede state law *altogether* may be inferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it ….'") (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). ***Second***, Congess has expressly or impliedly made a studied policy judgment concerning the importance of regulatory uniformity. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962); *see also California ex rel. Water Resources Board v. FERC*, 877 F.2d 743 (9th Cir. 1989).

Here, both of these field preemption elements are present, as the Supreme Court has recognized that airline regulation must be both comprehensive and uniform. For instance, in *City of Burbank v. Lockheed Air Terminal, Inc.*, the Court concluded: "The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C § 1348(c) .... The interdependence of these factors requires a *uniform* and *exclusive* system of federal regulation if the congressional

objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. 624, 638-39 (1973) (emphasis added). Taking their cue from the Supreme Court, courts of appeals have, unsurprisingly, held that the FAA has occupied the field, leaving no room for states to impose additional safety regulations on FAA–regulated airlines. *See Montalvo v. Spirit Airlines*, 508 F.3d 464, 472–73 (9th Cir. 2007); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 365 (3d Cir. 1999).

In similar fashion, the district court also erred by first employing an unduly narrow interpretation of the ADA term "services" and then thinking this interpretive gerrymandering could be redeemed by the Twenty–First Amendment. "Service," properly construed, is "a bargained–for or anticipated provision of labor … includ[ing] items such as ticketing, boarding procedures, provision of food and drink, and baggage handling …." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc). As explained in US Airways' brief, this interpretation of "services" comports with the term's plain meaning; the Supreme Court's authoritative interpretation of that term in *Rowe v. New Hampshire Motor Transport Ass'n.*, 552 U.S. 364 (2008); and the

weight of Circuit precedent. Nevertheless, the district court intentionally rejected this plain–meaning interpretation for a crabbed interpretation limited to "frequency and scheduling of flights." The correct definition of "services," cast aside below, includes ticketing and baggage handling, *Hodges*, 44 F.3d at 336; boarding procedures, *Smith v. Comair*, *Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); and "obligation[s] to give courteous service," *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987). Although this case does indeed involve alcoholic beverage regulations — as opposed to baggage–handling, boarding, or courteous–service obligations — that fact does nothing to immunize New Mexico's law from the preemption that is so clearly warranted under established preemption principles.

B. The Twenty–First Amendment Does Not Empower States To Regulate Alcohol Service Within Federal Enclaves.

Consider the following hypothetical scenario. A New Mexico resident becomes intoxicated in a bar in El Paso, Texas, but is nonetheless continually served alcohol in violation of Texas Law. *See* Tex. Alco. Bev. Code § 2.02(b). Our barroom drinker then unwisely chooses to drive home down Interstate 10 and is involved, through his

own fault, in a tragic and deadly car accident south of Las Cruces in New Mexico. In light of these circumstances, New Mexico's Regulation and Licensing Department wants an investigation performed into the culpability of the Texas establishment. Much as they might wish to do so, the New Mexico authorities certainly could not revoke the Texas establishment's Texas liquor license, or otherwise take direct regulatory action against that licensee. Of course, the Texas authorities might well appreciate New Mexico's input as to the penalty, if any, the Texas establishment should receive. But regulatory coordination is not the same as regulatory intrusion: New Mexico in the end could take no direct action against the Texas business license.

From one very crucial legal standpoint, this case is precisely the same as this Texas hypothetical, except that this case involves Federal airspace, not the territory of two neighboring states. To be sure, this case does not present a regulatory intrusion of one state into a neighboring state. But it does present an attempted intrusion of New Mexico law into federal enclaves beyond the reach of state regulation — commercial aircraft and within federal airspace.

The Supreme Court has long held that states may not regulate beyond their borders. *See*, *e.g.*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound."); *see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction."). This principle is so fundamental and firmly rooted that it is equally venerable in the jurisprudence of state supreme courts, including courts within the Tenth Circuit. *National Bank of Topeka v. Mitchell*, 118 P.2d 519, 522 (Kan. 1941); *Dunham v. Chemical Bank & Trust Co.*, 71 P.2d 468, 471 (Okla. 1937); *see also Turley v. Furman*, 114 P. 278, 282 (N.M. Terr. 1911).

The Constitution's prohibition on extraterritorial projections of state regulatory authority applies fully to state alcohol regulations. Significantly, it applies both to state attempts to project their law into other states, *see, e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (invalidating a state law that had the practical effect of controlling commercial activity wholly outside the state), and it applies to state

attempts to project their authority into federal enclaves, *see United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 375-78 (1973) (holding that a state may not regulate alcohol delivered and consumed only within a military base — a federal enclave). In contrast, the Twenty–First Amendment merely countenances state laws governing the "delivery or use" of alcohol ***within that state***, U.S. Const. amend XXI § 2 (emphasis added), and thus is fully consistent with the Constitution's fundamental and longstanding ban on extraterritorial regulation by state governments.

The force and effect of state alcohol regulations, like all other state regulations, therefore must end where a federal enclave begins. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) ("[T]hough the Amendment may have increased 'the state's power to deal with the problem [of alcohol]; … it did not increase its jurisdiction.'" (quoting the lower court with approval) (ellipsis in the original)); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) ("[S]tate right–to–work laws are of no effect in federal enclaves ….'"). It is thus settled law that state alcohol regulations do not apply to federal enclaves, like National Parks, where the sales are made by federally licensed concessioners.

Collins, 304 U.S. at 530. Nor can states intercept alcohol bound for a national park. *Id.* at 538. In *Collins*, the Supreme Court struck down California's attempt to project its regulatory authority into Yosemite Park, explaining, "There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereign. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, ***the XXI Amendment is not applicable.***" *Id.* (emphasis added).

Airplanes in flight, like national parks, are federal enclaves. "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103. Airlines may operate within federal airspace only pursuant to a federally issued FAA license — just as Texas bars and restaurants may operate in Texas only pursuant to Texas business licenses. *Compare* 14 C.F.R. pt. 119 *with* Tex. Alco. Bev. Code Ch. 28. Furthermore, within the enclave of federal airspace the federal government has the sole duty and responsibility to promulgate and enforce alcohol–service regulations for commercial airlines. 14 C.F.R. § 121.575; *see also, e.g.*, *In re Northwest Airlines*, No. FAA-2002-

11310-21, 2003 WL 23097587 (D.O.T. Oct. 1, 2003); *In re Trans World Airlines*, FAA No. 98-11, 1998 WL 348026 (F.A.A. June 11, 1998).

Nor does the federal government's choice to permit certain applications of state common law on airplanes alter commercial airlines' status as federal enclaves. *See* 49 U.S.C. § 40120(c); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993). In fact, federal law expressly incorporates state law to govern torts arising in national parks, 16 U.S.C. § 457, just as, in certain defined instances, FAA regulations also in some sense expressly refer to state law or state enforcement. *Hughes v. Attorney General of Florida*, 377 F.3d 1258, 1267 (11th Cir. 2004) (discussing 14 C.F.R. § 91.17(c)). But as *Collins* establishes, extraterritorial applications of state common law within federal enclaves in circumstances where the federal government accedes to it or regulated parties do not object, and intrusive, unconsented–to extraterritorial intrusions by state regulatory authorities, are two very different matters.

Here, New Mexico endeavors to regulate alcohol service in areas beyond its reach. It was asserted below that US Airways serves alcohol in or over New Mexico solely on board its planes; that US Airways does

not operate an airport lounge in New Mexico; and that US Airways passengers are not allowed to carry off open alcoholic beverage containers as they deplane in New Mexico. Assuming these facts, US Airways's alcohol service occurs exclusively outside New Mexico and inside a federal enclave — a place where the Twenty–First Amendment does not apply.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

February 10, 2010

Respectfully submitted,

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CERTIFICATE OF TYPE–VOLUME COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 5,810 words excluding the parts exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on this 10th day of February, 2010, I filed the foregoing brief via the Court's electronic case filing (ECF) system. Pursuant to this Court's General Order of March 18, 2009, the resulting Notice of Docket Activity generated by the ECF system constitutes service on counsel for both the appellants and appellees.

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the Court's General Order of March 18, 2009, I certify that:

(1) no privacy redactions were required;

(2) this ECF submission is an exact copy of the paper submission filed with the clerk, except that the ECF version is signed in the manner required by the General Order whereas the paper version is signed by hand; and

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