

No. 09-2271

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IN THE  
**United States Court of Appeals**  
FOR THE TENTH CIRCUIT

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US AIRWAYS, INC.,

*Plaintiff-Appellant,*

v.

KELLY O'DONNELL and GARY TOMADA,  
in their official capacities,

*Defendants-Appellees.*

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

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**BRIEF FOR AMICUS CURIAE ASSOCIATION  
OF FLIGHT ATTENDANTS - CWA.**

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## INTEREST OF AMICUS CURIAE

The Association of Flight Attendants-CWA (“AFA-CWA” or “the Union”) is a labor union affiliated with the AFL-CIO that represents over 55,000 flight attendants at 22 U.S. airlines, including US Airways. Founded in 1945, AFA-CWA is the largest flight attendant union in the world, and it is the exclusive collective bargaining agent for its members. In that capacity, the Union has negotiated dozens of collective bargaining agreements establishing flight attendant rates of pay, rules, and working conditions. It is also a recognized leader in advocating for flight attendant legislative interests in Congress, and at the U.S. government agencies charged with oversight of the aviation industry.

AFA-CWA has a unique and compelling interest in the outcome of this litigation since resolution of this appeal will have a nationwide impact on the tens of thousands of Union members who provide service to tens of millions of airline passengers each year. If the Court fails to correct the district court’s ruling, our members will be subject to a myriad of contradictory and confusing state laws governing alcohol service to airline passengers that would be unworkable, and which potentially could expose our members to civil and criminal liability.

Congress explicitly empowered the Federal Aviation Administration to establish rules and regulations to govern all aspects of air carrier service, including alcohol service, to the exclusion of all state or local laws. This preemption doctrine must be read broadly. Otherwise airlines, and most significantly their flight attendants,

could be subject to a parade of contradictory state and local laws, enacted in response to some unanticipated outrage, that will undermine and compromise aviation safety and service, and conflict with the FAA's exclusive oversight duties.

On many issues, AFA-CWA takes very different positions from the airline managements. In this case, however, there is no difference between US Airways' position and that of AFA. New Mexico's regulatory efforts threaten serious harm to both the industry and the Union. AFA therefore stands shoulder-to-shoulder with US Airways in urging this Court to reverse the district court's judgment, and it fully endorses US Airways' arguments for doing so.

All parties have consented to the filing of this brief.

## **ARGUMENT**

### **I. The District Court's Decision Would Create A Myriad of Unworkable and Contradictory State Laws Governing the Service of Alcohol To the Flying Public.**

Under the district court's decision, each of the 50 states could require flight attendants on planes that land in or take off from that state to be familiar with and apply most if not all of the provisions of the state's liquor laws' – on pain of civil and even criminal penalties. Indeed, under the logic of the court's opinion, states could apparently extend their regulatory requirements as well to many other aspects of in-flight service. Such requirements would be incredibly burdensome, adding to both the huge number of responsibilities that flight attendants already

bear – primarily related to ensuring the safety of their flights – and the enormous amount of information they must learn and apply in order to discharge those responsibilities. A brief review of some these duties, and of the concomitant training they require, illustrates just how onerous the district court’s decision would be.

Flight attendants’ primary responsibility is to ensure the safety and security of those on their airplanes. For every flight that responsibility begins even before the first passenger steps onboard, when flight attendants receive a pre-flight briefing from the captain regarding crew coordination, emergency evacuation procedures, the planned length of the flight, expected weather conditions, and any special passenger-related issues. Flight attendants also ensure that the required emergency equipment is on the plane and properly functioning.

Flight attendants’ safety responsibilities only increase once passengers are on the plane. Perhaps most importantly, flight attendants ensure that passengers comply with all of the numerous federal safety regulations governing interstate commercial aircraft. For instance, they ensure that, for both take-off and landing, all passengers are safely seated (with seat belts fastened, seat backs upright, and tray tables properly stowed), and that each piece of carry-on luggage is securely stowed so that it does not get tossed around, potentially injuring someone, or impede movement in an emergency. Flight attendants also provide the pre-flight safety briefing that all regular travelers know so well, a briefing that instructs

passengers in the use of emergency equipment, in how to exit the plane safely in the event of an emergency, and in assisting children or other dependants with whom they are traveling. As events such as the Hudson River landing occasionally remind us, this information can save mean the difference between life and death for scores or even hundreds of passengers on a downed aircraft.

Flight attendants continue to monitor compliance with safety regulations throughout the flight. They ensure, for example, that only approved electronic devices are used onboard (and only when permitted by the captain), and that passengers remain seated with their seat belts fastened until the captain authorizes passenger movement in the cabin. Most pertinent to this case, they also ensure compliance with the federal regulation governing onboard alcohol service, by preventing passengers from drinking their own alcohol and by not serving alcohol to anyone who appears to be intoxicated.

Flight attendants also address any safety threat presented by passenger conduct, such as an assault on a crewmember or other passenger or someone tampering with a smoke detector in an airplane lavatory. In addition, flight attendants provide first-aid to passengers who become ill or are injured onboard, as well as reassurance to passengers who are concerned about turbulence or other problems (which reassurance reduces the chance of a dangerous panic). And in the event of an emergency evacuation, flight attendants oversee and lead the process of getting everyone off the plane safely. At virtually all times they are on the front

lines in terms of dealing with passengers, while of course staying in near-constant communication with the cockpit crew.<sup>1</sup>

The extent of flight attendants' duties is reflected in the amount of training flight attendants must undergo. As the record in this case reveals, US Airways provides five weeks of initial training to its flight attendants, and two days of recurrent training every year thereafter. A1326-A1327. This is roughly similar to what is provided by most major commercial carriers. Such extensive training is needed to comply with federal law: Federal Aviation Administration regulations mandate training on a host of specified subjects, *see* 14 C.F.R. §§ 121.415, 121.421, 121.427, and require airlines to receive agency approval of their training programs, *see id.* §§ 121.404, 121.405.<sup>2</sup>

Under the district court's decision in this case, flight attendants – in addition to absorbing and retaining the tremendous amount of information required to perform all of their myriad safety and non-safety duties – would have to become familiar with the liquor laws of the states their airline serves. Every attendant, in fact, would potentially have to master the requirements of the alcohol laws and regulations of *every* state to which their airlines fly, because flight attendants do

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<sup>1</sup> In addition to discharging all of these safety responsibilities, flight attendants strive to make air travel as pleasant and comfortable as possible for passengers. For instance, they ensure that their planes are properly stocked with food and beverages, as well as amenities such as magazines, headsets, blankets, and pillows. They also greet passengers upon boarding and, when necessary, help them find their seats and stow their luggage. And of course they supply in-flight amenities, such as snacks, drinks, and movies, and provide information such as gate numbers for connecting flights.

<sup>2</sup> Flight attendants are also the subject of various other federal regulations. For instance, regulations specify how many flight attendants are required on each plane, 14 C.F.R. ' 121.391, as well as the maximum number of hours that flight attendants may work in given periods, and the related rest requirements, *see id.* ' 121.467.



not serve any specific state or states, and thus can, on any particular day, find themselves working a flight to any of the states their airline serves. Educating themselves about such a patchwork would be a huge burden for flight attendants, perhaps requiring several days of additional training and study time (time that they would obviously not be able to devote to working flights).

AFA is aware that the defendants in this case have stated that they are not formally requiring flight attendants to undergo the state training mandated for other in-state servers of alcohol. This is of no comfort to AFA. The defendants have also said that flight attendants must comply with New Mexico liquor laws, and that those who do not may be cited administratively or even criminally prosecuted (a point addressed further below). Put simply, flight attendants cannot comply with laws they know nothing about. They would therefore *have* to undergo training on those laws, the defendants' statements notwithstanding; whether it was the specific training course New Mexico requires or some other is largely irrelevant. The burden flows from the time and other resources required to become familiar with all of New Mexico's (and potentially other states') liquor laws.

Mastering myriad state liquor laws would not be the only problem for flight attendants. It would also be a large and distracting burden to apply those laws. As described above flight attendants have many duties to discharge on every flight. Those duties require the bulk of flight attendants' time during the flight. Having to devote time, attention, and energy to ensuring that specific states' liquor laws were

also being complied with would detract from flight attendants' ability to concentrate on their core safety duties, meaning that airline safety would inevitably decline. Even if flight attendants had an abundance of time during flights, moreover, they would still face problems applying state liquor laws. In a plane moving 500 miles an hour, and traveling 30,000 feet above the earth, it is often impossible to know – particularly for someone who is not on the flight deck – when a plane has crossed from one state into another, and thus when the applicable liquor laws have suddenly changed. And again, time spent figuring out just when the cross-over point has occurred is time that a flight attendant is not checking to see whether all passengers are safely buckled in, whether an overhead bin was not properly closed (creating the possibility of luggage falling out), or whether any other threat to aircraft safety exists in the cabin.

As noted, the defendants' position in this case is that flight attendants who violate New Mexico liquor laws would be subject to criminal penalties. That is simply outrageous. Flight attendants are not bartenders or waiters, and certainly not New Mexico bartenders or waiters. They are, primarily, safety personnel who play a critical role in keeping a vital artery of the nation's transportation system (one critical to a healthy national economy) running smoothly and safely. It is far beyond the bounds of reasonableness for New Mexico to claim the right to throw flight attendants into state prison based on allegations that they may have, while

working on an interstate flight (under federal regulations), violated one provision of state law or another.

To be sure, as alcohol servers flight attendants bear some responsibility to protect passengers from the dangers that alcohol can posed if misused. But that responsibility is spelled out by federal law – specifically the decades-old regulation regarding onboard alcohol service, 14 C.F.R. § 121.575 – and it is taught through training programs that meet federal standards and receive federal approval. It is also enforced by one federal agency with special expertise in the field of air safety. It is not for New Mexico, or any other state, to threaten fines and imprisonment for any violation of additional, state-created standards. To hold otherwise would create a strong disincentive to becoming (or remaining) a flight attendant, and make flight attendants reluctant (or outright unwilling) to work on flights serving states that assert the right to treat them as criminals in these circumstances.

This disincentive would be particularly strong given the realities involved in answering criminal charges outside of one's home state: Flight attendants would often have to travel great distances for court appearances (arraignment, trial, etc.), and would have their guilt or innocence determined by judges or juries who would see them – accurately – as outsiders, and not as members of the community. Indeed, flight attendants' status as strangers to the jurisdiction might lead judges to deny them bail, on the theory that they are relatively unlikely to appear for trial. More generally, flight attendants' lack of local connections might make them

attractive targets for harsh treatment by local prosecutors or judges (perhaps seeking to respond to public and media pressure similar to that caused by the Papst incident). All of this simply underscores the impropriety of allowing states to bring the awesome power of criminal prosecution to bear against flight attendants for conduct onboard an interstate flight – a power that the federal government has, notably, not seen fit to exercise in these circumstances.

A final note: An unstated premise of New Mexico's actions here is that flight attendants are cavalier about onboard alcohol service, and that as a result there is a widespread problem – one that states must step in to address – of passengers being over-served while flying and then driving drunk on state highways. That premise is absolutely false. Flight attendants take all of their safety (and other) duties extremely seriously, including the duties relating to responsible alcohol service. While flight attendants do not enjoy refusing alcohol service to passengers, and occasionally must deal with a passenger who becomes irate when refused, they are also the front-line responders when an intoxicated passenger becomes disruptive or threatening. They thus have a lively personal interest in this specific issue, and do not hesitate to stop serving passengers who are visibly intoxicated. AFA's experience is that flight attendants, airlines, and the FAA are all well aware of the potential issues related to alcohol service, and all respond appropriately both in general and when specific incidents occur. AFA firmly rejects the notion that flight attendants as a group are in any way regular or

knowing contributors to a public-safety threat. To the contrary, as described above, flight attendants are, first and foremost, individuals whose job is to promote and ensure safety. Neither they nor their employers have any interest in endangering aircraft or alienating customers by over-serving passengers who could then pose a danger or disturb fellow passengers. The question here, however, is how such issues of airline service and safety should be monitored and regulated. The answer is that there is practical room only for one system of uniform federal regulation.

### CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

*/s/Edward J. Gilmartin* \_\_\_\_\_

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### CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32 (a)(7)(B) because it was prepared in 14-Point Times New Roman proportional typeface and according to the word-count function of the word processing program in which it was prepared (WordPerfect 12), the brief contains 2745 words, excluding the cover, the signature block, and parts exempted by Rule 32(a)(7)(B)(iii).

*/s/Edward J. Gilmartin*  
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Edward J. Gilmartin

**CERTIFICATE OF SERVICE**

I certify that on this 17<sup>th</sup> 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 the appellees.

*/s/Edward J. Gilmartin*

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Edward J. Gilmartin

**CERTIFICATE OF DIGITAL SUBMISSION**

Pursuant to this Court's General Order of March 18, 2009, I certify that in the foregoing brief, no privacy redactions were required and hence no such redactions were made. I further certify that electronic version of the brief has been scanned by viruses by Trend Micro Office Scan 9.1 (updated continuously) and is, according to that program, free of viruses. I further certify that the electronically filed version of the brief is an exact copy of the paper version filed with the clerk, except that the electronic version is signed in the manner required by the General Order whereas the paper version is signed by hand.

*/s/Edward J. Gilmartin*

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Edward J. Gilmartin