No. 09-2271

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

US AIRWAYS, INC.,

Plaintiff-Appellant,

v.

O'DONNELL et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO (JUDGE ARMIJO)

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF US AIRWAYS AND IN SUPPORT OF REVERSAL AND REMAND

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INTEREST OF THE UNITED STATES

This case arises from the State of New Mexico's attempt to enforce its Liquor Control Act against US Airways, Inc. US Airways sued to enjoin the state statute as preempted under the federal Airline Deregulation Act of 1978 and the Federal Aviation Act of 1958. Responsibility for implementing and enforcing these federal statutes is vested in the Department of Transportation (DOT) and its subsidiary agency, the Federal Aviation Administration (FAA), and the United States has a strong interest in ensuring that the two laws are properly interpreted and applied in

this case. Accordingly, the United States respectfully submits this brief as *amicus curiae* to urge reversal of the district court's decision. *See* Fed. R. App. P. 29(a).

STATEMENT

A. Statutory Background

1. Civilian aviation in the United States is subject to comprehensive federal supervision and control. Two federal statutes in particular bear on New Mexico's assertion of authority to regulate plaintiff US Airways.

First, the Airline Deregulation Act of 1978 (ADA) provides, in relevant part, that "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under [Title 49, Subpart II]." 49 U.S.C. § 41713(b)(1).

Second, the Federal Aviation Act of 1958, 49 U.S.C. § 40101 *et seq*. (FAAct), directs the Federal Aviation Administration to promulgate such rules as "the Administrator finds necessary for safety in air commerce and national security." 49 U.S.C. § 44701(a)(5). Pursuant to this grant of authority, the FAA has promulgated comprehensive regulations regarding airline safety, including regulations requiring flight attendants to complete federally approved training programs that include instruction in "passenger handling." 14 C.F.R. § 121.421; *see*

also id. §§ 121.404, 121.405, 121.415, 121.427. The regulations also directly address the service of alcohol, including prohibitions on serving alcohol to passengers who appear to be intoxicated. 14 C.F.R. § 121.575.

2. The New Mexico Liquor Control Act establishes liquor license requirements for in-state retailers, wholesalers, and distributors as well as license requirements for clubs and restaurants. *See* N.M. Stat. §§ 60-6A-1 to 60-6A-5. The statute also requires every person selling alcoholic beverages "on trains or airplanes within the state" to secure a license. *Id.* § 60-6A-9(A). The New Mexico Regulation and Licensing Department (RLD) is charged with enforcing the statute.

Like FAA regulations governing the service of alcohol, New Mexico law prohibits the service of alcoholic beverages to an intoxicated customer when the server knows or has reason to know that the customer is intoxicated. N.M. Stat. § 60-7A-16; *compare* 14 C.F.R. § 121.575(b)(1).

B. Facts and Prior Proceedings.

1. Prior to 2007, US Airways operated without a New Mexico liquor license. In January 2007, the New Mexico RLD cited US Airways for allegedly serving two alcoholic beverages to a passenger who caused a fatal automobile accident several hours after disembarking in Albuquerque. The RLD also issued a cease-and-desist order prohibiting US Airways from selling alcohol without a New Mexico liquor

license on flights arriving or departing from New Mexico. *See US Airways, Inc.* v. *O'Donnell*, No. 1:07-cv-01235-MCA-LFG, dkt. #85, at 3 (D.N.M. Sept. 20, 2009) (hereinafter "Slip Op."). In March 2007, US Airways received a temporary license. However, on June 13, after citing the airline for a second instance of allegedly serving alcohol to an intoxicated passenger, the RLD issued a decision declining to extend the airline's temporary license on the ground that its alcohol server training program did not comply with New Mexico law. *Ibid*. The state subsequently denied US Airways's license application.

2. US Airways filed this action, asserting that the state's Liquor Control Act and associated regulations are preempted under federal law. The district court granted summary judgment for RLD, construing the term "service" in 49 U.S.C. § 41713(b)(1) narrowly to capture only "the temporal component of air transportation." Slip. Op. 10. To justify this narrow construction, the court invoked the canon of constitutional avoidance: if the term "service" in § 41713(b)(1) were construed to encompass alcohol service, the court believed, the federal statute would "violate § 2 of the 21st Amendment." Slip Op. 11, 19.

The district court also concluded that the comprehensive scheme of safety regulations under the FAAct poses no bar to New Mexico's liquor control laws. The court believed that the FAA's authority to regulate airline safety reflects only

"the need for exclusive and complete rules for the physical and mechanical operation of aircraft," and "does not indicate an intent to regulate the in-flight service of alcohol." Slip Op. 21.

SUMMARY OF ARGUMENT

I. New Mexico seeks to regulate the service of alcohol on airline flights into and out of New Mexico airports, asserting the authority to ban liquor service altogether or to impose such conditions as it believes appropriate, including flight attendant training beyond that required by the Federal Aviation Administration. This assertion of authority is explicitly precluded by the Airline Deregulation Act of 1978 and cannot be reconciled with the uniform system of regulation contemplated by the Federal Aviation Act of 1958 and the comprehensive FAA regulations implementing that statute.

A. The Airline Deregulation Act explicitly preempts any state "provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1). As the predecessor agency of the FAA explained in its contemporaneous interpretation of the statute, this provision encompasses not only "flight frequency and timing," but also related services including the "segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets,

alcoholic beverages, entertainment, and excess baggage[.]" *Implementation of the Preemption Provisions of The Airline Deregulation Act of 1978*, 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979) (Statement of the Civil Aeronautics Board) (quoted in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 337 & n.6 (5th Cir. 1995) (en banc)).

The agency's contemporaneous understanding of the statute is consistent with the Supreme Court's repeated instruction that § 41713(b)(1) "expresses a broad pre-emptive purpose" and should be interpreted accordingly. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). The Supreme Court has thus condemned interpretations that would frustrate Congress's purpose by characterizing a particular service as "unessential" to the primary business of operating the airline. *See American Airlines v. Wolens*, 513 U.S. 219, 226 (1995) (holding that unilateral cutbacks made by an airline to frequent-flier rewards clearly "related to . . . 'services,' *i.e.*, access to flights and class-of-service upgrades").

Failing to advert to this guidance, the district court mistakenly concluded that Congress's preclusion of state regulations related to airline "service[s]" applies only to "the temporal component of air transportation," meaning "such things as the frequency and scheduling of transportation." Slip. Op. 10. As the Second Circuit observed, Supreme Court decisions make clear that "service" "extend[s] beyond prices, schedules, origins, and destinations[.]" *Air Transport Association of*

America, Inc. v. Cuomo, 520 F.3d 218, 223 (2d Cir. 2008) (per curiam) ("*ATA*"). Accordingly, in a ruling flatly at odds with the district court's decision here, the Second Circuit had "little difficulty" in concluding that a New York passenger bill of rights that required "airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relate[d] to the service of an air carrier" within the meaning of the ADA. *Id.* at 222.

B. The district court similarly erred in concluding that New Mexico's assertion of regulatory authority is compatible with the Federal Aviation Act and implementing regulations. Congress's interest in a uniform system of federal rules extends well beyond "the physical and mechanical operation of the aircraft." Slip. Op. 21. Congress mandated, for example, that the FAA certify flight attendants and approve the contents of their training programs. *See* 49 U.S.C. § 44728. Pursuant to this provision, FAA regulations require flight attendant training on "[p]assenger handling, including the procedures to be followed in the case of . . . persons whose conduct might jeopardize safety" (such as those who are intoxicated). *See* 14 C.F.R. § 121.421(a)(1)(ii). FAA regulations also specifically prohibit flight attendants from serving alcohol to any passenger who appears to be intoxicated. 14 C.F.R. § 121.575.

New Mexico's assertion of jurisdiction is premised on the asserted failure of

the FAA to enforce these restrictions in the manner that the state believes appropriate, and on the alleged inadequacy of US Airways's FAA-approved training for flight attendants. It is axiomatic, however, that states are not free to impose a patchwork of different training and enforcement requirements reflecting their own policy priorities. As Congress has made clear, a single federal regulator must weigh a host of competing concerns in establishing standards and determining appropriate enforcement measures.

II. Congress did not, in establishing exclusive federal authority over airline services, contravene the 21st Amendment. US Airways does not store liquor in New Mexico and it does not import liquor for use in New Mexico. As New Mexico implicitly recognizes, it could not regulate alcohol service in an airplane that merely flew over its territory, and it has no interest in the cabin service of liquor as such. Its interest arises from the potential discharge of passengers who may proceed to drive or cause other harms while intoxicated. New Mexico may respond to this concern through a variety of means, including by providing tort remedies against an airline when a passenger's conduct can be traced to the carrier's negligence. The 21st Amendment does not, however, authorize each of the several states to graft its own regulatory conditions onto the uniform regulation of civil aviation that Congress has deemed essential.

ARGUMENT

I. FEDERAL LAW BOTH EXPRESSLY AND IMPLIEDLY PREEMPTS NEW MEXICO'S ATTEMPT TO REGULATE THE SERVICE OF ALCOHOL ABOARD AIR CARRIERS.

A. The State's Enforcement Of Its Liquor Control Act Is Expressly Preempted Under the Airline Deregulation Act.

After "determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices,' as well as 'variety [and] quality . . . of air transportation services,'" Congress enacted the Airline Deregulation Act of 1978 (ADA). *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (alteration and omission in original; citations omitted). To ensure that the states would not defeat the ADA's goals by filling the void with regulations of their own, Congress included an express preemption provision in the Act. The Airline Deregulation Act explicitly prohibits states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law *related to* a price, route, or *service* of an air carrier that may provide air transportation." 49 U.S.C. § 41713(b)(1) (emphases added).

The Supreme Court has repeatedly admonished that this provision and others with similar language should be read liberally to effectuate congressional intent. *See Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1221 (10th Cir. 2001) (recognizing that "[t]he Supreme Court has interpreted [§ 41713(b)(1)] broadly") .

As the Supreme Court explained in *Morales*, the phrase "related to" in § 41713(b)(1) mirrors the language found in the ERISA preemption provision and should be given the same broad effect. 504 U.S. at 383-84. Accordingly, § 41713(b)(1) preempts not only state laws directly addressing aviation, but all "[s]tate enforcement actions having *a connection with or reference to* airline 'rates, routes, or services.'" *Morales*, 504 U.S. at 384 (emphasis added); *see Arapahoe County*, 242 F.3d at 1221-22; *see also Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 128 S. Ct. 989, 995 (2008) (explicating *Morales* and emphasizing that "pre-emption may occur even if a state law's effect on rates, routes, or services is only indirect").

Section 41713(b)(1) thus prohibits states from "impos[ing] their own public policies . . . or regulation on the operations of an air carrier." *American Airlines v. Wolens*, 513 U.S. 219, 229 n.5 (1995). This prohibition, the Court emphasized, cannot be defeated by characterizing the service at issue as "unessential" to the primary business of operating the airline. *See id.* at 226 ("*Morales*, we are satisfied, does not countenance the Illinois Supreme Court's separation of matters 'essential' from matters unessential to airline operations."). Accordingly, the Court in *Wolens* held that state-law consumer fraud claims predicated on unilateral cutbacks by the airline to frequent-flier rewards were preempted because they clearly "related to . . .

'services,' *i.e.*, access to flights and class-of-service upgrades." *Ibid.*

The reasoning and holding of *Wolens* cannot be reconciled with the preemption analysis of the district court here, and the court made no attempt to do so. *Wolens* held that the allegedly fraudulent manipulation of a frequent flier program to deny class-of-service upgrades related to a "service" within the broad scope of § 41713(b)(1). A state's explicit attempt to regulate in-flight services provided by an airline, including beverage and liquor service, likewise falls within the domain that Congress intended to be free of state regulation. *Wolens* does not permit a reading of "service" in § 41713(b)(1) that applies only to "the temporal component of air transportation" such as the "frequency and scheduling of flights." Slip Op. 10.

Nor can the district court's analysis be squared with the Supreme Court's reasoning in *Rowe*. Applying the *Morales* analysis, the Court in *Rowe* found that an identically worded preemption provision governing the trucking industry preempted Maine's Tobacco Delivery Law, which required that tobacco retailers use delivery services that followed certain specific procedures in verifying the age of recipients of tobacco products. Although the Maine law on its face applied to tobacco retailers, rather than to motor carriers directly, the statute was preempted because it "require[d] carriers to offer a system of services that the market does not now

provide." *Rowe*, 128 S.Ct. at 995. As the Court explained, "[t]he Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining . . . *the services* that motor carriers will provide." *Ibid*. (emphases added).

As the Second Circuit observed, the Supreme Court in *Rowe* "necessarily defined 'service' to extend beyond prices, schedules, origins, and destinations." *ATA*, 520 F.3d at 223. The Second Circuit thus had "little difficulty" concluding that a New York state passenger bill of rights "requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relate[d] to the service of an air carrier" within the meaning of the ADA. *Id.* at 222.

The district court noted the Second Circuit's holding in *ATA* but did not address its reasoning or its discussion of applicable Supreme Court precedent. Instead, the district court restricted "service" to encompass only matters such as flight frequency and scheduling, failing to heed the Supreme Court's clear directive that § 41713(b)(1) be read to "express a broad pre-emptive purpose." *Morales*, 504 U.S. at 383.[1] As the Eleventh Circuit recognized in rejecting the same type of

[1] The district court declared that it was issuing its ruling "[i]n the absence of a consistent and authoritative definition for "service," Slip Op. 9, but made no reference to the Supreme Court's interpretation of § 41713(b)(1) in *Morales* and

narrow construction accorded to "service" by the district court in this case,"no matter how broadly [a court] construes the term 'related to,' if the scope of that phrase's referent (the word 'services') is sufficiently constricted, the scope of pre-emption under § 41713 will nonetheless be minimal." *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257 (11th Cir. 2003).

2. As the district court acknowledged, its interpretation conflicts not only with the Second Circuit's decision in *ATA*, but also with many other circuit decisions construing "service" to encompass "the provision or anticipated provision of labor from the airline to its passengers and encompasses matters such as boarding procedures, baggage handling, and [the provision of] food and drink—matters incidental to and distinct from the actual transportation of passengers." *ATA*, 520 F.3d at 223.

In reasoning later adopted by other circuits and cited with approval by this Court, the en banc Fifth Circuit in *Hodges* explained that a "service" "generally represent[s] a bargained-for or anticipated provision of labor from one party to another," and thus reflects "a concern with the contractual arrangement between the airline and the user of the service." 44 F.3d at 336. As the Fifth Circuit noted, this

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Wolens. Although the district court cited the Supreme Court's decision in *Rowe*, it did not address the Court's analysis and holding in that case.

interpretation is consistent with the construction of the Airline Deregulation Act adopted shortly after its enactment by the Civil Aeronautics Board, the predecessor agency of the FAA. *Id*. at 337 (citing 44 Fed. Reg. 9948 (Feb. 15, 1979)). The Civil Aeronautics Board explained that "preemption extends to all of the economic factors that go into the provision of the *quid pro quo*" for a passenger's fare, including not only "flight frequency and timing," but also "segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage[.]" *Hodges*, 44 F.3d at 337 & n.6 (quoting 44 Fed. Reg. 9951).[2] *See Arapahoe County*, 242 F.3d at 1222 (citing *Hodges* for the proposition that "[e]lements of air carrier service . . . include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself").

The Fourth, Seventh and Eleventh Circuits have specifically endorsed the

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[2] In 2003, the Department of Transportation officially withdrew the Board's 1979 policy statement, *see Preemption in Air Transportation; Policy Statement Amendment*, 68 Fed. Reg. 43882 (July 24, 2003), observing that, after nearly a quarter of century of experience under the ADA, the Board's policy statement had become superfluous in light of the body of judicial decisions construing § 41713(b). DOT explained that the courts have broadly accepted the Board's conclusion that the ADA preempts affirmative state regulation of the services that airlines offer in exchange for their rates and fares — including regulation of "charges for headsets, excess baggage, and alcoholic beverages, as well as requirements for insurance coverage and capitalization"— and "no court of which the Department is aware has held to the contrary." 68 Fed. Reg. 43882.

reasoning in *Hodges* and have likewise adopting a broad definition of "service." *See Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (citing *Hodges* in holding that "[u]ndoubtedly, boarding procedures are a service rendered by an airline"); *Travel All Over the World, Inc. v. Kingdom of Saudia Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (adopting *Hodges*' definition of services); *Branche*, 342 F.3d at 1257-59 (same; elaborating that "service" includes "the elements of air travel that are bargained for by passengers with air carriers," or "the incidents of that transportation over which air carriers compete"). Prior to *Hodges*, the D.C. Circuit had adopted a similarly broad understanding of the statute's preemptive effect, concluding that "[a] state law obligation to give courteous service . . . is expressly preempted by" § 41713(b)(1)). *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987).

3. In departing from the Supreme Court's analysis and the relevant discussions of other courts of appeals, the district court emphasized the parties' failure to provide "any authority indicating that eliminating federal or state health or safety oversight of alcohol as an in-flight amenity was a concern of Congress in enacting the ADA." Slip op. 9. This statement reflects a fundamental misconception as to the relevant preemption inquiry. As the Supreme Court has emphasized, Congress broadly precluded state regulations relating to "service[s]" of

airlines without attempting to identify all the services that states might attempt to regulate. As the Court has also made clear, to "interpret the federal law to permit" some regulations of services "could easily lead to a patchwork of state service-determining laws, rules, and regulations." *Rowe*, 128 S. Ct. at 996. Thus, if the ADA were construed to permit New Mexico to impose its liquor control laws on federally licensed and regulated airlines, the Act "would allow other states to do the same." *Ibid.* The resulting patchwork would plainly be "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace." *Ibid.* Indeed, as the Second Circuit noted in *ATA*, if one state is free to require or preclude service of certain foods or beverages, "another state could be free to . . . prohibit[] the service of soda on flights departing from its airport, while [yet] another could require allergen-free food options . . ., [thus] unraveling the centralized federal framework for air travel." 520 F.3d at 225.

4. The decisions of the Ninth and Third Circuits on which the district court relied concerned not the type of positive regulation at issue here, but the extent to which state tort law was expressly preempted by the Airline Deregulation Act. *See Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261, 1265 (9th Cir. 1998) (en banc) (preemption of passengers' "run-of-the-mill" state tort claims would not

further the congressional purpose of "avoid[ing] state interference with federal deregulation"); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 193-95 (3d Cir. 1998) (travel agency could proceed with its defamation claim because the claim "[did] not frustrate Congressional intent, nor [did] it impose a state utility-like regulation on the airlines"). As the Fifth Circuit noted in *Hodges,* the ADA did not purport to displace all state tort law. Neither the Ninth or the Third Circuit had occasion to consider the term "service" in the context of prescriptive state regulation of the services offered by airlines in exchange for the ticket price.

The holdings of *Charas* and *Taj Mahal Travel* are thus not directly in question here. Insofar as New Mexico provides tort remedies for injuries by intoxicated persons that can be traced to the conduct of third parties, including airlines, § 41713(b)(1) poses no bar to state proceedings. What a state may not do is to deny an airline permission to serve alcohol or provide other in-flight services, or to condition provision of these services on compliance with state regulatory requirements such as New Mexico's rules for the training of alcohol servers.

5. In adopting its highly restrictive reading of § 41713(b)(1), the district court invoked the canon of constitutional avoidance, stating that "if the Court were to construe 'service' to encompass the in-flight sale of alcoholic beverages, thus rendering the New Mexico liquor laws unenforceable, § 41713(b)(1) would violate

§ 2 of the Twenty-First Amendment." Slip Op. 11.

The district court's application of the avoidance canon is flawed in multiple respects. The term "service," as used in § 41713(b)(1), encompasses a broad range of potential state requirements that have nothing to do with the service of alcohol, such as the provisions regarding service of food and beverages at issue in *ATA*. As the Fifth Circuit noted *Hodges*, "[e]lements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling." 44 F.3d at 336-38. To this list one might add the availability of telephone and internet service; rules regarding the transportation of pets; the provision of blankets, pillows, and headphones; requirements regarding seat width or leg room; or any other matter of concern to a given state's constituents. The federal Act must be interpreted with regard to the full range of services that might be subject to state regulation, and cannot be narrowed by invoking a constitutional provision that could at most affect only the service of alcohol.

In any event, the district court's reasoning collapses two distinct issues. Before considering the impact of the 21st Amendment in a preemption case, a court must first determine whether the challenged state action would otherwise be preempted. *See, e.g, Capital Cities, Inc. v. Crisp*, 467 U.S. 691, 698 (1984) ("[W]e turn first before assessing the impact of the Twenty-first Amendment to consider

whether the [state statute in question] does in fact conflict with federal law."). Only then does a court proceed to consider whether federal preemption is precluded by the 21st Amendment. As discussed in Part II below, the district court erred not only in importing the 21st Amendment into its statutory analysis, but also in assuming that the 21st Amendment defeats Congress's attempt to create uniform regulations governing the services provided by one of the quintessential instrumentalities of interstate commerce.

B. New Mexico's Licensing Scheme Is Also Preempted Under the Aviation Safety Provisions of the Federal Aviation Act and FAA Regulations.

New Mexico's alcohol licensing scheme is also independently preempted under the aviation safety provisions of the Federal Aviation Act and the accompanying FAA regulations. That statute expressly directs the FAA to promulgate such rules as "the Administrator finds necessary for safety in air commerce and national security." 49 U.S.C. 44701(a)(5); *see generally id.* § 44701(a) (directing the Administrator to "promote safe flight of civil aircraft in air commerce" by issuing regulations on broad range of enumerated subjects). As the courts have repeatedly recognized, the FAAct and its implementing regulations "occupy exclusively the entire field of aviation safety and carry out Congress' intent to preempt all state law in this field." *Montalvo v. Spirit Airlines*, 508 F.3d 464,

471 (9th Cir. 2007) (holding preempted a state-law claim for failure to warn passengers of the risk of deep-vein thrombosis); *accord Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367-68 (3d Cir.1999) (same, claim for failure to warn regarding risks of turbulence); *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6-7 (1st Cir.1989) (same, state law requirement of additional drug testing for pilots).

As the Ninth Circuit has explained, "[t]he purpose, history, and language of the FAA[ct]" indicate "that Congress intended to have a single, uniform system for regulating aviation safety," overseen by a single federal Administrator who "'would be given full responsibility and authority for the . . . promulgation and enforcement of safety regulations.'" *Montalvo*, 508 F.3d at 471-72 (quoting H.R. Rep. No. 85-2360, at 22 (1958)). "[T]he Administrator has chosen to exercise this authority by issuing such pervasive regulations that we can infer a preemptive intent to displace all state law on the subject of air safety." *Id.* at 472. *See also City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973).

Focusing exclusively on one provision of the FAAct, the district court believed that Congress "d[id] not indicate an intent to regulate the in-flight service of alcohol," but rather indicated a preference for uniform and exclusive rules only with respect to "the physical and mechanical operation of aircraft." Slip. Op. 21. Other provisions, not cited by the district court, sweep far more broadly. For

example, as the district court failed to note, the FAA must certify flight attendants and approve the contents of their training programs. 49 U.S.C. § 44728. FAA regulations require air carrier training programs to instruct flight attendants on "[p]assenger handling, including the procedures to be followed in the case of . . . persons whose conduct might jeopardize safety" (such as those who are intoxicated), *see* 14 C.F.R. § 121.421(a)(1)(ii), and to certify the proficiency and knowledge of each new crew member trainee, *see* 14 C.F.R. § 121.401(c). FAA inspectors must ensure that each airline's flight attendant program is complete, current, and in compliance with federal regulations. 49 U.S.C. § 44728.

FAA regulations also deal specifically with the service of alcoholic beverages, including prohibitions on serving alcohol to any passenger who appears to be intoxicated. *See* 14 C.F.R. § 121.575. The FAA's alcohol regulations reflect an exercise of the Administrator's express statutory authority to promulgate such rules and requirements as"the Administrator finds necessary for safety in air commerce and national security." 49 U.S.C. 44701(a)(5). The district court asserted, without explanation, that these requirements demonstrate only an "incidental" federal interest in the regulation of alcohol onboard airlines. Slip Op. 22. Yet the federal regulations impose the same fundamental requirement that New Mexico imposes on servers of alcoholic beverages: a prohibition on serving persons

who are or appear to be intoxicated. 14 C.F.R. § 121.575(b)(1).

In defending its assertion of regulatory authority in the district court, New Mexico maintained that state intervention was appropriate because the federal government was not effectively enforcing its regulatory restrictions or requiring adequate flight attendant training. *See, e.g.,* N.M. Mot. SJ, dkt. #67, at 13 ("While the FAA requires that all flight attendants complete initial and recurrent training, the federal agency prescribes no curriculum for alcohol service training [and instead] reviews and approves the training programs submitted by the airlines" including US Airways's "initial flight attendant training program of five weeks, of which no more than 3 hours and 30 minutes is devoted to alcohol service training"); *see also id.* at 32-33 (criticizing FAA for failing to impose fines greater than $25,000 for violations of alcohol service rules and for failing to send agents to airports "to observe deplaning passengers for signs of intoxication"). To date, New Mexico has not enforced against airlines the full training requirements under New Mexico law, which must cover at least six enumerated subjects.[3] *See* N.M. Stat. § 60-6E-5(B). Nonetheless, the premise of New Mexico's argument is that some form of liquor training, oversight and enforcement beyond that deemed appropriate by the FAA is

[3] The state's failure to clarify which requirements of its licensing scheme will apply to air carriers only underscores the risks posed by a patchwork of inconsistent state regulation of air commerce.

required to safeguard the state's interests. Indeed, in refusing to extend US Airways's temporary license, the RLD explicitly cited the fact that the carrier "has done little if anything to consider implementing applicable portions of the Department's required alcohol server training," and noted the airline's reliance on compliance with "existing FAA approved policies and procedures." JA87.

As Congress has made clear, it is the responsibility of the FAA to promulgate and enforce requirements governing safety and efficiency in air commerce — a subject that "requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *City of Burbank*, 411 U.S. at 639. The safety concerns created by an intoxicated passenger must be evaluated in the broader context of other critical safety issues. It is the responsibility of the FAA to ensure that the agency's determination of nationwide aviation safety priorities is not distorted by the intervention of one or more states asserting disparate interests.

This Court's decision in *Cleveland v. Piper Aircraft*, 985 F.2d 1438 (10th Cir. 1993), cited by the district court, does not call this authority into question. The Court in that case held that the FAA did not preempt state common-law tort claims arising out of aviation accidents alleging design defects. The Court looked to the FAA's savings clause, then codified at 49 U.S.C. App. §1506(a), which provided

that "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[4] *See* 985 F.2d at 1442. The Court distinguished tort cases from positive state regulation of airline conduct, explaining that the latter "do not involve tort claims that implicate the savings clause." *Id.* at 1442 n.7. This distinction is consistent with the Supreme Court's treatment of the same savings clause, *see Wolens*, 513 U.S. at 232-33, as well as with the Supreme Court's conclusion in *City of Burbank* that local aircraft-noise regulations were preempted by the FAA and related statutes. *See* 411 U.S. at 638-639; *see also, e.g.*, *Drake v. Lab. Corp. of Am.*, 458 F.3d 48 (2d Cir. 2006) (tortious interference, negligent infliction of emotion distress, and similar tort claims not preempted). The New Mexico license requirement here, unlike a traditional tort action, is plainly not encompassed by the savings clause, and impinges on the uniform system for regulating aviation safety mandated by Congress.

II. THE 21ST AMENDMENT DOES NOT OVERRIDE CONGRESS'S CONSTITUTIONAL AUTHORITY TO REGULATE INTERSTATE AIR TRANSPORTATION.

As discussed, the district court mistakenly invoked the 21st Amendment to

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[4] Congress subsequently recodified this provision in 49 U.S.C. § 40120(c) without substantive change. *See* Pub.L. 103-272, § 1(e), 108 Stat. 1117 (1994).

accord an unduly restrictive interpretation of § 41713(b)(1) at odds with congressional intent and Supreme Court guidance. The district court accordingly had no occasion to determine whether the Amendment rescues the New Mexico statute from express or implied preemption.

Assuming that the 21st Amendment is implicated at all in this matter, it plainly does not nullify Congress's preclusion of state regulation of prices, routes and services of air carriers, or its displacement of state regulatory authority in the field of aviation safety.

1. The 21st Amendment, which ended Prohibition, additionally provided that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. This provision restored to the states their historical power to regulate the distribution, sale, and consumption of alcohol in their internal markets, *Capital Cities*, 467 U.S. at 713, and to prevent the unlawful diversion of liquor into those markets, *see North Dakota v. United States*, 495 U.S. 423, 431-32 (1990) (plurality opinion) (upholding state regulation of alcohol delivered to a federal military base in order to prevent diversion into the intrastate economy); *compare Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333, 334 (1964) (holding unconstitutional a state law that did not seek "to regulate or control"

intoxicating liquors "in the interest of preventing their unlawful diversion into the internal commerce of the State," but rather impeded interstate commerce authorized by Congress "in the exercise of its explicit power under [the Commerce Clause]").

The 21st Amendment did not, however, authorize states to regulate the instrumentalities of interstate commerce. As Justice Jackson observed, federal control over aviation is both "intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring). The 21st Amendment would be implicated if US Airways sought to ship liquor into New Mexico or store it in New Mexico. It does not. US Airways does not "deliver[]" liquors to New Mexico. The liquors are "used" solely within aircraft traveling in interstate commerce and subject to federal jurisdiction, and New Mexico does not contend that alcohol served on US Airways planes poses any meaningful risk of diversion into the intrastate economy. The service of alcohol to airplane passengers solely within an airplane and incident to interstate travel does not materially implicate the state's authority under the 21st Amendment.

New Mexico has not claimed that it could require that an airline cease alcohol

service merely because the aircraft is flying over its territory. (Were it otherwise, a cross-country flight could be subject to any number of conflicting prohibitions and requirements.) New Mexico's legitimate interest is not in the regulation of liquor *per se*, but in preventing and punishing harm caused by intoxicated persons who disembark within its territory. The United States shares this concern, as demonstrated by DOT's longstanding support of state efforts to prevent drunk driving in ways that do not infringe on exclusive areas of federal authority. The state has a wide variety of tools available to advance this important interest, including criminal prohibitions and state tort law. Nothing in the 21st Amendment, however, authorizes states to regulate the very instrumentalities of interstate commerce.[5]

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[5] The 1973 decision in *National R.R. Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D. Kan. 1973) (three-judge panel), *aff'd without op.*, 414 U.S. 948 (1973), is not to the contrary. *Miller* employed the same constitutional avoidance analysis used by the district court here to conclude that a federal preemption provision did not prevent Kansas from enforcing its liquor laws on Amtrak trains. As discussed in the brief of US Airways, the Supreme Court's affirmance without opinion is without precedential significance. Similarly, this Court's follow-on decision in *National R.R. Passenger Corp. v. Harris*, 490 F.2d 572 (10th Cir. 1974) (per curiam), simply recognized the preclusive effect of the Supreme Court's summary affirmance in *Miller* against Amtrak, *see id.* at 573. In any event, the *Miller* analysis is at odds with the Supreme Court's analysis of both federal preemption and the 21st Amendment in the ensuing decades. Even at the time, *Miller* was obliged to distinguish and narrowly cabin *Hostetter*, which invalidated state regulations on sales of liquor to departing international passengers.

2. In any event, even where a state's authority under the 21st Amendment is implicated, it would be an "absurd oversimplification" to conclude that Congress lacks the power to legislate. *Hostetter*, 377 U.S. at 331-332. The Supreme Court has made clear that the 21st Amendment does not trump other authority created by the Constitution, including Congress's authority to regulate interstate commerce. "Both the Twenty-first Amendment and Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter*, 377 U.S. at 332. *See also Granholm v. Heald*, 544 U.S. 460, 486-87 (2005).

"Notwithstanding the Amendment's broad grant of power to the States, therefore, the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor." *Capital Cities*, 467 U.S. at 713. Thus, in *Capital Cities*, the Supreme Court held that FCC regulations preempted a state law barring liquor advertising on cable television, notwithstanding the state's claim that the 21st Amendment protected its power to regulate the sale of alcohol within its borders. *Id.* at 713-16. Likewise, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court held that federal antitrust law preempted California's wine-pricing scheme

notwithstanding the state's claim that the challenged price restrictions embodied the state's core authority under the 21st Amendment "to promote temperance and orderly marketing conditions." *Id.* at 112; *see id.* at 106-114. And in *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (per curiam), the Court found "no substance" in the contention that federal labeling requirements for whiskey were invalid under the 21st Amendment. Id. at 173.

Accordingly, "there is no bright line between federal and state powers over liquor." *Midcal*, 445 U.S. at 110. What is required, rather, is a "pragmatic effort to harmonize state and federal powers within the context of the issues and interests at stake in each case," *Capital Cities*, 467 U.S. at 714 (internal quotation marks and citation omitted), and "[t]he competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case," *Midcal*, 445 U.S. at 110.

Here, even assuming that the 21st Amendment is implicated by the service of alcohol on airplanes moving in interstate commerce, the state's interests protected by the 21st Amendment are at most tangentially affected. New Mexico's claim of regulatory authority is linked to the departure or arrival of aircraft in New Mexico; the state does not claim the power to regulate flights merely traversing its territory. Passengers on incoming aircraft, however, will almost certainly consume no liquor

while on the ground in New Mexico. The only point at which alcohol on US Airways flights might be consumed on the ground in New Mexico is prior to takeoff on outbound flights. Even assuming that alcohol consumed while in an outbound airplane in interstate commerce is "use" within the contemplation of the 21st Amendment, it does not implicate New Mexico's animating interests: such passengers will be discharged not in New Mexico, but in another state.

By contrast, the federal interest in ensuring a uniform nationwide body of regulation of interstate air transportation is apparent. Congress passed the FAAct more than half a century ago out of the explicit conviction that "[i]t is essential that *one agency of government, and one agency alone*, be responsible for issuing safety regulations if we are to have timely and effective guidelines for safety in aviation." H.R. Rep. No. 85-2360 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741, 3761 (emphasis added). As the Supreme Court has recognized, the uniformity of these regulations is the linchpin of their success. *See City of Burbank*, 411 U.S. at 638-39 (explaining that the FAAct "requires a delicate balance between safety and efficiency, and the protection of persons on the ground . . . . The interdependence of these factors requires a *uniform and exclusive system of federal regulation* if the congressional objectives underlying the [FAA] are to be fulfilled" (emphasis added; internal citations omitted)). The need for nationwide uniformity in the regulation of

interstate air commerce is both fundamental and intuitive: were states allowed to impose a patchwork of requirements on the airlines, the challenges of compliance would multiply in ways that could only divert the attention of airline personnel charged with the on-the-ground task of implementing them.

The balance of state and federal interests in the regulation of civilian air transportation clearly favors national uniformity. *See Midcal*, 445 U.S. at 114 (concluding that federal law preempted state law, notwithstanding the 21st Amendment, because "[t]he unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the [federal] Act"). It follows that the 21st Amendment does not save the New Mexico Liquor Control Act from preemption.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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February 10, 2010

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Fed. R. App. P. 29(c) that the foregoing amicus brief was prepared in 14-point Times New Roman proportional typeface and contains 6,957 words, according to the count of Corel WordPerfect 14.

s/ Mark R. Freeman

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Mark R. Freeman

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2010, I caused the foregoing amicus brief to be filed electronically with the Court via the CM/ECF system, with paper copies to follow in accordance with the Court's rules. Pursuant to this Court's General Order of March 18, 2009, the resulting Notice of Docket Activity generated by the ECF system constitutes service on counsel for the appellees.

s/ Mark R. Freeman

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Mark R. Freeman

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order of March 18, 2009, I hereby certify as follows:

1. in the foregoing brief, no privacy redactions were required;

2. the electronic version of the brief has been scanned for viruses by the following program, and no viruses were found:

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s/ Mark R. Freeman

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Mark R. Freeman