Nos. 10-3298 and 10-3570

In the
United States Court of Appeals
for the Seventh Circuit

Anheuser-Busch, Inc., *et al.*,

Plaintiffs-appellants,

v.

Stephen B. Schnorf, *et al.*, Commissioners of the Illinois Liquor Control Commission, in their official capacities,

Defendants-appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
No. 10 C 1601
Hon. Robert M. Dow, Jr., Judge

APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX

ORAL ARGUMENT REQUESTED

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-3298

Short Caption: Anheuser-Busch, Inc., et al. v. Stephen B. Schnorf, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Anheuser-Busch, Inc. and Wholesaler Equity Development Corporation ("WEDCO")

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Skadden, Arps, Slate, Meagher & Flom LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Anheuser-Busch Companies, Inc. is the parent corporation of Anheuser-Busch, Inc. and WEDCO

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Anheuser-Busch InBev

Attorney's Signature: Edward M. Crane Date: 10/25/10

Attorney's Printed Name: Edward M. Crane

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No [ ]

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Attorney's Printed Name: Albert L. Hogan III

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MLC DEPARTMENT

DATE RECEIVED: _____

DATE DOCKETED: 01/08/AM

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Anheuser-Busch InBev

Attorney's Signature: Edward M. Crane Date: 11/08/10

Attorney's Printed Name: Edward M. Crane

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JURISDICTIONAL STATEMENT

Plaintiffs' claims arise under 42 U.S.C. § 1983 and the Commerce Clause of the United States Constitution. Plaintiffs commenced this action on March 10, 2010, by filing a Complaint for Declaratory Judgment and Injunctive Relief. The Complaint sought redress, pursuant to 42 U.S.C. § 1983, for three violations of the United States Constitution: Commerce Clause (Count I); Procedural Due Process under the Fourteenth Amendment (Count II); and the Contracts Clause (Count III). The district court's jurisdiction over the subject matter of this action thus arose under 28 U.S.C. §§ 1331 and 1343(a).

On September 3, 2010, the district court issued a Memorandum Opinion and Order (the "Sept. 3 Order") granting plaintiffs' motion for summary judgment on their Commerce Clause claim. (SA at 2.)[1] The court, however, denied plaintiffs' request to equalize the disparate treatment at issue by permitting the aggrieved class to benefit from certain provisions of the statute at issue. (*Id.* at 37-38.) Instead, to remedy defendants' violation of the Commerce Clause, the court enjoined enforcement of (or "nullified") certain provisions of the statute, such that all persons' rights under these provisions of the statute were eliminated. (*Id.*)

Plaintiffs-appellants filed their notice of appeal on October 1, 2010, within 30 days from entry of the Sept. 3 Order, appealing the district court's

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[1] Citations to "SA__" are to the required short appendix attached hereto. Citations to "A____" are to the additional appendix submitted herewith. The current and historical versions of the Illinois Liquor Control Act of 1934 cited herein are included in the additional appendix.

ruling only as to the proper injunctive remedy for defendants' violation of the Commerce Clause. This Court therefore has jurisdiction over this matter pursuant to 28 U.S.C. § 1292(a)(1).

On October 18, 2010, plaintiffs voluntarily dismissed with prejudice their Contracts and Due Process claims. On October 29, 2010, the district court entered final judgment on all claims in this matter. On November 3, 2010, AB Inc. and WEDCO filed a notice of appeal from the Sept. 3 Order and final judgment against defendants on plaintiffs' Commerce Clause claim, such that this Court also has jurisdiction over this matter pursuant to 28 U.S.C. § 1291. AB Inc. and WEDCO's appeal from the district court's Sept. 3 Order and final judgment against defendants on plaintiffs' Commerce Clause claim remains limited to the proper remedy for defendants' violation of the Commerce Clause.

ISSUE PRESENTED FOR REVIEW

The district court ruled that defendants—the Commissioners of the Illinois Liquor Control Commission (the "ILCC") and their general counsel—violated the Commerce Clause of the United States Constitution when they blocked a corporate acquisition by declaring that under the Illinois Liquor Control Act of 1934 (the "Liquor Control Act") out-of-state brewers, but not in-state brewers, are ineligible to own or operate a beer distributor in Illinois. Under *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984), which holds that "ordinarily extension, rather than nullification, is the proper course," the district court was required to fashion a remedy for defendants' unconstitutional conduct by determining whether permitting all brewers—both in-state and out-of-state—to own or operate a distributor would be consistent with the General Assembly's intent. The district court, however, remedied the unconstitutional discrimination by "nullifying" the right of all brewers, in-state and out-of-state, to own or operate a distributor in Illinois. The issue on appeal is whether the district court erred in imposing the "nullification" remedy because it (1) gave both "controlling" weight and judicial deference to defendants' assertions as to meaning of the law even though those assertions were contrary to the Liquor Control Act itself and the longstanding history and application of the Act; and (2) otherwise relied on several incorrect factual and legal propositions in determining the intent of the General Assembly under *Heckler*.

STATEMENT OF THE CASE

On March 10, 2010, plaintiffs filed a complaint for declaratory and injunctive relief in the district court for the Northern District of Illinois. Plaintiffs' complaint challenged the constitutionality of defendants' enforcement of Illinois law under the Commerce Clause because defendants interpreted and enforced Illinois law in such a manner as to discriminate against out-of-state brewers. Plaintiffs' complaint also contained claims for violation of the Contracts and Due Process clauses of the United States Constitution.

On April 1, 2010, the district court entered an expedited briefing schedule on plaintiffs' motion for summary judgment on their Commerce Clause claim. After full briefing, on June 16, 2010, the court held oral argument on plaintiffs' motion for summary judgment.

On September 3, 2010, the district court granted plaintiffs' motion for summary judgment in a Memorandum Opinion and Order. The district court held that defendants violated the Commerce Clause because their interpretation and enforcement of the Liquor Control Act discriminated against out-of-state brewers. (SA at 2.) Specifically, the court held that under *Granholm v. Heald,* 544 U.S. 460 (2005), defendants' "'differential treatment' of in-state and out-of-state brewers is *per se* invalid unless the state meets its burden of 'advancing a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" (*Id.* at 22.) The district court further held that defendants "have not articulated a legitimate local purpose

that justifies their discrimination" against out-of-state brewers, and thus the discrimination is unconstitutional. (*Id.* at 27.)

To remedy defendants' unconstitutionally discriminatory interpretation of Illinois law, the district court had to equalize the treatment of in-state and out-of-state brewers. The court either could "extend" the in-state brewer distribution right to out-of-state brewers, such that out-of-state brewers could continue to own or operate an Illinois distributor as in-state brewers are permitted to do and as out-of-state brewers had for over 70 years prior to defendants' recent interpretation, or "nullify" the in-state brewer distribution right such that no brewers could own or operate an Illinois distributor. (*Id.* at 37-38.) The district court chose to nullify provisions of the Liquor Control Act such that no brewers, whether in-state or out-of-state, may own or operate an Illinois distributor. (*Id.*) The Sept. 3 Order provided that this remedy would be stayed until March 31, 2011, to give the Illinois General Assembly an opportunity to act, if it chooses to do so. (*Id.* at 37.)

On October 1, 2010, AB Inc. and WEDCO filed a notice of appeal pursuant to 28 U.S.C. § 1292(a)(1), appealing only those portions of the district court's Sept. 3 Order that pertain to the proper remedy for defendants' violation of the Commerce Clause.

On October 18, 2010, the parties to the action in the district court filed a joint stipulation of dismissal with prejudice as to Counts II (violation of Procedural Due Process of the Fourteenth Amendment) and III (violation of

Contracts Clause) of plaintiffs' complaint. On October 29, 2010, the district court entered final judgment as to all of plaintiffs' claims.

On November 3, 2010, plaintiffs-appellants filed a notice of appeal pursuant to 28 U.S.C. § 1291, appealing the Sept. 3 Order and final judgment against defendants on plaintiffs' Commerce Clause claim only as to the proper remedy for defendants' violation of the Commerce Clause. On November 4, 2010, the Court consolidated the two appeals.

* * *

AB Inc. and WEDCO respectfully submit that oral argument is appropriate because this appeal involves important constitutional issues.

STATEMENT OF FACTS

A. The Parties

AB Inc. is a brewer of beer and a wholly owned subsidiary of Anheuser-Busch Companies, Inc. (A163 ¶ 2.) Throughout the United States, AB Inc. distributes its beer through independent wholesalers/distributors, but also through a network of eleven company-owned distributors. (A160 ¶ 10.) As to the latter, AB Inc. performs both the brewer and distributor functions under applicable federal regulations, including pursuant to a federal Wholesaler Basic Permit. (A155 ¶ 7.) At all times relevant to this matter, AB Inc. has exported beer produced in the United States into Illinois for distribution within the State and intends to continue to do so in the future. (A163 ¶ 3.) AB Inc. has, in its own name or through its affiliates, performed the distributor function in Illinois since at least 1982 through the present. (A164 ¶¶ 5-6, 10.) WEDCO is a wholly-owned subsidiary of Anheuser-Busch Companies, Inc. and has owned an interest in CITY Beverage – Illinois, L.L.C. ("CITY Beverage"), an Illinois Distributor, since CITY Beverage's formation in 2005. (A163 ¶¶ 4-6.)

Defendant Schnorf is the Acting Chair and a Commissioner of the ILCC and defendants Aguilar, Downes, Esteban, McMahon, Mulcahey, and O'Connell were Commissioners of the ILCC at the time this lawsuit was commenced. (A164 ¶ 8.) Defendant Haymaker is Chief Legal Counsel of the ILCC. (A164 ¶ 8.) Defendants are named in this suit in their official capacities and at all times material hereto were acting under color of Illinois law, ordinance, regulation, custom and/or usage. (A164 ¶ 8.)

B. The Illinois General Assembly enacts the Liquor Control Act in 1934 and permits all alcohol manufacturers to engage in wholesale distribution.

In 1933, the Twenty-first Amendment to the United States Constitution was ratified, repealing prohibition. U.S. Const. amend XXI. In 1934, the Illinois General Assembly passed the Liquor Control Act, authorizing and regulating the sale and consumption of alcohol beverages in Illinois. Act of Jan. 31, 1934 [hereinafter, the "1934 Act"], 1934 Ill. Laws 57. The 1934 Act established a regulatory scheme for all phases of the alcohol beverage industry in Illinois, from manufacture, to wholesale distribution and sale, to retail sale to consumers. *See generally, id.* The statute required appropriate licensure for any person or entity engaged in any of the range of activities from the manufacture to the retail sale of alcohol beverages. *Id.* Indeed, the General Assembly provided that "[a]ny person who manufactures, imports for distribution as an importing distributor, distributes or sells alcoholic liquor at any place within the State without having first obtained a valid license so to do . . ." would be subject to fines and even imprisonment. *Id.* Art. X, § 1.

The 1934 Act specified types of licenses necessary to perform certain functions in the regulatory scheme, such as a Manufacturers License, Importing Distributor License, Distributor License, and Retailers License. *Id.* Art. V, § 1. The statute required separate licensing and compliance at the manufacturer, distributor, and retail levels of the alcohol beverage industry and this aspect of the Liquor Control Act is often referred to as a "three tier"

system. (A164-65 ¶ 11.) Nonetheless, the phrases "three tier" and "separate tiers" do not appear in the 1934 Act. *See generally,* the 1934 Act.

Consistent with an intent to regulate a wide range of conduct, the General Assembly defined the term "manufacture" to mean "to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle or fill an original package with any alcoholic liquor . . ." *Id.* Art. I, § 1(8). Similarly, the term "manufacturer" included "every brewer, fermenter, distiller, rectifier, wine maker, blender, processer, bottler, or person who fills or refills an original package and others engaged in brewing, fermenting, distilling, rectifying, or bottling alcoholic liquors as above defined." *Id.* Art. I § 1(7). Thus, to engage lawfully in any of these activities as an alcohol manufacturer a person would need to obtain a Manufacturers License. *See id.* Art. II, § 1 ("No person shall manufacture, bottle, blend, sell, barter, transport, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this Act . . . .").

In addition, the 1934 Act permitted alcohol manufacturers (which included, by definition, brewers) to perform the wholesale distributor function, *i.e.*, distribute alcohol to retailers in Illinois. *Id.* Art I, § 1(7); Art. V, § 1(a). The statute stated: "A manufacturers license shall allow the manufacture, storage, *and wholesale distribution and sale* of alcoholic liquors to licensees in this State and to persons without the State, as may be permitted by law." *Id.* Art. V, § 1(a) (emphasis added).

As with the definition of manufacturer, the General Assembly also described the people whose conduct would make them a distributor. *Id.* Art. I, § 1(9). The 1934 Act provided that the term "distributor" means "any person, other than a manufacturer licensed under this Act, who is engaged in this State in purchasing, storing, bottling, possessing, or warehousing any alcoholic liquors for resale . . . ." *Id.* And, if a person fit the definition of a distributor, they were required to obtain a Distributor License to be in compliance with the law. *See id.* Art. II, § 1.

Although the 1934 Act permitted alcohol manufacturers to distribute alcohol to retailers, a separate Article of the statute prohibited manufacturers from holding a retail license: "No person having been licensed as a manufacturer shall be permitted to receive any retailer's license." *Id.* Art. VI, § 3. The General Assembly also expressed its intent that the retail function should not be unduly influenced by those engaged in the manufacturer or distributor function. *See, e.g., id.* Art. VI, § 4 (prohibiting alcohol retailers from borrowing money or "anything else of value, or accept or receive credit" from Manufacturers, Distributors, and Importing Distributors), § 5 (prohibiting Manufacturers, Distributors, and Importing Distributors from supplying "any furnishing, fixture, or equipment" to an alcohol Retailer for their place of business).

C. The General Assembly amends the Liquor Control Act in 1947 and affirmatively maintains brewers' rights to distribute beer.

In 1947, the General Assembly substantially revised the Liquor Control Act to restrict the rights of certain kinds of alcohol manufacturers to engage in

"wholesale distribution," but to continue the right of other kinds of manufacturers to do so. Ill. Rev. Stat. ch. 43 (1947). The amendment created new and separate licenses for various manufacturing activities, including brewers, distillers, and wine manufacturers, *id.* Art. V, ¶ 115, and added a new provision of the statute which provided that "[n]o person licensed . . . as a *distiller,* or a *wine manufacturer,* or any subsidiary or affiliate thereof . . .shall be issued an importing distributor's or distributor's license." *Id.* ¶ 121 (emphasis added).

The General Assembly determined to treat brewers differently than other manufacturers in the 1947 amendment to the Liquor Control Act. *Id.* The statute did not list brewers among those manufacturers that were prohibited from performing the distributor function either in its own name or through an affiliate, unlike it did for winemakers and distillers. *Id.* To the contrary, the amended statute affirmatively provided that brewers could continue to distribute beer in Illinois:

> "A Brewer may make sales and deliveries of beer to importing distributors, distributors, retailers and to non-licensees, in accordance with the provisions of this Act."

Id. ¶ 115.

D. The Illinois Attorney General confirms that the Liquor Control Act allows all brewers to own or operate a distributor.

In 1979, the Illinois Attorney General confirmed that the Liquor Control Act permits all brewers to distribute beer. Op. Ill. Att'y Gen. S-1462 at 127-28 (1979) (included hereto at A156-57). The Attorney General's opinion stated:

> "[Question:] May a manufacturer of beer, whether licensed in Illinois or in some other State, receive a distributor's, importing distributor's, or foreign importer's license in Illinois?"
>
> "[Answer:] It is my opinion that one may. . . . [B]rewers are not included within the prohibition of Section 3 of Article VI [prohibition against distillers and winemakers holding Distributor's and Importing Distributor's Licenses and now codified at Section 6-4]. There are no other provisions which prevent a manufacturer of beer from receiving a distributor's, importing distributor's or foreign importer's license."

Id.

Consistent with the Attorney General's opinion, at this time, out-of-state brewers, including AB Inc., performed the distributor function. (A19 (noting that the ILCC "issued brewers licenses to out-of-state manufacturers of beer").) The General Assembly later amended the Liquor Control Act to clarify that Brewers should hold Distributor's and Importing Distributor's Licenses in order to perform the distributor function. *See* 235 ILCS 5/5-1(a) ("A Brewer may make sales and deliveries of beer . . . to retailers provided the brewer obtains an importing distributor's license or distributor's license in accordance with the provisions of this Act.").

E. The General Assembly creates a Non-Resident Dealer's License, but does not alter brewers' right to own or operate a distributor.

In 1982, the General Assembly modified the Liquor Control Act to require that out-of-state alcohol manufacturers hold a newly created license entitled a "Non-Resident Dealer's ("NRD") License," but did not alter provisions of the statute that affect brewers' ability to continue to perform the distributor function. *See* Ill. Rev. Stat. ch. 43, ¶ 115, 121 (1982). As with other definitions in the Act, the General Assembly defined an NRD with respect to certain

conduct, as "any person, firm, partnership, corporation or other legal business entity who or which exports into this State . . . any alcoholic liquors for sale to Illinois licensed foreign importers or importing distributors"). *Id.* ¶ 95.29. The NRD license allowed its holder "to ship alcoholic liquor into this State from any point outside of this State, and to sell such alcoholic liquor to Illinois licensed foreign importers and importing distributors and to no one else in this State." *Id.* ¶ 115.

The amendment did not add Brewers or NRDs to the list of manufacturers that were prohibited from performing the distributor function. *Id.* ¶ 121.

In 1984, the General Assembly added language to clarify that NRDs could "warehouse" alcoholic liquor. Ill. Rev. Stat. ch. 43, ¶ 115 (1984) ("A non-resident dealer's license shall permit such licensee to ship into *and warehouse* alcoholic liquor into [sic] this State . . . .") (emphasis added). Thus, an NRD was permitted to engage in some of the same conduct that was otherwise used to define a "distributor," namely to warehouse alcoholic liquor. *Id.* ¶¶ 115, 95.15. The definition of distributor was conformed to these changes. *Id.* ¶ 95.15 ("'Distributor' means any person, other than a manufacturer *or non-resident dealer* licensed under this Act, who is engaged in this State in purchasing, storing, possessing or *warehousing* any alcoholic liquors for resale or reselling at wholesale, whether within or without this State.") (emphasis added).

F. The ILCC issues distributors licenses to brewers including AB Inc. after 1982.

The ILCC continued to license out-of-state brewers, including AB Inc., to perform the distribution function in Illinois after 1982. (A22, A74-76, A163-64 ¶¶ 5, 6, 10.) Each year during the period from 1982 through 2005, the ILCC issued to AB Inc. in its own name one or more Distributor's and Importing Distributor's Licenses. (A164 ¶ 10.) During this time period, the ILCC issued distributors licenses to out-of-state brewers other than AB Inc., such as Miller Brewing Company. (A19-22, A74-76.)

During much of the period from 1982 through the present, the ILCC also issued Distributor's and Importing Distributor's Licenses to one or more affiliates of AB Inc. (A164 ¶ 10.)

G. The Associated Beer Distributors of Illinois is unsuccessful in its attempt to amend the Liquor Control Act to prevent brewers from owning or operating Illinois distributors.

In 1999, the Associated Beer Distributors of Illinois ("ABDI") caused the introduction of a bill in the Illinois General Assembly to attempt to amend the Liquor Control Act to preclude Brewers and NRDs from owning or operating a distributor. (A132-33.) The proposed legislation would have amended Section 5/6-4(a) (formerly, ¶ 121) of the Liquor Control Act to include Brewers and NRDs in its list of alcohol manufacturers that are prohibited from holding Distributor's and Importing Distributor's Licenses either directly or through affiliate ownership. (A176-81.) After encountering opposition from AB Inc., the bill was withdrawn and the law did not change. (A133-34.)

ABDI describes itself as the "state membership organization of the beer wholesaling industry in Illinois representing over 60 licensed Illinois beer distributors." (Docket No. 81 at 2.) ABDI, which is located in Springfield, Illinois, also describes that it "advocates value in the three-tier regulatory system by being the unified voice for beer distributors on legislation and regulation." *See* ABDI website, http://www.abdi.org/ (last visited Jan. 16, 2011).

In 2000, for reasons not set forth in the record, the ILCC purports to have issued Trade Practice Policy ("TPP") 39, "which changed the direction of the Commission and reasserted the law that required NRDs and distributors to retain separate ownership." (A22.) Although the Commission has authority to promulgate rules and regulations under the Act, 235 ILCS 5/3-12(a)(2), 3-12(a)(10), the TPPs are merely notifications of ILCC "interpretation" and are not adopted according to formal rulemaking procedures and do not have the force of law. *See, e.g.,* ILCC website at http://www.state.il.us/lcc/TPPreview.asp (last visited Jan. 16, 2011).

Subsequent to ABDI causing its proposed legislation to be withdrawn and the purported issuance of TPP 39, the ILCC continued to annually issue Distributor's and Importing Distributor's Licenses to AB Inc. and its affiliates. (A22, A163-64 ¶¶ 5, 6, 10.)

H. In 2005, AB Inc. and the Soave Entities form CITY Beverage, an Illinois distributor, with AB Inc. maintaining a 30% interest.

In 2005, AB Inc. entered into an agreement with the Soave Entities that formed the CITY Beverage entity as the parent company of CITY Bloomington,

CITY Chicago, and CITY Markham. (A163 ¶ 5.) These CITY Beverage entities distribute AB Inc.'s beer in certain areas of Illinois. (A3 ¶ 7.) WEDCO maintained a 30 percent ownership interest in CITY Beverage and the Soave Entities owned a 70 percent interest in CITY Beverage. (A163 ¶ 5.) From 2005 through the present, the ILCC has issued to CITY Bloomington, CITY Chicago, and CITY Markham, in various names, Illinois Distributor's and Importing Distributor's Licenses. (A163 ¶ 6.) Thus, from 2005 through the present, AB Inc. affiliate WEDCO has maintained an ownership interest in CITY Beverage, which has held Distributor's and Importing Distributor's Licenses on an annual basis. (A163 ¶¶ 5, 6.)

I. The General Assembly responds to *Granholm* and extends the in-state benefit.

In 2007, after the Supreme Court issued its decision in *Granholm*, 544 U.S. at 487, which confirmed that the "regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," the Illinois General Assembly amended a particular aspect of the Liquor Control Act to conform to the *Granholm* decision. The General Assembly "authoriz[ed] direct shipment of wine by an out-of-state maker of wine on the same basis permitted an in-state maker of wine. . . ." 235 ILCS 5/6-29(a)(1) (2007) (noting that the "intent" of the section is to be "in conformance with the United States Supreme Court decision decided on May 16, 2005 in Granholm v. Hearld." [sic]).[2]

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[2] Rather than banning all direct wine shipments to consumers, Illinois replaced a reciprocal direct shipping provision with a winery-shipper licensing provision that applies equally to in-state and out-of-state wineries. *See* 235 ILCS 5/6-29(a)(1).

J. On unconstitutional grounds, the ILCC blocks AB Inc.'s acquisition of the 70% interest in CITY Beverage that it does not already own.

In December 2009, WEDCO reached an agreement with the Soave Entities to purchase the 70 percent interest in CITY Beverage that WEDCO did not already own (the "Transaction"). (A167 ¶ 20.) The Transaction was scheduled to close on February 12, 2010. (A167 ¶ 20.) On January 6, 2010, AB Inc. and WEDCO notified the ILCC that WEDCO planned to purchase a wholesaler in Illinois and on January 27, 2010, informed the ILCC that WEDCO would acquire the interest in CITY Beverage that it did not already own. (A167 ¶ 21.) During this period, representatives of AB Inc. and WEDCO had over a dozen contacts with representatives of the ILCC to discuss and provide them with information about the transaction. (*Id.*) At no time during the course of these discussions and conversations did representatives of the ILCC state that WEDCO's acquisition of any wholesaler, or specifically of CITY Beverage, would violate the Liquor Control Act. (*Id.*)

As of February 11, 2010, the parties to the transaction had complied with virtually all preconditions in preparation for the February 12 closing. (A167 ¶ 22.) For example, all material closing documents were prepared, funds were readied for wire transfer to the Soave Entities, AB Inc. already had enrolled all of the CITY Beverage employees in its benefits plans, and AB Inc. had arranged to transition the business to AB Inc.'s IT systems immediately after the closing. (A3 ¶ 10.)

On February 11, 2010, at 4:29 PM, legal counsel for the ILCC e-mailed to a representative of AB Inc., a letter from defendant Haymaker stating that it

would be unlawful for WEDCO to consummate the acquisition of CITY Beverage. (A9-11, A167-68 ¶ 23.) Under defendants' interpretation of the Liquor Control Act set forth in defendant Haymaker's February 11 letter, an out-of-state beer producer (or an affiliate) is ineligible to hold Distributor's and Importing Distributor's Licenses, and thus is prohibited from owning or operating an Illinois distributor. (A110-11, A165 ¶ 15.) According to defendants, the Liquor Control Act's prohibition against out-of-state brewers distributing beer is necessitated by Illinois' three-tier system, which they contend requires separation of ownership between brewers, distributors, and retailers of beer. (A18-19, A60.) Defendants, however, acknowledged that in-state beer producers are entitled to hold Distributor's and Importing Distributor's Licenses. (A18, A165 ¶ 13-14.) Thus, under defendants' interpretation of the Liquor Control Act, in-state brewers are permitted to perform the distributor function in Illinois, while out-of-state brewers are precluded from doing the same. (A165 ¶ 13.)

After receipt of defendant Haymaker's February 11 letter, AB Inc. and WEDCO postponed the closing of the transaction because of the prospect of concluding a transaction that would be rendered essentially worthless. (A11, A23)

On March 2, 2010, the ILCC held a Special Session on the question of whether out-of-state brewers may perform the distribution function. (A15-16.) In connection with the Special Session, plaintiffs demonstrated that the Liquor Control Act has permitted all brewers, both out-of-state and in-state, to own

and operate a distributor, and also that defendants' interpretation of the Liquor Control Act violates the Commerce Clause. (*See generally,* A25-57.) At the Special Session, various economic actors, including ABDI and MillerCoors, urged the ILCC to rule that the Liquor Control Act does not permit out-of-state brewers to own and operate a distributor, despite that the statute permits in-state brewers to do so. (A111-13, A132-37; *see also* A111-30.)

As the product of the Special Session, on March 10, 2010, the ILCC issued a Declaratory Ruling, which stated that it would be unlawful for WEDCO to acquire CITY Beverage because out-of-state brewers may not "possess[] an ownership interest in a licensed Illinois distributor" under the Liquor Control Act. (A59-60.) The Declaratory Ruling also permits WEDCO to retain its current minority interest in CITY Beverage due to the "history and facts surrounding this case." (A60-61, A168 ¶ 26.) On March 10, 2010, the same day that the ILCC issued the Declaratory Ruling, plaintiffs commenced this action. (A62; Docket No. 1.)

Currently, at least three in-state brewers hold Distributor's Licenses, including Argus Brewery ("Argus"), Big Muddy Brewing ("Big Muddy"), and Goose Island Beer Co. (A159 ¶ 5.) Argus and Big Muddy currently distribute beer directly to retailers. (*Id.*)

SUMMARY OF ARGUMENT

This case is about whether a federal court can remedy a violation of the United States Constitution by looking to the law, or, instead, is compelled when fashioning a remedy to accept the lawless views of the state actors who committed the violation in the first place.

The facts of the case are stunning. Since its inception in 1934, the Illinois Liquor Control Act has allowed brewers of beer to engage in wholesale distribution in Illinois. The General Assembly has over the years amended the Act to affirmatively shape this right, and the plain language of the law and its history leave no doubt that the General Assembly intended for brewers to be able to act as distributors. Consistent with the law, for nearly 30 years the ILCC granted AB Inc. distributors licenses which allowed AB Inc. to own and operate beer distributors in Illinois. The ILCC also granted distributors licenses to other brewers.

In 2005, AB Inc. and Soave formed CITY Beverage, with AB Inc. contributing its existing distributor operations and maintaining a 30% ownership interest in the new company. The ILCC granted CITY Beverage distributors licenses from then to the present, and over that time CITY Beverage has operated as one of the largest beer distributors in Illinois. In 2010, AB Inc. was set to acquire the remaining 70% ownership interest in CITY Beverage.

The ILCC intervened to block the transaction. They did so (encouraged by various economic actors) based on a conjured up interpretation of the

Liquor Control Act and declared that out-of-state brewers were not permitted to own an interest in an Illinois beer distributor. Whatever their reasons, there is no question that the ILCC's actions were contrary to the plain language of the Liquor Control Act, and literally decades of history, custom, and practice. There is also no question that their actions violated the United States Constitution. Having so advised the ILCC to no avail, AB Inc. brought this case seeking swift justice.

The district court confirmed that the ILCC's actions violated the Commerce Clause by discriminating against out-of-state brewers. Guided by the Supreme Court, which has instructed that in cases of discrimination "ordinarily extension, rather than nullification, is the proper course," the district court was required to fashion a remedy consistent with the intent of the Illinois General Assembly. But, instead, the district court fashioned a remedy consistent with the goals of the ILCC and its supporters, and "nullified" the right of all brewers under the law, in-state and out-of-state, to own or operate a distributor in Illinois.

This appeal is straightforward. The district court's nullification remedy is premised on a significant error of law: the district court believed that in determining the intent of the legislature under *Heckler* it was required to give "controlling weight" to *the ILCC's* views on the Liquor Control Act, and to otherwise defer to what *the ILCC* said about Illinois law. Thus, instead of independently examining the law and its application over time, which show without question that all brewers have been able to own or operate a

distributor in Illinois since 1934, the district court accepted as correct defendants mythical view to the contrary, simply because they are state actors. As a result, the district court imposed a remedy entirely inconsistent with the intent of the General Assembly, and, thus, contrary to federal law. In addition, even under the flawed deferential framework of the analysis it performed, the district court relied on numerous factual errors and errors in statutory interpretation to conclude that it should do exactly what the ILCC and its supporters wanted, and take away all brewers' rights under the Liquor Control Act to own or operate a distributor.

Unburdened by these errors, a federal court can come to only one conclusion. The remedy for the ILCC's unconstitutional actions is clear: Allow all brewers to act as distributors, just as the General Assembly has provided in the law, and just has been the case in Illinois for more than 70 years. The district court should be reversed.

ARGUMENT

I. Standard of Review

Although the district court's balancing of factors in issuing an injunction is subject to an abuse of discretion review, *Pro's Sports Bar & Grill, Inc. v. City of Country Club Hills*, 589 F.3d 865, 870-871 (7th Cir. 2009), a district court automatically abuses its discretion when its decision is based on errors of law or findings of fact that are clearly erroneous. *United States v. Jain*, 174 F.3d 892, 899 (7th Cir. 1999); *Romanelli v. Suliene*, 615 F.3d 847, 852 (7th Cir. 2010). A court also abuses its discretion if it does not reach a "reasonable decision based on facts supported by the record," the decision is "arbitrary," or "contains no evidence upon which the court could have rationally based its decision." *Id.*

This Court reviews the district court's legal rulings de novo and its factual determinations for clear error. *Pro's Sports*, 589 F.3d at 870-871. This Court reviews questions of statutory construction as conclusions of law, and thus under the de novo standard. *Id.* at 871 ("Determining the nature of Pro's original license is a matter of statutory interpretation and thus a question of law that we review de novo."). Accordingly, an error in statutory interpretation constitutes an abuse of discretion. *Id; Jain*, 174 F.3d at 899.

II. The District Court Misapplied *Heckler* by Declining to Analyze Whether Permitting Out-Of-State Brewers to Distribute Beer Would Circumvent the Intent of the Legislature.

When a state implements a "constitutionally underinclusive" law, a court has two remedial alternatives: it may either nullify the law and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the rights provided by the law to include those who are aggrieved by the exclusion. *Heckler*, 465 U.S. at 738. But, these two choices are not viewed equally—in fact one is preferred: In *Heckler*, the Supreme Court stated that "ordinarily 'extension, rather than nullification, is the proper course." *Id.* at 739 n.5 (internal citations omitted). The Court went on to counsel that, although extension is favored, a court should nonetheless satisfy itself that extension would not circumvent the overall "intent of the legislature." *Id.* To be sure, however, the law favors extension as the appropriate remedy, unless such a remedy would run afoul of the expressed intent of the legislature. *Id.*; *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *Dickerson v. Bailey*, 336 F.3d 388, 407 (5th Cir. 2003) (applying *Heckler* preference for extension where discrimination against out-of-state alcohol beverage producers violated the Commerce Clause); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008) (reciting standard).

In the typical case, the legislature has expressed an intent to confer a particular benefit on a class of persons, but at the same time to exclude other persons from receiving that benefit. Thus, to confirm that extension of the benefit would not be contrary to the intent of the legislature, a district court

should 'measure the intensity of commitment to the residual policy,' or in other words the desire to extend a benefit or allow a certain type of conduct, and also "'consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Heckler*, 465 U.S. at 739 n.5 (citations omitted). Given that extension is preferred, a court's traditional analysis is in some sense an attempt to confirm that the legislature would be unlikely to withdraw a benefit in general simply because they were no longer permitted to unconstitutionally exclude certain people from receiving it.

This case, however, presents a unique circumstance because the unconstitutional discrimination was created by defendants' erroneous and unreasonable interpretation of the Liquor Control Act, rather than by the General Assembly. As described more fully below, *infra* Arg. II.iii, the Liquor Control Act allows *all* brewers to own and operate a distributor in Illinois, and has done so since its enactment in 1934. Consistent with this legislative preference, AB Inc. held completely and in its own name Distributor's and Importing Distributor's Licenses from 1982 through 2005. (A164 ¶ 10.) Moreover, AB owned a 30% stake in CITY Beverage from its formation in 2005, and continues to own that stake today. (A163 ¶¶ 5-6.) Similarly, other brewers, including Miller Brewing Company held Illinois distributors licenses during this period. (A19, A22, A74-76, A159 ¶ 5.)

The fact that out-of-state brewers have been involved in beer distribution for decades in Illinois cannot be shaken off as inexplicable inaction by prior inept state actors, as defendants suggest. (A22-23.) Rather, all brewers can be

distributors under the law. Indeed, in 1979 the Illinois Attorney General confirmed in a formal opinion that the Liquor Control Act allows all brewers to hold distributors licenses. Op. Ill. Att'y Gen. S-1462 at 127-28 (1979) (A156-57.) Notwithstanding what the law actually says and has been for more than 70 years, in February 2010 the defendant state actors stepped in to block the Transaction with a patently unconstitutional slant on the Liquor Control Act—because AB Inc. was an out-of-state brewer, it could not acquire the remaining 70% interest in CITY Beverage that it did not already own. (A10-11.) Regardless of the reason for their departure from actual law, the fact is the ILCC's actions were unmoored from any expression of intent by the General Assembly of Illinois. Accordingly, in this case, because the unconstitutional discrimination was the product of the ILCC's contrived interpretation and enforcement of the law, and further, because the law in reality allows brewers to hold distributors licenses (and to own entities that do so), the *only* remedy consistent with the intent of the General Assembly was to extend the benefit and enjoin the ILCC from attempting to unconstitutionally block AB from concluding the Transaction.

Although recognizing what the Liquor Control Act says and how it has been applied in reality over the years (*i.e.*, that the Liquor Control Act allows all brewers to own or operate a distributor) is the key to imposing the remedy consistent with the intent of the General Assembly, the district court believed for two reasons that it was required to accept the ILCC's interpretation of the statute when it fashioned a remedy for the ILCC's patently unconstitutional

behavior. Based on these two missteps, the court accepted as correct defendants' flawed interpretation of the Liquor Control Act as prohibiting out-of-state brewers from distributing beer. (SA at 30-31, 33-34.) As a result, the district court's analysis was flawed as a matter of law, and resulted in the wrong remedy under *Heckler.*

i. The district court misapplied *Heckler* by regarding defendants' views about Illinois' statutory scheme as "controlling" for purposes of determining the General Assembly's intent.

The Sept. 3 Order summarizes the provisions of the Liquor Control Act that have permitted out-of-state brewers to own or operate a distributor in Illinois since 1934, and the facts that show Illinois law has been consistently applied that way. (SA at 30.) But, in the remedial phase of the case the court dispensed with its own review of the provisions of the Liquor Control Act and the history of regulation under the Act, and instead looked to the ILCC to explain the law and its history of application. In particular, the district court explained:

> - "[A]lthough Plaintiffs have 'vigorously contest[ed]' the Commission's 'highly questionable' interpretation of the Act, their federal dormant commerce clause claim accepts – indeed, *requires* – the Commission's interpretation." (*Id.* at 34 n. 16 (emphasis added).)
>
> - "Although counsel for defendants acknowledged at oral argument that the Commission has made *exceptions* for AB Inc. in prior years, counsel explained that the Commission now views those *concessions* as having been a 'mistake' and rests its *current* (and, for this litigation, *controlling*) construction of the Act on its reading of a 1982 amendment." (SA at 30 (emphasis added).)

(*Cf id.* at 3 n.4, 11-12 (holding in constitutional adjudication phase of case that "under *Pennhurst* and its progeny, the only construction of the Act that matters for purposes of the Commerce Clause claim on which Plaintiffs have sought partial summary judgment is the Commission's.").) Thus, the district court failed to conduct a review of the Liquor Control Act and its regulatory history and instead accepted as true during the remedial phase defendants' interpretation of the law to permit only in-state brewers to distribute beer and to prohibit out-of-state brewers from doing the same. Similarly, the court ignored decades of history during which the ILCC granted, and renewed annually, distributor licenses to AB Inc., and instead accepted defendants' characterization of these actions as a 30-year course of lawless "exceptions" or "concessions." (*Id.* at 30-31, 33-34.) As a result, the district court did not properly apply *Heckler*, which instructs that extension is the preferred remedy unless doing so would violate the intent of the *legislature*.

The district court's analysis went awry because it mistakenly believed that the Supreme Court's holding in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), applied to the remedial phase of this case. In particular, the district court read *Pennhurst* to require that, under the Eleventh Amendment, it adopt defendants' views about the Liquor Control Act and its regulatory history as "controlling" for all purposes in the litigation, including when "conforming state law to federal constitutional commands." (SA33; *see also, e.g.*, SA10-12, SA30-31, SA38.) Indeed, the district court made clear its belief that "although Plaintiffs have 'vigorously contest[ed]' the

Commission's 'highly questionable' interpretation of the Act, their federal dormant commerce clause claim accepts – indeed, requires – the Commission's interpretation." (*Id.* at 34 n. 16.) As result of applying the Eleventh Amendment, the district court concluded that it had no basis to infer that the General Assembly intended to permit "all producers to be allowed to act as distributors" (*id.* at 31), and in fashioning a remedy under *Heckler*, the court failed to account for the plain language of the statute that permits brewers to distribute beer.

The district court's application of *Pennhurst* to the remedy phase of the case was plainly wrong, as a matter of law. In *Pennhurst*, the Supreme Court held that the Eleventh Amendment, which bars suits by private citizens against states, "prohibits a federal court from ordering state officials to conform their conduct to state law." *Komyatti v. Bayh*, 96 F.3d 955, 959 (7th Cir. 1996); *Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993) ("Constitutional adjudication tests the *power* of a state to act in a particular way."). Stated differently, federal courts may not "exercise pendent jurisdiction to adjudicate claims that state officials are violating state law." *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993).

The court's power to craft a remedy for a statute that violates the United States Constitution, however, is based on federal, rather than state, law. *Komyatti*, 96 F.3d at 960-61; *see also Branch v. Smith*, 538 U.S. 254, 278 & n.* (2003) (plurality opinion) (Scalia, J.); *Brown v. Georgia Department of Revenue*, 881 F.2d 1018, 1023 (11th Cir. 1989) ("Because the court ordered the hearing

to comply with State Personnel Rules, the appellants argue that the district court ordered the state to comply with state law. Under *Pennhurst*, however, the determinative question is not the relief ordered, but whether the relief was ordered pursuant to state or federal law."). Thus, the Eleventh Amendment does not bar reference to state law when a federal court remedies a violation of federal law. For example, in *Komyatti*, Indiana challenged the federal court's power to enforce a consent decree to which the state was a party and that measured the state's conduct "against a standard articulated in a state statute." *Komyatti*, 96 F.3d at 960-61. This Court held that reference to state law in enforcing the consent decree

> is not a federal suit against state officials on the basis of state law . . . [and] is not . . . tantamount to requiring state officials to conform their conduct to state law. Rather, the remedy embodied in a consent decree springs from and serves to resolve the underlying federal constitutional violation. Therefore, a provision in a validly-entered consent decree is an obligation on state officials to conform their conduct to federal law. Provided that the inclusion of the state statute into the consent decree is designed to remedy the federal constitutional violation in the underlying complaint, therefore, the Eleventh Amendment does not preclude parties to a lawsuit alleging a federal constitutional violation from incorporating the standards found in a state statute into their agreed settlement.

96 F.3d at 960 (citations and quotations omitted); *accord Wis. Hosp. Ass'n. v. Reivitz*, 820 F.2d 863, 868 (7th Cir. 1987).

Similarly, in *Branch*, a plurality of the Supreme Court held that *Pennhurst* does not bar a federal court from referencing a "State's substantive 'policies and preferences' for redistricting" when redistricting a state pursuant to the federal constitution and federal law. 538 U.S. at 277-78. The Court

stated "[h]ere a federal court granted relief on the basis of federal law-specifically the Federal Constitution. The district court did not instruct state officials on how to conform their conduct to state law; rather it deferred to the State's 'policies and preferences' for redistricting.'" *Id.* at 278 & n.*. The Court further noted that "[f]ar from intruding on state sovereignty, such deference respects it." *Id.*

In this case, the ILCC's novel interpretation and enforcement of the Liquor Control Act is what brought the case to federal court. That is because the ILCC invented a gloss on the Act that discriminated against out-of-state brewers and then proceeded to enforce that discriminatory gloss in violation of the Commerce Clause. Thus, there is no question that the plaintiffs properly raised, and the district court had jurisdiction over, a federal Commerce Clause claim. And of course, when adjudicating the merits of that federal claim the district court had to examine what the ILCC contended the Liquor Control Act said and how the ILCC was enforcing the Act. *See Burgess*, 996 F.2d at 184.

The Eleventh Amendment, however, does not bar courts from considering the intent of the legislature contrary to state actors' views in the remedial phase of a case, after there has been an adjudication of unconstitutionality. *See, e.g., Brown*, 881 F.2d at 1023. To the contrary, *Heckler requires* that the district court look to state law, and not the misguided views of state actors, when fashioning a remedy. *See Branch*, 538 U.S. at 278 & n.*. (noting that "[f]ar from intruding on state sovereignty, such deference respects it."). Thus, the district court's misapplication of *Pennhurst* in the remedial phase had the

effect of overriding *Heckler*'s command that a court remedy an unconstitutionally underinclusive statute by looking to the intent of the legislature. Applying *Pennhurst* as the district court did here, in a case where the unconstitutional discrimination is wholly a product of defendant state actors' unreasonable interpretation of state law leads to absurd results—state actors who violate the United States Constitution are essentially permitted to determine the proper remedy for their transgression.

Had the district court not misapplied *Pennhurst* and thus ignored what the Liquor Control Act says, and how it has been applied for decades, it would have found that the General Assembly has, since 1934, permitted all brewers to own or operate an Illinois distributor. Given that the ILCC's deal-blocking interpretation against out-of-state brewers has no basis in Illinois law, extension of the distribution right is the only remedy consistent with the intent of the General Assembly. On the basis of the district court's error of law, this Court should reverse the district court's imposition of the nullification remedy and "extend" (or, more appropriately viewed in the context of this case, "reinstate") to out-of-state brewers the same right to own or operate an Illinois distributor afforded to in-state brewers under the Liquor Control Act.

ii. The district court misapplied *Heckler* by deferring to defendants' views about the Liquor Control Act's statutory and regulatory history.

The district court gave a second reason for declining to consider that the Liquor Control Act permits all brewers to own or operate a distributor in Illinois. The court stated:

> [T]he Court must give due regard to the commission's current construction of the Act – both because the Commission has been charged under state law with administering the state's liquor laws and because that construction was rendered after considerable study of the issue, with the input of interested parties (included Plaintiffs and at least some of the *amici* in this action).

(SA at 31 (citing Illinois state court decisions).) The court's deference to defendants' interpretation of the Liquor Control Act under Illinois state law principles was an error of law, and a misapplication of Illinois law.

As an initial matter, it was an error of federal law that the district court abdicated its responsibility under *Heckler* to examine the intent of the legislature, and instead deferred to the views of the ILCC, under non-binding state law principles. (SA at 31 (acknowledging that the state law principles it references are "non-binding") (citing *W. Belmont, L.L.C. v. City of Chicago*, 811 N.E.2d 220, 224 (Ill. App. Ct. 2004)).)

To the extent that *Heckler* permits such deference in determining a remedy for a violation of the federal constitution under non-binding state law principles, the court misapplied state law deference principles. As a threshold prerequisite to affording deference, Illinois law requires that an agency's interpretation of an ambiguous statute be reasonable. *Metro. Water Reclamation Dist. of Greater Chicago v. Civil Serv. Bd. of the Metro. Water Reclamation Dist. of Greater Chicago*, 832 N.E.2d 835, 840 (Ill. App. Ct. 2005) ("[A]n agency's statutory interpretation is not binding on a reviewing court and will be rejected if it is unreasonable or erroneous . . . The statutory language itself is the best indicator of legislative intent."); *Fried v. Danaher*, 263 N.E.2d

820, 822 (Ill. App. Ct. 1970) (examining reasonableness of interpretation). Indeed, in rejecting the ILCC's interpretation of the Liquor Control Act in the past, an Illinois appellate court cautioned "[w]here the language of a statute is clear, we need not look further to determine the legislative intent." *Peerless Wholesale Liquors, Inc. v. Ill. Liquor Control Comm'n*, 296 Ill. App. 3d 230, 234-35 (Ill. App. Ct. 1998) (rejecting ILCC's "contention that [the court] should defer to the Commission's interpretation on this issue"). In addition, in considering whether to defer to a state agency's interpretation of an ambiguous state law, and if so, in determining how much weight to give that interpretation, Illinois law requires the court to examine the longevity and consistency of the interpretation. *Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n*, 447 N.E.2d 295, 300 (1983); *Fried*, 263 N.E.2d at 822 ("The construction placed on an equivocal statute by officials charged with executing it will be given considerable weight where the construction is consistent, long continued and reasonable.").

The district court did not make a finding as to whether the Liquor Control Act's provisions are ambiguous, let alone as to the reasonableness, longevity, or consistency of defendants' interpretation of the Liquor Control Act. Without making those findings, the district court's deference to defendants' views on Illinois' statutory scheme was an error of law.

Had the district court properly applied Illinois law, it would have concluded that defendants' "current" interpretation is due no deference or weight. Basic statutory construction principles require "courts [to] start with the assumption that the legislature intended to enact an effective law." *Pliakos*

v. Ill. Liquor Control Comm'n, 143 N.E.2d 47, 49 (Ill. 1957). Defendants' proffer of a patently unconstitutional interpretation of the Liquor Control Act thus automatically renders defendants' statutory construction suspect. Moreover, for the reasons described *infra* Arg. II.iii, there is no ambiguity in the Liquor Control Act permitting all brewers to own or operate an Illinois distributor. *Metro.*, 832 N.E.2d at 841 ("Where the statute is clear and unambiguous, the statute should be applied without resort to aids of statutory construction"); *Peerless*, 296 Ill. App. 3d at 234-35 (same). To the contrary, defendants' interpretation of the Liquor Control Act to permit only in-state brewers to distribute beer is unreasonable, and raises at least one irreconcilable conflict within the statute. *See infra* Arg. II.iii.

In addition, defendants' interpretation reflects an about-face of decades of actions by the state consistent with an out-of-state brewer's right to own and operate a distributor. When compared to the ILCC's longstanding, prior interpretation, under which all brewers could distribute beer, and during which AB Inc.'s Distributor's and Importing Distributor's Licenses were renewed annually from at least 1982 through 2005, the ILCC's new interpretation is of recent vintage. (A19, A22, A74-76, A164 ¶ 10; *see also id.* at A156-57.) Given all of these factors, the ILCC's current views on the law were entitled no weight. *Ill. Consol. Tel. Co.*, 447 N.E.2d at 300.

In fact, under Illinois law the district court should have deferred or given weight to the ILCC's *prior* interpretation of the Liquor Control Act, under which all brewers, out-of-state or in-state, were permitted to own and operate an

Illinois distributor. The Illinois Supreme Court's decision in *Mississippi River Fuel Corp. v. Ill. Commerce Comm'n*, is instructive in this regard. 116 N.E. 2d 394, 397 (Ill. 1953). In that case, the Illinois Commerce Commission reversed its long-standing interpretation of Illinois law. In rejecting the state agency's then "current" interpretation, the court held that the state agency's long-standing prior interpretation was entitled to deference as it

> [i]llustrate[d] the fact that for a period of almost 20 years, during which time the personnel and political complexion of the Illinois Commerce Commission repeatedly changed, that body, by its inaction continuously construed the Public Utilities Act as not applicable to Mississippi. The courts of this State are, of course, not bound by the construction which the commission places upon that statute, but still such a consistent and long-standing administrative interpretation cannot but have a persuasive effect. . . . Where a particular construction has been given to a provision and it has been continued for a long term of years and acquiesced in by the public at large, such construction is entitled to great weight and may be equal in force to a judicial construction.

(*Id.*) The situation here resembles precisely that of *Mississippi River Fuel.* For decades, under the supervision of the ILCC and generations of its Commissioners, all brewers were permitted to distribute beer, and out-of-state brewers, such as AB Inc. and Miller Brewing Company, held Illinois distributors licenses. (A19, A22, A74-76, A164 ¶ 10, A74-76.) Under the Illinois law the district court referenced, this history, and not the unsupported assertions by the defendants, should have been conclusive.

iii. The Liquor Control Act permits all brewers to distribute beer.

Had the district court correctly reviewed the provisions of the Liquor Control Act to determine the General Assembly's intent, the court would have

found that extension is the only remedy consistent with that intent. Under *Heckler*, that should have ended the inquiry.

The Liquor Control Act has permitted all brewers to own and operate an Illinois distributor since its enactment in 1934. 1934 Act Art. V. In fact, the 1934 version of the Liquor Control Act permitted all alcohol manufacturers to distribute their products directly to retailers. *Id.* Art. V. "A manufacturers license shall allow the manufacture, storage, *and wholesale distribution and sale* of alcoholic liquors to licensees in this State and to persons without the State, as may be permitted by law." *Id.* Art. V § 1 (emphasis added).

In 1947, the General Assembly adopted an important set of amendments to the Liquor Control Act, and introduced, for the first time, a separation between the manufacturer and distributor function under the Act. But, critically, this separation applied only to distillers and winemakers, and explicitly not to brewers. With respect to brewers, the 1947 Act provided:

> "A Brewer may make sales and deliveries of beer to importing distributors, distributors, *retailers* and to non-licensees, in accordance with the provisions of this Act."

1947 Act Art. V § 115(a) (emphasis added). With respect to alcohol manufacturers other than brewers, the General Assembly added a new provision of the Liquor Control Act in Section 3 of Article VI which provided that "[n]o person licensed . . . as a *distiller*, or a *wine manufacturer* . . . shall be issued an importing distributor's or distributor's license." *Id.* Art. VI § 121(a). (emphasis added). Moreover, no less than the Illinois Attorney General himself recognized that the Liquor Control Act permits all brewers to distribute beer.

Op. Ill. Att'y Gen. S-1462 at 127-28 (1979) (A156-57) (formal opinion of Attorney General stating all brewers may hold Distributor's and Importing Distributor's Licenses).

Despite a number of amendments from 1947 to the present, the General Assembly continues to affirmatively permit brewers to own and operate an Illinois distributor and has not added brewers to the list of alcohol manufacturers that may not distribute beer specified in Section 5/6-4(a). Even those who apparently believe that they would benefit most from the imagined economic protectionist barriers against out-of-state brewers have previously recognized that, under Illinois law, all brewers can own or operate an Illinois distributor. In 1999, ABDI (who appeared as an amicus in support of defendants in the proceedings below) initiated a bill in the General Assembly to *change* Illinois law to prevent brewers from distributing beer. (A132-33; *see also* A176-81.) After encountering opposition from AB Inc., which was licensed and operating a distributor at the time, that bill was withdrawn and Illinois law did not change. (A133-34.) Introduction of this bill indicates the widespread recognition—by Illinois distributors no less—that Illinois law does not prohibit out-of-state brewers from distributing beer.

In the district court, defendants offered only tenuous theories and speculation to refute plaintiffs' construction of the Liquor Control Act and other evidence. According to defendants, the Liquor Control Act did not prohibit out-of-state brewers from holding Distributor's and Importing Distributor's Licenses until 1982, at which time the law was amended to require out-of-state

brewers to hold NRD Licenses. Two years later, the definitions of Distributor and Importing Distributor in the Act were amended to make clear that an NRD is not a Distributor simply because it performs some of the same functions as a Distributor and Importing Distributor. 235 ILCS 5/1-3.15 ("'Distributor' means any person, other than a manufacturer or non-resident dealer licensed under this Act, who is engaged in this State in purchasing, storing, possessing or warehousing any alcoholic liquors for resale or reselling at wholesale, whether within or without this State."). Defendants seize on this supposedly negative prohibition to justify their refusal to permit out-of-state brewers to distribute beer.

Defendants are grasping at straws, however, because the 1982 and 1984 amendments to the Liquor Control Act did not have any effect on out-of-state brewers' statutory right to own or operate a distributor. Defendants' interpretation also ignores the plain fact that the General Assembly in 1982 (or any time thereafter) did not include out-of-state brewers in Section 5/6-4(a)'s prohibition against certain alcohol manufacturers acting as distributors. The phrase "other than a manufacturer or non-resident dealer" in the definition of "Distributor" is not any sort of negative prohibition, but rather merely clarifies that manufacturers and NRDs are not automatically Distributors simply because they engage in some of the same conduct that is used to *define* a Distributor. For example, warehousing or storing of alcohol liquor for resale is a function performed at multiple tiers of the system, 235 ILCS 5/5-1(m), 5/5-1(a), 5/5-1(b), 5/1-3.15, and thus the definition of Distributor would be

overinclusive without the qualifier that excludes manufacturers and NRDs, which warehouse beer in connection with their functions.[3]

Moreover, defendants' interpretation of the definition of Distributor creates an irreconcilable conflict in the statute, which defines manufacturer to include brewers. Indeed, the Liquor Control Act has excluded manufacturers from the definitions of Distributor and Importing Distributor since 1934. 1934 Act Art. I, §1(a). Given that there is no dispute that the Liquor Control Act permits certain manufacturers, including for example in-state brewers, to be Distributors, the definition of Distributor cannot actually serve to bar manufacturers from acting as distributors. 235 ILCS 5/1-3.08 ("Manufacturer' means every brewer . . ."), 5/5-1(a) (Class 3) ("A Brewer may make sales and deliveries of beer to . . . retailers . . . ."), 5/5-1(a) (Class 2) ("A Rectifier . . . may make sales and deliveries of alcoholic liquor to . . . retailers . . . .").

Not surprisingly, defendants produced no legislative history or other contemporaneous commentary heralding this supposedly momentous change in Illinois law in 1982, which would have ended almost 50 years of brewer distribution. Indeed, the ILCC did not view the 1982 amendment as prohibiting

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[3] This is consistent with the fact that manufacturers have been excluded from the definition of distributor since the 1934 Act. In the 1934 Act, the term "distributor" was defined as "any person, other than a manufacturer licensed under this Act, who is engaged in this State in purchasing, storing, bottling, possessing, or warehousing any alcoholic liquors for resale . . . ." 1934 Act Art. I § 1(9). The term "manufacturer" was defined to include "every brewer, fermenter, distiller, rectifier, wine maker, blender, processer, bottler or person who fills or refills an original package . . . ." *Id.* § 1(7). Given that the 1934 Act affirmatively permitted all manufacturers to store and distribute alcohol, *id.* Art. V, § 1(a), the exclusion of manufacturers from the definition of a distributor obviously meant that a manufacturer is not a distributor simply because it performs some of the same functions as a distributor, *e.g.,* bottling, warehousing, and distributing alcohol.

out-of-state brewers from holding Distributor's and Importing Distributor's Licenses because it *continued to issue such licenses for another 25 years after 1982 to out-of-state brewers* such as AB Inc. and Miller Brewing Company. Consistent with this statutory history, the ILCC's long-standing practice has been to permit out-of-state brewers to hold Distributor's and Importing Distributor's Licenses, both before and after 1982. (A19-22, A164 ¶ 10, A74-76.) In particular, from 1982 through 2005, the ILCC annually issued to AB Inc. in its own name one or more Distributor's and Importing Distributor's Licenses (A164 ¶¶ 6, 10.), and during much of that period and from 2005 through *today*, to one or more of AB Inc.'s affiliates. (*Id.*) During the period from 1982 through 2005, other out-of-state brewers, such as Miller Brewing Company, also held Distributor's and Importing Distributor's Licenses. (A19, A22, A74-76.) Defendants admit that they are unable to explain why AB Inc. and other out-of-state brewers were permitted to hold Distributor's Licenses in Illinois after 1982. (A22-23 ("The reason for this cannot be explained . . . .").) But the explanation is actually easy: it is because the law allowed brewers to hold those licenses, and it always has.

Defendants also baldly asserted that Illinois maintains a three-tier system that prohibits common ownership between the tiers and that permitting out-of-state brewers to distribute beer in Illinois would be contrary to the intent of the General Assembly. The Liquor Control Act does not bear out defendants' argument because the phrase "three-tier system" is only a general label used to describe a regulatory system with separate licensing required for each of the

three functions in the production, distribution, and retail sale of liquor. There is not a uniform three-tier act or model code, and thus there is no particular legal significance to the term. Instead, each state creates its own regulatory system.[4] While many states, like Illinois, have created a three-tier structure, the language of each particular state's law controls how the regulatory system functions and the Liquor Control Act does not contain any prohibition against brewers also performing the distributor function, unlike it does expressly for winemakers and distillers. *See* 235 ILCS 5/6-4(a) ("No person licensed . . . as a distiller, or a wine manufacturer . . . shall be issued an importing distributor's or distributor's license . . . ."). Indeed, the central issue in this case was that the Liquor Control Act affirmatively permits in-state brewers to act as a distributor.

Given the regulatory scheme set forth under the Liquor Control Act that permits all brewers to distribute beer and to hold distributors licenses, "extension" of the in-state benefit is the only remedy consistent with the intent of the General Assembly.

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[4] Illinois is far from alone in permitting a brewer to perform the distributor function in the three-tier system. AB Inc. relies on a network of eleven company-owned distributors in other states. (A160 ¶ 10.) In fact, there are more than 20 states that permit AB Inc. to be a licensed distributor (or be affiliated with a distributor), all of which consider themselves "three-tier." (A155 ¶¶ 5-6.) Also, the federal government licenses brewers to perform the distributor function and AB Inc. in fact performs both the brewer and distributor functions under applicable federal regulations, including pursuant to a federal Wholesaler Basic Permit. (A155 ¶ 7.)

III. The District Court Erred in Measuring the Intensity of Illinois' Commitment to the Residual Policy and Potential Disruption to the Statutory Scheme.

After accepting defendants' view that the Liquor Control Act prohibits out-of-state brewers from distributing beer, the district court determined that it was "left without any clear direction on how the General Assembly would address the specific matter before the Court," and thus "turn[ed] to 'the intensity of the commitment to the residual policy' and 'the degree of potential disruption of the statutory scheme.'" (SA at 32.) This "minimum damage" analysis is strained and artificial because the unconstitutional discrimination at issue in this litigation was the product of a fictional statutory scheme promulgated by defendants—a statute that bars out-of-state brewers from owning or operating an Illinois distributor—rather than the Liquor Control Act, which permits as much. Not surprisingly, the district court encountered difficulty in making sense of the components to this mythical statutory scheme and the "residual policy" left after eliminating the discrimination that the General Assembly never authorized.

However, even accepting that the court was forced to adopt defendants' view that the Liquor Control Act prohibits out-of-state brewers from owning or operating an Illinois distributor, numerous factual errors and errors in statutory interpretation underpin the court's conclusion that in that event, the "'intensity of commitment to the residual policy' and 'the degree of potential disruption of the statutory scheme'" "strongly" point to imposition of the nullification remedy. (SA at 33.) In fact, the court's analysis, if performed

correctly, should have led it to exactly the opposite conclusion—extension is the only remedy consistent with the intent of the General Assembly.

The district court concluded that three separate considerations favor nullifying, rather than extending, the in-state benefit. (SA at 33.) As explained in more detail herein, each of the three considerations of the court's conclusion are the product of either errors of law or reliance on clearly erroneous factual findings. In addition, the court erred by declining to consider in its "minimum damage" analysis that, after the Supreme Court decided *Granholm*, the Illinois General Assembly amended the Liquor Control Act to conform to the *Granholm* decision certain direct shipment provisions relating to wine by extending the in-state distribution right.

i. The district court's conclusions about the General Assembly's commitment to permitting in-state brewers to distribute beer are premised on errors of law.

The court's first consideration was its conclusion that the General Assembly's "'commitment' to the 'residual policy' of permitting in-state brewers to self-distribute is of short duration," based on a belief that the in-state privilege originated in "June 2009." (SA at 33.) The court reasoned that when the long history of Illinois' "three-tier system" is compared to the *recent* ability of in-state brewers to distribute beer, Illinois' commitment to permitting in-state brewers to distribute beer "cannot fairly be characterized as deep or lasting." (*Id.* at 33.) In determining that Illinois only recently has permitted in-state brewers to distribute beer, the court credits in-state brewers' distribution right as the product of the ILCC's recent interpretation. (*Id.* at 33-34 ("Indeed,

by its own admission, the Commission's current interpretation of the relevant provisions of the Act was adopted only recently.").) The court further noted that only three "small" brewers presently hold Distributor's Licenses. (*Id.*)

The court's analysis is flawed as a matter of statutory interpretation. Rather than the product of a "recent" interpretation by defendants, there is no dispute in this case that the Liquor Control Act has permitted in-state brewers to distribute beer for over 70 years, since 1934. 1934 Act Art. V § 1 (a). ("A manufacturers license shall allow the manufacture, storage, and wholesale distribution and sale of alcoholic liquors to licensees in this State and to persons without the State, as may be permitted by law."); 235 ILCS 5/5-1(a). ("A Brewer may make sales and deliveries of beer . . . to retailers."). Defendants even acknowledge that the Liquor Control Act is unambiguous in its provision permitting in-state brewers to distribute beer, stating:

> Therefore, the Act leaves no ambiguity in this specific case allowing common ownership across two tier levels.

(A18; *see also* A13; A156-57 (formal opinion of Attorney General stating all brewers may hold Distributor's and Importing Distributor's Licenses).) Indeed, according to defendants, the 1982 amendment barred out-of-state brewers from distributing beer, but preserved in-state brewers' right to do so. (A19.)

The district court, however, premised its nullification remedy on exactly *the opposite* reading of the Liquor Control Act—that the Liquor Control Act has only permitted in-state brewers to distribute for a "short duration," since June 2009. (SA33.) The court's confusion as to the supposed "short duration" of in-state brewers' ability to distribute beer under the Liquor Control Act is a

fundamental error that led the court to nullify an "unambiguous" (to use defendants' description) expression of the General Assembly's intent to permit in-state brewers to distribute beer.

Moreover, the court's reference to the fact that only three "small" brewers currently take advantage of the law was irrelevant to the purely statutory question of the General Assembly's commitment to permitting in-state brewers to distribute beer. (SA33.) The district court even recognized as much in the constitutional adjudication portion of its opinion. (*See* SA25 ("This argument fails to address the fact that the Liquor Control Act permits *all* in-state brewers to hold Distributor's and Importing Distributor's Licenses, not just small in-state brewers . . . .") (emphasis in original).)[5] Moreover, even if it was a relevant consideration, there is no record evidence about how long in-state brewers have taken advantage of this distribution opportunity and how many did so prior to the three that currently hold Distributor's Licenses. Thus, reference to the in-state brewers that currently distribute beer is uninformative and was in error.

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[5] The district court also incorrectly understood defendants' counsel to represent that only three in-state brewers currently own or operate a distributor. For example, the public records available on the ILCC's website, of which this Court may take judicial notice, *Palay v. United States*, 349 F.3d 418, 425 n.5 (7th Cir. 2003) (court may take judicial notice of matters of public record); *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003), indicate that in-state brewer Two Brothers Brewing Company has common ownership with a distributor, Windy City Distribution Company. State of Illinois Liquor Control Commission, *License Locator*, http://www.state.il.us/lcc/tdq.asp (last visited Jan. 16, 2011). Windy City Distribution Company represents that it distributes beer for 35 craft brewers. *See* Windy City Distribution website, http://www.windycitydistribution.com/ (last visited Jan. 16, 2011).

These errors of law in construing the Liquor Control Act were fundamental to the court's nullification of the provisions of the Liquor Control Act permitting in-state brewers to distribute beer. The district court's error of law in construing the Liquor Control Act requires reversal and imposition of the extension remedy.

ii. The district court committed an error of law and relied upon an erroneous factual finding in determining that nullification would keep "intact most of the three-tier system" and prevent expansion beyond the "three licenses the Commission has granted in the past fifteen months."

In the second consideration of its "minimum damage" analysis, the district court balanced in-state brewers' "recent" right to distribute beer against preservation of Illinois' "three-tier system" and the possibility of expanding the "exception" for in-state brewers to out-of-state brewers. (SA34.) The components to the court's balancing test all are the product of errors of statutory interpretation or erroneous factual findings.

First, the district court's starting point is that the Liquor Control Act only "recently" permitted in-state brewers to distribute. The district court thus repeats its misunderstanding of Illinois law—as explained *supra* Arg. III.i—because under *both* sides' interpretation of Illinois law it is incorrect that the in-state distribution policy is "recent." (*See id.*)

Second, the district court's analysis is premised on the notion that Illinois' three-tier system expresses an overarching restriction against common ownership between alcohol manufacturers and distributors, and thus prohibiting brewers from distributing beer keeps "intact most of the three-tier

system." (SA34.) As explained *supra* Arg. II.iii, this notion is drawn from thin air. The Liquor Control Act does not contain any prohibition against brewers also performing the distributor function like it does for winemakers and distillers. 235 ILCS 5/6-4(a). If the invocation of the label "three tier system" automatically implies a "strict separation" between the tiers, then the General Assembly's work in creating Section 5/6-4(a) is rendered meaningless. Indeed, the central issue in this case is that the Liquor Control Act affirmatively permits in-state brewers to act as distributors, which results in discriminatory treatment of out-of-state brewers under defendants' interpretation of the statute. Thus, as to brewers, the purported strict separation between producer and distributor in the Liquor Control Act is illusory. The district court, however, appears to accept defendants' unsupported view of Illinois' three-tier system as necessarily correct, without meaningful explanation. (SA34.)

In addition, the court indicates that the nullification remedy can be accomplished "simply by striking" the language affirmatively permitting brewers to distribute beer. (SA34.) The court, however, misunderstands the Liquor Control Act. To prohibit brewers from owning and operating distributors, the court would also have to undertake a far more intrusive change to the statute—it would have to add brewers to the list of manufacturers in 235 ILCS 5/6-4(a), that are prohibited from holding Distributor's and Importing Distributor's Licenses. By contrast, the extension remedy would require no change to the Liquor Control Act.

Third, the district court concluded that extension of the in-state benefit would "significantly expand the exception far beyond the three licenses that the Commission has granted in the past fifteen months and concessions (or 'mistakes') that the commission has made to Anheuser-Busch-affiliated entities since 1982." (SA34.) This conclusion is itself an error of law because it is contrary to the fact that the Liquor Control Act permits all in-state brewers to distribute beer, regardless of size and that the size and number of in-state brewers that currently are licensed to distribute beer is irrelevant to the scope of that legislative benefit. There is no indication in the statute (or otherwise in the record) that the General Assembly is biased against large brewers or against a large number of brewers distributing beer in Illinois. The court even recognized the fallacy of its own conclusion when adjudicating the constitutional issue in this case. (SA25.) In rejecting the contention that "AB Inc.'s 'size and significant market presence * * * would be a fundamental alteration to the three-tier system,'" the district court stated:

> This argument fails to address the fact that the Liquor Control Act permits *all* in-state brewers to hold Distributor's and Importing Distributor's Licenses, not just small in-state brewers, and prohibits *all* out-of-state brewers from holding Distributor's and Importing Distributor's Licenses.

(*Id.* (emphasis in original).) But, in the remedy phase of the case, the district court appears to have turned around and accepted defendants' unsupported view of the Liquor Control Act as necessarily correct, despite the provisions of the Liquor Control Act.

In concluding that extension of the in-state benefit would "significantly expand the exception beyond the three licenses that the Commission has granted in the past fifteen months and concessions (or 'mistakes') that the commission has made to Anheuser-Busch-affiliated entities since 1982," the district court also relied on clearly erroneous factual findings. There is no evidence in the record that the "three currently licensed craft brewers" are the only in-state brewers who have been granted Distributor's Licenses in the past 70 years or that AB Inc. is the only out-of-state brewer to have been issued a Distributor's License since 1982. To the extent that the record speaks to this fact at all, it indicates to the contrary in that during the period from 1982 through 2005 other out-of-state brewers, such as Miller Brewing Company, also were permitted to hold Distributor's and Importing Distributor's Licenses. (A 22, A74-76.)

iii. The district court relied on a clearly erroneous factual finding in concluding that extension would require more significant regulatory efforts for Illinois.

The third and final of the court's considerations that led it to conclude that the nullification remedy is appropriate is based on a clearly erroneous factual finding. The district court found that "extending the self-distribution privilege to out-of-state producers also would require more significant efforts in regard to the State's licensing, enforcement, and tax collection scheme for beer than withdrawing the privilege from in-state producers." (SA34.) However, there is no record evidence to support this statement, let alone to show the degree of those additional efforts. The lack of any record evidence on this point is

particularly striking in this case: AB Inc. or its affiliates have operated distributorships in Illinois for nearly 30 years and the defendants offered *no evidence* of any increased regulatory efforts that were required, or of any regulatory problems that were created as a result.

In fact, when adjudicating the constitutional issue in this case, the district court itself recognized this argument as purely speculative:

> Defendants next argue that 'it is more difficult for state regulatory agencies with limited budgets and resources to exert control over out-of-state licenses' and that 'there is an increased risk of tax evasion when a producer and distributor affiliate.' . . . As with Defendants' first argument, Defendants fail to cite record evidence for this proposition.

(SA26.) The court further rejected this argument by noting that "post-acquisition CITY Beverage would remain subject to local regulatory control as an in-state operation and thus Illinois' regulatory control over CITY Beverage would not change." (SA26 n.14.) Finally, the district court recognized that in rejecting the same tax collection and enforcement argument in the "legitimate local purpose" phase of *Granholm*, the Supreme Court "found it to be of particular importance" that the Twenty-first Amendment Enforcement Act gives state attorneys general the power to sue alcohol producers in federal court to enjoin violations of state law. (SA26 & n.14 (citing *Granholm*, 544 U.S. at 292).) The court held that defendants in this case did not explain why the Twenty-first Amendment Enforcement Act "would be ineffective to exert regulatory control over entities that are not local." (SA26 & n.14.)

These facts noted by the district court remained true at the remedy phase and required the same conclusion. It was clearly erroneous for the

district court to conclude that regulatory enforcement concerns justified the nullification remedy.

iv. The district court abused its discretion in ruling that the amendment to the Liquor Control Act enacted in response to *Granholm* is not relevant to the intent of the General Assembly.

With respect to the Liquor Control Act, the General Assembly already has voiced a clear preference for extension to out-of-state manufacturers of the in-state benefit, if required to choose. After the Supreme Court decided *Granholm* in 2005, the Illinois General Assembly amended the Liquor Control Act for the purpose of conforming to the *Granholm* decision certain direct shipment provisions relating to wine. 235 ILCS 5/6-29(a)(1) (2007) (noting that the "intent" of the section is to be "in conformance with the United States Supreme Court decision decided on May 16, 2005 in Granholm v. Hearld." [sic]). The Liquor Control Act was amended to "authorize direct shipment of wine by an out-of-state maker of wine *on the same basis permitted an in-state maker of wine. . . .*" *Id.* (emphasis added). This is powerful evidence that the General Assembly would prefer extension, rather than nullification, where the application of the Liquor Control Act violates *Granholm.*

The district court, however, acted unreasonably in affording no weight to the General Assembly's statutory amendment with respect to the wine shipper's provision. First, the amendment is probative of the General Assembly's preference to extend the in-state distribution right, as it is the clearest and most recent expression of its views generally as to permitting out-of-state alcohol beverage manufacturers to distribute in Illinois. Most

importantly, this statutory provision demonstrates that the General Assembly prefers to continue to promote in-state alcohol manufacturers, rather than bar all alcohol manufacturers, if required under *Granholm* to choose between the two.

Given the court's disregard for the provisions of the Liquor Control Act that permit all brewers to own or operate a distributor, the court's "minimum damage" analysis was a purely predictive exercise about how the General Assembly would act if faced with the district court's choice between extension and nullification. In attempting to make an educated guess about how the General Assembly would act if presented with this choice, it was manifestly unreasonable for the district court to ignore this important evidence of how the General Assembly acted when faced with a strikingly similar scenario. There was no rational basis to not afford some weight to this fact and the court's failure to do so thus constitutes an abuse of discretion.

The court declined to consider the General Assembly's *Granholm* amendment on the tenuous grounds that, because in-state brewer Big Muddy obtained a distributors license in June 2009, the General Assembly would not have been aware at the time it passed the amendment that in-state brewers were distributing beer. (SA at 29.) But, the record is actually silent as to whether any in-state brewers held distributors' licenses at the time of the amendment, and, thus, the district court's factual premise is in error. More importantly, the General Assembly is presumed to understand the provisions of the statute and thus it is irrelevant whether in-state brewers were taking

advantage of certain provisions at the time the General Assembly amended the law.[6]

* * *

In sum, even accepting that the court was forced to adopt defendants' view that the Liquor Control Act prohibits out-of-state brewers from owning or operating an Illinois distributor, the district court's imposition of the nullification remedy must be reversed. If the district court had properly performed the "minimum damage" analysis, it would have determined that "extension" of the in-state benefit was the appropriate remedy. Accepting the framework of the district court's analysis, the significant duration of the in-state distribution right actually strongly favors extension. The General Assembly's amendment to the wine-shipper provision following *Granholm* only reaffirms this conclusion. This Court should therefore reverse the district court's imposition of the nullification remedy and extend ("reinstate") to out-of-state brewers the same right to own or operate an Illinois beer distributor afforded to in-state brewers under the Liquor Control Act.

CONCLUSION

For the reasons stated herein, the district court abused its discretion in determining the proper remedy for defendants' constitutional violation.

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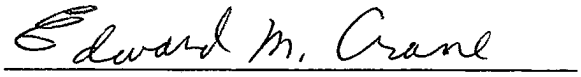
[6] The reason that the General Assembly took action with respect to winemakers, but not with respect to brewers in response to *Granholm* is logically explained by understanding that the General Assembly had not previously attempted to discriminate against out-of-state brewers. As explained in this brief throughout, the Liquor Control Act permits all brewers to distribute beer.

Accordingly, this Court should reverse that portion of the Sept. 3 Order that nullifies provisions of the Liquor Control Act, such that no brewer may distribute beer in Illinois, and reform the remedy to extend ("reinstate") to out-of-state brewers the same right to own or operate an Illinois beer distributor afforded to in-state brewers under the Liquor Control Act. This Court should enter plaintiffs' proposed form of injunction to accomplish as much. (Docket No. 28, Exhibit A.)

Dated: January 21, 2011

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because it contains 13,895 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, with 12 point font in the body of the brief and 11 point font in footnotes and Bookman Old Style font.

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel for Plaintiffs-appellants certifies that all materials required by Circuit Rules 30(a) and (b) are included in the appendix.

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CIRCUIT RULE 31(e) STATEMENT

Pursuant to Circuit Rule 31(e), counsel for Plaintiffs-appellants certifies that PDFs of those appendix materials provided by scanning paper documents are unavailable in non-scanned PDF format.

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CERTIFICATE OF SERVICE

Edward M. Crane, an attorney, hereby certifies that on January 21, 2011, he caused true and correct copies of the foregoing to be served on the following counsel for defendants via hand delivery:

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