Nos. 10-3298, 10-3570

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

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| ANHEUSER-BUSCH, INC. and WHOLESALER EQUITY DEVELOPMENT CORPORATION,<br>Plaintiffs-Appellants,<br>and<br>CITY BEVERAGE-ILLINOIS, L.L.C., CITY BEVERAGE L.L.C., CITY BEVERAGE-MARKHAM L.L.C., CHICAGO DISTRIBUTING L.L.C., SD OF ILLINOIS, INC., and DOUBLE EAGLE DISTRIBUTING COMPANY,<br>Plaintiffs,<br>v.<br>STEPHEN B. SCHNORF, JOHN M. AGUILAR, DANIEL J. DOWNES, SAM ESTEBAN, MICHAEL F. MCMAHON, MARTIN MULCAHEY, DONALD O'CONNELL, Commissioners of the Illinois Liquor Control Commission, in their official capacities, and RICHARD R. HAYMAKER, Chief Legal Counsel of the Illinois Liquor Control Commission, in his official capacity,<br>Defendants-Appellees. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.<br><br>No. 10 cv 1601<br><br>The Honorable ROBERT M. DOW, Jr., Judge Presiding. |

# BRIEF OF DEFENDANTS-APPELLEES

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases*** Page(s)

***Statutes***

## JURISDICTIONAL STATEMENT

The jurisdictional statement of plaintiffs Anheuser-Busch, Inc. and Wholesaler Equity Development Corp. ("WEDCO") (sometimes collectively "Anheuser-Busch") is not complete and correct. The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. Anheuser-Busch's complaint, filed pursuant to 42 U.S.C. § 1983, challenged the constitutionality, under the Commerce Clause, the Due Process Clause, and the Contracts Clause of the U.S. Constitution, of Illinois' policy of allowing in-state beer-producers, but not out-of-state beer-producers, to be beer distributors. (1/21.)[1]

This Court has jurisdiction under 28 U.S.C. § 1291 of Anheuser-Busch's appeal pursuant to its November 3, 2010 notice of appeal, but not pursuant to its October 1, 2010 notice of appeal. On September 3, 2010, the district court granted partial summary judgment, ruling that Illinois' policy of allowing only in-state beer producers to be beer distributors violates the Commerce Clause and ordering the termination of distribution rights for all beer producers. (SA 1-38.) Anheuser-Busch's October 1, 2010 notice of appeal sought review of this decision. (120/1-2.) However, the district court did not enter a Rule 54(b) finding, and nullifying the Act's provisions allowing in-state brewers to sell beer to retailers does not constitute an interlocutory "injunction" appealable under 28 U.S.C. § 1292 (a)(1). See *Matter of City of Springfield, Ill.*, 818 F.2d 565, 567 (7th Cir. 1987).

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[1] References to record materials identify documents by their corresponding number on the district court's docket (including hyphenated numbers for exhibits, e.g., "26-2"), followed by the relevant pages or other relevant information (e.g., "7/12-15" refers to Document 7 at pp. 12-15). References to materials in the appendix to Anheuser-Busch's brief begin with the prefix "SA," and references to materials in Anheuser-Busch's separate appendix begin with the prefix "A."

On October 18, 2010, Anheuser-Busch voluntarily dismissed with prejudice its other constitutional claims (SA 40; 133/1-2), and on October 29, 2010, the district court entered a final judgment pursuant to Rule 58 limited to its rulings on the Commerce Clause claim (SA 40-41). Anheuser-Busch's November 3, 2010 notice of appeal (137/1-2) seeks review of the remedy included in that judgment, which is properly before this Court.

The Court should also be aware of events that may moot this appeal. As of May 25, 2011, both houses of the Illinois General Assembly had passed Senate Bill 754, which creates a new "craft brewer's license" for in-state and out-of-state beer producers whose annual production is less than 15,000 barrels (465,000 gallons), and who may then obtain approval from the Illinois Liquor Control Commission (the "Commission") to self-distribute up to 7,500 barrels of that production in Illinois. (The bill's text and related information is available on the General Assembly's website at *www.ilga.gov/legislation*, accessed May 24, 2011.) By its terms, this bill will take effect immediately if it becomes law and will eliminate any distinction between the distribution rights of in-state and out-of-state beer producers, which the district court found unconstitutional. At that time, the present appeal — involving only the remedy the district court chose to prevent that distinction — will become moot, and the district court's judgment should be vacated. See *Zessar v. Keith*, 536 F.3d 788, 793-95 (7th Cir. 2008); *Brooks v. Vassar*, 462 F.3d 341, 348-49 (4th Cir. 2006). Defendants will apprise the Court when this legislation takes effect.

## ISSUE PRESENTED FOR REVIEW

Whether the district court, after holding that Illinois' policy of allowing only in-state beer producers to distribute beer violates the Commerce Clause of the U.S. Constitution, acted within its discretion by ruling that the appropriate remedy is to deny, rather than to allow, distribution rights to both in-state and out-of-state beer producers.

## STATEMENT OF THE CASE

This appeal arises out of the district court's judgment that Illinois' policy of allowing only in-state beer producers to be beer distributors violates the Commerce Clause of the U.S. Constitution, and that the appropriate remedy for this violation is to deny all beer producers — both in-state and out-of-state — the ability to distribute beer in Illinois. In this appeal, Anheuser-Busch contests the district court's ruling solely on the remedy issue, which it claims represents an abuse of discretion.

## STATEMENT OF FACTS

### Introduction

On March 10, 2010, the Commission issued a unanimous declaratory ruling that under the Illinois Liquor Control Act of 1934 (the "Liquor Control Act," or "Act") an out-of-state beer producer, authorized to obtain a "non-resident dealer" license, may not be a beer distributor or have an ownership interest the holder of a beer distributor's license. (A 59-62.) Later that day, Anheuser-Busch filed this Section 1983 action alleging that the Act, as interpreted by the Commission, violates its rights under the Commerce Clause and other provisions of the U.S. Constitution. (1/16-17.) A month later Anheuser-Busch moved for summary judgment on its Commerce Clause claim. (28/1-5.) Ruling on that motion, the district court held that (1) Illinois' policy of allowing only in-state beer producers to obtain a beer distributor's license, and therefore to distribute their own product to retailers, violates the Commerce Clause (SA 1-27), and (2) the appropriate remedy for this violation is to deny, rather than to allow, distribution rights for all beer producers, without regard to their location (SA 27-35). Anheuser-Busch has appealed the district court's ruling on the remedy issue. (137/1.)

### Legal Framework and History of the Liquor Control Act

The Liquor Control Act, which was adopted shortly after passage of the Twenty-First Amendment and has since been amended multiple times (A 182-671), describes its purposes as protecting the "health, safety and welfare of the People of the State of Illinois" and promoting "temperance in the consumption of alcoholic liquors . . . by sound and careful control and regulation of the manufacture, sale and distribution of

alcoholic liquors." 235 ILCS 5/1–2. The Act regulates alcoholic beverages through a "three-tier" licensing system, pursuant to which the functions performed at each tier — production, distribution, and retail — requires separate licensing and compliance with regulations specific to that tier. (A 164-65 (par. 11); A 171 (par. 1); 235 ILCS 5/2–1, 5–1.) Subject to exceptions not relevant here, the Act states:

> No person shall manufacture, bottle, blend, sell, barter, transport, transfer into this State from a point outside this State, deliver, furnish or possess any alcoholic liquor for beverage purposes, unless such person has been issued a license by the Commission . . . .

235 ILCS 5/2–1 . The three main categories of alcoholic beverages regulated by the Act are spirits (defined as beverages containing "alcohol obtained by distillation," including "brandy, rum, whisky, gin, or other spiritous liquors"), wine, and beer, each of which is subject to certain unique provisions. 235 ILCS 5/1–3.02 to 1–3.04, 1–3.07 to 1–3.17, 5–1.

Before the creation in 1982 of the non-resident dealer's license (see below at 8-9), the three principal classes of licenses issued under the Act (listed in Section 5–1 of the current version of the Act) were for (I) manufacturers, including distillers, brewers, and, depending on their volume of production, wine manufacturers and wine makers (sometimes collectively "wine makers"); (ii) distributors and importing distributors (collectively, "distributors");[2] and (iii) retailers. See A 228; 235 ILCS 5/1–3.07 to 1–3.16, 5–1(a) (Classes 1, 3-8), (b), (c), (d). As it was in effect before 1982, Section 115(a) of Act

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[2] Under the Act, a person with a distributor's license, which permits the sale at wholesale of specified products in a designated geographic area, may automatically obtain an importing distributor's license for no additional fee. 235 ILCS 5/1–3.15, 1–3.16; 5–1(b), (c), 6–9; see also A 228.

(now Section 5–1(a)) stated that a "manufacturer's license" allowed the manufacture, importation in bulk, storage, and sale of alcoholic liquor to licensees within the State as authorized by the Act. (A 228.) As relevant here, Section 115(a) further stated that distillers and wine manufacturers could make sales and deliveries to importing distributors, distributors, and "to no other licensees"; that wine makers (who produce no more than 10,000 gallons) could make sales to "distributors in this State"; and that licensed brewers could make sales and deliveries to "importing distributors, distributors, retailers and to non-licensees" in accordance with the Act. (*Id.*) Section 121(a) further provided that a distributor's license could not be issued to licensed distillers, wine manufacturers, or their affiliates. (A 229-30.)

In 1979, the Illinois Attorney General issued an opinion in response to an inquiry by the Commission's Executive Director on the two following questions, among others:

- May a manufacturer of beer not licensed in Illinois bring beer into Illinois and warehouse it here . . . for subsequent resale to Illinois licensed distributors?
- 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?

(A 156-57.) On the first question, the opinion concluded that "a beer manufacturer must have a Class 3, Brewer's license, in order to sell beer to licensed distributors in Illinois." (*Id.*) On the second question, the Opinion concluded that a beer manufacturer outside the State may receive a distributor's license. (*Id.*) Elaborating, the Opinion stated that "a manufacturer outside the State must have a Class 3, Brewer's license, in order to bring beer into the State and to sell it," and that although the Act disallows the issuance

of distributor's licenses to distillers and wine manufacturers, no similar provision "prevent[s] a manufacturer of beer from receiving a distributor's, importing distributor's or foreign importer's license." (*Id.*)

In June 1981, the next General Assembly passed Public Act 82–606, which took effect at the beginning of 1982 and amended the Act by creating a new class of license for a "non-resident dealer" (sometimes referred to as an "NRD"). Pursuant to these amendments, Section 1–3.29 of the Act defines a non-resident dealer as a person that "exports into this State, from any point outside of this State, any alcoholic liquors for sale to Illinois licensed foreign importers or importing distributors," and further provides that a non-resident dealer license "shall be restricted to the actual manufacturer of such alcoholic liquors . . . or the duly registered agent of such manufacturer . . . ." 235 ILCS 5/1–3.29 .[3] Section 5–1(m) of the Act, as amended by Public Act 82–606, provides:

> A non-resident dealer's license shall permit such licensee to ship into and warehouse 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; . . . .

235 ILCS 5/5–1(m) .

Following creation of the non-resident dealer license, out-of-state beer producers received such licenses instead of brewer's licenses. Anheuser-Busch's Complaint describes the change as follows:

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[3] For convenience, references from here on are to the section numbers in the current version of the Act.

> Since 1982, . . . in-state brewers have obtained Brewer's Licenses and out-of-state Brewers have obtained [non-resident dealer] Licenses. The Brewer's License permits in-state Brewers to brew beer in Illinois and distribute beer to retailers in Illinois. The [non-resident dealer] license permits out-of-state Brewers to sell beer to wholesalers in Illinois.

(1/7 (par. 24), admitted at 25/6-7.)

In 1984, Public Act 83–1254 amended the Act's definition of a "distributor" to refer to "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 . . . ." 235 ILCS 5/1–3.15 ; see also A 363.

In 1994, the Illinois General Assembly adopted Public Act 88–535, which amended various provisions in the Liquor Control Act and the Illinois Beer Industry Fair Dealing Act (815 ILCS 720/1 *et seq.*), which regulates the relation between beer producers and distributors. Among other things, 88–535 amended Section 5–1(a) of the Liquor Control Act to require that a person holding a brewer's license also obtain a distributor's license to be authorized to make sales to retailers. 235 ILCS 5/5–1(a) ; see also A 388.

In 2000, the Commission issued Trade Practice Policy 39. (53-8/6; 91/63-64.) The published compilation of these Trade Practice Policies states that they "express the Commission's best decision on questions presented to it, given the facts and circumstances involved and the state of prevailing law a guideline for interpreting the Act." (91/19.) Trade Practice Policy 39 states the opinion of the Commission's Legal Division that a single legal entity cannot be issued "both an Illinois Distributor and Non-resident

dealer license." (91/63.) The stated basis for this opinion includes Sections 1–3.29 and 5–1(m) of the Act, which defines a non-resident dealer and identifies what a non-resident dealer license authorizes, and Section 1–3.15, which defines a distributor. (91/63-64.)

At about the same time that the Commission issued Trade Practice Policy 39, it issued letters to out-of-state beer producers (who held non-resident dealer licenses), including Miller Brewing Co., notifying them of the Commission's position that they could not continue to hold a distributor's license, and they then relinquished those licenses. (A 74-76.) For reasons that are not clear, Anheuser-Busch could not find such a letter in its files and may never have received one. (A 74-78, 84.)

**The Liquor Control Commission's Declaratory Ruling**

In early January 2010, the Commission was advised that WEDCO intended to purchase a 70% interest in CITY Beverage ("CITY"), a licensed beer distributor, which, when added to WEDCO's existing 30% interest, would make WEDCO the sole owner of CITY. (A 167 (par. 21).) Over the following weeks, the Commission's staff requested information about the ownership in WEDCO (68-11/2-3), and, promptly after being advised that WEDCO is a wholly owned subsidiary of Anheuser-Busch, Inc., Rick Haymaker, the Commission's Chief Legal Counsel, notified Anheuser-Busch that consummation of the proposed transaction would violate the Act. (A 10-11, 167-68 (par. 23).) Anheuser-Busch then postponed the closing of the contemplated transaction, and at Anheuser-Busch's request the Commission held an expedited, special session on March 2, 2010, to address the issue. (A 15, 18, 64-153; 168 (par. 24).)

At the Commission's special session, which all of its seven members attended (A 66), it heard from Mr. Haymaker, representatives of Anheuser-Busch, and various people involved in the industry (A 69-152). The Commission also received Mr. Haymaker's legal memorandum explaining his position, as well as Anheuser-Busch's 34-page Memorandum of Fact and Law, accompanied by voluminous attachments (A 25-57).

The comments included a description of the historically unique aspect of beer distribution which, in light of the perishable nature of the product, involved many local producers who distributed their own production in a limited geographic area (A 125-26); the Commission staff's issuance to Anheuser-Busch and renewal from 1980 to 2005 of a distributor's license for a given territory (A 86-89, 150-51); and the Commission's admission that it did not have a definitive explanation for doing so, which it attributed either to a mistake in the Act's application or to de facto grandfathering of Anheuser-Busch's rights predating the 1982 amendments to the Act (A 22, 77-78, 127, 143-44).

After taking the matter under advisement, the Commission on March 10, 2010, issued a two-part declaratory ruling. (A 59-62.) First, the Commission unanimously ruled that the Act "prohibits an Illinois license Non-resident dealer from possessing an ownership interest in a licensed Illinois distributor," and that Anheuser-Busch would be in violation of the Act if it or any affiliate "purchased any additional interest in CITY." (A 60.) Second, the Commission ruled, four-to-three, that in light of the "history and facts surrounding this case," including WEDCO's ownership of a 30% interest in CITY since 2005, the Commission would renew CITY's distributor's licenses "as currently owned," "absent any other disqualifying factors." (A 61.)

**District Court Proceedings**

Anheuser-Busch's complaint alleged that the Act, as interpreted by the Commission, "favor[s] in-state brewers over non-resident brewers" and thereby discriminates against interstate commerce in violation of "the Commerce Clause of the United States Constitution." (1/15 (par. 48).) In support of its motion for summary judgment, filed several weeks later, Anheuser-Busch submitted, among other items, affidavits describing its ownership of WEDCO, the formation of CITY in 2005 and the history of WEDCO's 30% ownership interest in CITY, and the proposed transaction pursuant to which WEDCO would acquire the remaining 70% of CITY. (A 3, 6.) Anheuser-Busch also submitted a transcript of the Commission's March 2, 2010 hearing. (A 64-153.)

The additional materials submitted in connection with the motion for summary judgment included the following evidence. Anheuser-Busch, which is the nation's largest beer producer, had annual Illinois sales in excess 100 million gallons. (86/3 (pars. 8-9); see also A 126.) Anheuser-Busch and MillerCoors together dominate the U.S. beer market, accounting for about 80% of total sales. (68-7/3, 16.) Decades after the last major Illinois-based brewery closed, the Commission in mid-2009 issued a distributor's license to Big Muddy, a craft brewer whose annual production is several thousand gallons, and a similar license was later issued to Argus, whose yearly production is less than 60,000 gallons. (86/2-3 (pars. 6-7).)[4]

[4] A distributor's license was also issued to Goose Island Brewing Co., which operates both a brewery and a brew pub, but does not use that license to make sales to retailers. (86/2 (par. 5).)

After briefing, the district court entered summary judgment in Anheuser-Busch's favor on the liability aspect of its Commerce Clause claim, and further held that the appropriate remedy was to deny all beer producers the ability to be or own a beer distributor or to sell beer directly to retailers. (SA 1-38.) Measured against the Commission's interpretation of the Act, the effect of this remedy was to eliminate the ability of in-state beer producers (holding a "brewer's license") to hold a distributor's license or self-distribute their product to retailers, rather than to extend that ability to out-of-state beer producers (holding a "non-resident dealer license").

In reaching its decision on the remedy issue, the district court applied the factors identified in *Heckler v. Mathews*, 465 U.S. 728 (1984), including, as relevant to this case, the intensity of Illinois' commitment to its policy of allowing in-state brewers to distribute beer, and the extent to which each of the alternative remedies would disrupt Illinois' statutory scheme. (SA 28-35.) Following *Heckler*'s terminology, the district court identified the two possible remedies to avoid an unconstitutional discrimination between in-state and out-of-state beer producers as "extension," which would "extend the in-state benefit to all brewers," and "nullification," which would "nullify[] the in-state benefit." (SA 28.) Quoting *Heckler*, the district court further noted that although "ordinarily extension, rather than nullification, is the proper course, the court should not, of course, use its remedial powers to circumvent the intent of the legislature." (SA 28-29, quoting *Heckler*, 465 U.S. at 739 n.5 (citations and internal quotation marks omitted).) Then, giving "due regard" to the Commission's construction of the Act, and citing with approval *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), in

which the Fourth Circuit applied the *Heckler* factors to a Commerce Clause challenge to North Carolina liquor laws, the district court concluded that all of the relevant considerations "point strongly in the direction of removing the exception for in-state brewers, rather than extending the exception for all brewers." (SA 31-33.) Elaborating, the district court stated that the remedy of denying distribution rights to all beer producers caused the "minimum damage" to Illinois' prevailing three-tier system, required the fewest changes to the Act's provisions, and avoided imposing additional "significant efforts in regard to the State's licensing, enforcement, and tax collection scheme." (SA 33-34.)

The district court also found unpersuasive Anheuser-Busch's argument that the General Assembly "expressed a clear preference for extension" when it amended Section 6–29 of the Act in 2008 to permit direct-to-consumer shipments of limited quantities of wine by out-of-state wine makers. (SA 29.)[5] The district court noted, in particular:

> The specific problem involving discrimination against out-of-state wineries was obvious in the wake of *Granholm*, and there is no evidence that the General Assembly even considered any existing or potential issues concerning brewers at that time. In enacting economic legislation, the General Assembly may consider one issue at a time, and there is no basis for concluding that it was doing more than that in amending Section 5/6–29. Moreover, at the time that the amendment was enacted, no in-state brewers had been cleared to self-distribute; the record

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[5] The prior version of Section 6–29 allowed such shipments only from States whose laws provided reciprocal rights to Illinois wine makers, 235 ILCS 5/6–29 (2006), and the amendment stated that its purpose was to conform to the Supreme Court's decision in *Granholm v. Heald*, 544 U.S. 460, 473 (2005), which indicated that such reciprocity provisions are just as unconstitutional as laws that allow only in-state wineries to make direct shipments to consumers. See Public Act 95–634, § 5.

> evidence is that the first such license was issued to Big Muddy in June 2009.

(SA 29.)

Finally, noting that the policy questions implicated by the remedy issue were ones preferably decided by the legislative branch, and that a legislative amendment that eliminated the Act's constitutional infirmity would not be limited to the two judicially available alternatives, the court entered a stay of its judgment until March 31, 2011 (which it later extended to May 31, 2011) to give the Illinois General Assembly an opportunity to address the problems raised by its judgment. (SA 35-37.) This appeal by Anheuser-Busch followed.

## SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it chose, as a remedy for Illinois' policy allowing only in-state beer producers to distribute beer, to deny, rather than to permit, distribution rights to all beer producers. As part of its analysis, the district court correctly treated Illinois law as distinguishing between in-state and out-of-state beer producers, with only the former being eligible for a brewer's license, and therefore also being eligible for a distributor's license. That is the most reasonable interpretation of the relevant statutory language, and the Commission's adoption of that interpretation after careful deliberation is entitled to significant weight. In addition, the remedy chosen by the district court, which terminates distribution rights for only two small in-state brewers, rather than giving all out-of-state beer producers the ability to distribute beer in Illinois, reflects an appropriate recognition of the relative weight of Illinois' strong commitment to its three-tier system for regulating the distribution and sale of alcoholic beverages, and its substantially weaker interest in allowing self-distribution by local beer producers.

## ARGUMENT

### I. The District Court Did Not Abuse its Discretion by Ending Illinois' Self-Distribution Privilege for In-State Beer Producers Rather than Requiring Illinois to Extend Such Rights to Out-of-State Producers.

As Anheuser-Busch acknowledged below (115/48), the district court's ruling on the remedy issue is reviewed under an abuse of discretion standard. See *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 434-35 (6th Cir. 2008); see also Pl. Br. at 52. The court did not abuse that discretion by ruling that the appropriate remedy for Illinois' policy of allowing only in-state beer producers to distribute beer is to eliminate that right so that no beer producers — in-state or out-of-state — may be a distributor and sell beer to retailers.

#### A. The District Court Correctly Treated Illinois Law as Allowing Self-Distribution Rights Only for In-State Beer Producers.

Anheuser-Busch vigorously argues that (1) Illinois law allows all beer producers — in-state and out-of-state — to be beer distributors; (2) the district court therefore made an error of law by treating Illinois law as prohibiting out-of-state beer producers from being beer distributors; and (3) it consequently committed an abuse of discretion by adopting a remedy that similarly denies out-of-state beer producers the ability to be a beer distributor and, according to Anheuser-Busch, thereby frustrates the intent of the Illinois legislature. (Pl. Br. at 24-47.) This argument proceeds from an incorrect premise, for the district court correctly treated Illinois law as allowing only in-state beer producers to be beer distributors and to sell beer to retailers in the State.

The content of state law presents a question of law, which this Court reviews *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). In this case, the

district court's ruling concerning the Act's meaning is supported by its text, as well as the significant deference owed to the Commission's interpretation.[6]

The starting point for interpreting an Illinois statute is its text, which should be given its plain and ordinary meaning, read in the context of the entire act where it appears. *Solon v. Midwest Med. Records Ass'n.*, 925 N.E.2d 1113, 1117 (Ill. 2010); *People v. Maggette*, 747 N.E.2d 339, 346 (Ill. 2001). If the statute's text is ambiguous, in the sense that it reasonably can be understood in more than one way, the court may consult extrinsic sources. *Solon*, 925 N.E.2d at 1117; *Maggette*, 747 N.E.2d at 346. Here, the only reasonable reading of the Act's text is that it allows in-state beer producers, but not out-of--state beer producers, to be distributors and to sell beer to retailers.

Illinois, like many states, has adopted a "three-tier system" of regulating the manufacture, importation, distribution and sale of alcoholic beverages. (A 164-65 (par. 11); A 171 (par. 1).) The Act further distinguishes between in-state producers (e.g., distillers, wine makers and brewers) and out-of-state producers by specifying that, while the former may obtain a manufacturer's license, the latter may obtain only a non-resident dealer's license. See 235 ILCS 5/1–3.07 to 1–3.12, 1–3.29; 5–1. Section 1–3.29 defines a non-resident dealer as a person who exports alcoholic beverages "into this

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6 Anheuser-Busch argues that the district court misapplied *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984), by reading it not only to foreclose any claim that state actors failed to conform their conduct to state law, but also to require adopting the Commission's interpretation of the Act in the remedy phase of the case. (Pl. Br. at 27-32.) Although some comments in the district court's opinion arguably suggest that it may have relied on *Pennhurst*, among other factors, in determining the content of Illinois law for purposes of formulating a remedy (SA 30, 34 n.16), that is immaterial because the content of Illinois law presents a legal question that the Court decides *de novo*.

State, from any point outside of this State, . . . for sale to Illinois licensed foreign importers or importing distributors." 235 ILCS 5/1–3.29. And while the provisions of the Act *defining* a manufacturer (including the sub-categories of distiller, wine maker, and brewer) include persons who produce alcohol either inside or outside the State, 235 ILCS 5/1–3.07 to 1–3.12, the provisions describing who is eligible to obtain a specific *license* make clear that a manufacturer's license (including a brewer's license) under Section 5–1(a) may be issued only to an in-state producer, and that an out-of-state producer must instead obtain a non-resident dealer license, 235 ILCS 5/1–3.29, 5–1(a), (m). Thus, Anheuser-Busch admits that, "[i]n 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" (Pl. Br. at 12), and that since that time "in-state brewers have obtained Brewer's Licenses and out-of-state Brewers have obtained NRD Licenses" and Anheuser-Busch "has held an Illinois NRD License" (1/7-8 (pars. 24, 27); see also A 140-41).

This distinction is significant, because although the Act states that a person with a brewer's *license* (i.e., an in-state beer producer) may sell beer not only to distributors but also to retailers (provided the licensee also obtains a distributor's license), 235 ILCS 5/5–1(a) (Class 3), it also states that a non-resident dealer license authorizes the sale of alcoholic beverages "to Illinois licensed foreign importers and importing distributors *and to no one else in this State*," 235 ILCS 5/5–1(m) (emphasis added). The plain meaning of these provisions, read together, is that out-of-state manufacturers with a non-resident dealer license who bring alcoholic beverages into Illinois, like Anheuser-Busch, may sell

those beverages only to distributors, not to retailers, and therefore may not themselves be distributors.[7]

Consistent with this interpretation, the Act defines a distributor as "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." 235 ILCS 5/1–3.15 (emphasis added). Thus, just as the Act's provisions relating to non-resident dealers provide that they may sell only to distributors or foreign importers, this provision reaffirms that a distributor must be someone "other than" a non-resident dealer.

Anheuser-Busch argues that the italicized portion of the above-quoted provision just clarifies that although distributors, manufacturers and non-resident dealers may all engage in certain common activities, a distributor is a person who does not do so in the *capacity* of a manufacturer or non-resident dealer. Any other interpretation of this section, Anheuser-Busch maintains, would be inconsistent with Section 5–1(a), 235 ILCS 5/5–1(a), which since 1947 has prohibited distillers and wine manufacturers, but not brewers, from selling directly to retailers. (Pl. Br. at 40.) But Anheuser-Busch exaggerates the significance of Section 5–1(a)'s limited allowance for a licensed "brewer" to sell *directly* to retailers. That is not the same as the activity of a "distributor" who,

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[7] Anheuser-Busch does not make the argument that, if Illinois law does not allow it to be a distributor or make sales to retailers, it may get around that prohibition by having a subsidiary hold a distributor's license. Such an argument, which is therefore forfeited, see *Firishchak v. Holder*, 636 F.3d 305, 309 n.2 (7th Cir. 2011), is without merit in any event, see, e.g., *Traffic Jam & Snug, Inc. v. Liquor Control Comm'n*, 487 N.W.2d 768, 770-72 (Mich. App. 1992); *Speck Restaurant, Inc. v. Oregon Liquor Control Comm'n*, 545 P.2d 601, 603 (Ore. App. 1976); see also *People v. Select Specialties, Ltd.*, 740 N.E.2d 543, 548 (Ill. App. 2000) (holding that Illinois Liquor Control Act prohibits what it does not expressly permit).

as specified in Section 1–3.15, engages in the "*resale or reselling* at wholesale" of alcoholic beverages. 235 ILCS 5/1–3.15 (emphasis added). Thus, Section 5–1(a)'s limited allowance for licensed brewers to sell directly to retailers is not inconsistent with Section 1–3.15, but merely reflects the distinct origins of the beer distribution business in a time when beer was subject to spoilage because it could not be refrigerated during travel over long distances and many local brewers delivered their product directly to their retail customers over a limited geographic area. See A 125-26.

Describing the Commission's above-described interpretation of the Act as "conjured up," "contrived," having "no basis in Illinois law," and a "fictional statutory scheme promulgated by defendants," Anheuser-Busch insists that the Act's text has "no ambiguity" and that its "plain language" leaves "no doubt" that "all brewers" may "hold distributors licenses." (Pl. Br. at 20, 26, 32, 35, 42, 43; see also *id.* at 29, 36-42.) This argument is unconvincing. In support of its position, Anheuser-Busch repeatedly, and misleadingly, uses the word "brewer" as if the Act made no distinction between persons *defined* as brewers and those *licensed* as brewers. Anheuser-Busch asserts, for example, that "[s]ince its inception in 1934, the Illinois Liquor Control Act has allowed *brewers* of beer to engage in wholesale distribution in Illinois" (Pl. Br. at 20, emphasis added); the amendments to the Act after 1979 "did not alter provisions of the statute that affect *brewers*' ability to continue to perform the distributor function" (*id.* at 12, emphasis added); and these amendments "did not add *Brewers* . . . to the list of manufacturers that were prohibited from performing the distributor function" (*id.* at 13, emphasis added); see also *id.* at 21-22, 25-26, 35. This seemingly intentional failure to recognize this clear

statutory distinction is telling because, although Anheuser-Busch fits within the Act's general *definition* of a brewer, it admits that since the Act was amended in 1982 to create the new non-resident dealer license it cannot hold an Illinois brewer's *license*, and instead has a non-resident dealer license because its produces beer *outside* the State. (Pl. Br. at 12; 1/7-8 (pars. 24, 27); see also A 140-41.) Consequently, Anheuser-Busch's *status* as a "brewer" does not give it the rights conferred by the Act on persons with a brewer's *license*. And to the extent Anheuser-Busch argues that the Act allows *licensed* brewers (i.e., in-state beer producers) to obtain a distributor's license, that argument merely reinforces the Commission's interpretation of the Act.

Anheuser-Busch likewise misses the mark when it repeatedly emphasizes the 1979 opinion by the Illinois Attorney General that the Act allowed both in-state and out-of-state beer producers to obtain a brewer's license. (Pl. Br. at 26, 37-38.) Again, this argument fails to take account of the significant change in the Act, enacted in the wake of this opinion, that created the new license for non-resident dealers, including all out-of-state manufacturers (like Anheuser-Busch) whose products are imported into Illinois for sale in the State, and that specify that a person with a non-resident dealer license may sell to "foreign importers and importing distributors *and to no one else in this State*." 235 ILCS 5/1–3.29, 5–1(m) .

Anheuser-Busch also reads too much into the later effort, which Anheuser-Busch itself was instrumental in defeating (A 133-34), to amend the Act to specifically prohibit out-of-state beer producers from holding a distributor's license. (Pl. Br. at 38.) Given the nature of the legislative process, however, the non-passage of amendatory legislation

is not probative of the statute's proper interpretation. *Gannon v. Chicago, M., St. P. & P. Ry. Co.*, 175 N.E.2d 785, 794 (Ill.1961); see also *United States v. Craft*, 535 U.S. 274, 287 (2002); *Castro v. Chicago Housing Auth.*, 360 F.3d 721, 728-29 (7th Cir. 2004).

Even assuming, however, that Anheuser-Busch's proposed reading of the Act were a reasonable one (which Defendants dispute), the district court properly gave substantial deference to the Commission's interpretation, reached "after considerable study of the issue" (SA 31), that it allows only in-state beer producers to be distributors.[8] Anheuser-Busch's contention that the Commission's interpretation deserves "no weight" (Pl. Br. at 35) is based on an incorrect view of the applicable law and an inaccurate version of the relevant facts.

Under Illinois law, the interpretation of an ambiguous statute by an agency charged with administering it is entitled to "'great weight.'" *Illinois Consol. Tel. Co. v. Illinois Commerce Comm'n*, 447 N.E.2d 295, 300 (Ill. 1983) (quoting *P.H. Mallen Co. v. Department of Fin.*, 25 N.E.2d 43, 45 (Ill. 1939)); see also *Vino Fino Liquors, Inc. v. License Appeal Comm'n of City of Chicago*, 914 N.E.2d 724, 732 (Ill. App. 2009). Consequently, "[a] court will not substitute its own construction of a statutory provision

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[8] Anheuser-Busch also suggests that the Court should reject the Commission's interpretation of the Act because it fails to avoid the constitutional infirmity on which it bases its dormant commerce clause claim. (See Pl. Br. at 34-35.) But the relevant provisions of the Act were passed at a time when Supreme Court precedent treated the Twenty-First Amendment as dramatically limiting, if not entirely eliminating, any dormant commerce clause restrictions on a State's ability to regulate the importation and distribution of alcohol within its boundaries. See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 584-85 (1986). There is no historical basis, therefore, for the notion that the General Assembly should be deemed not to have intended the Act to have a meaning that would render it unconstitutional only due to the *later* evolution of Twenty-First Amendment jurisprudence.

for a reasonable interpretation adopted by the agency charged with the statute's administration." *Church v. State*, 646 N.E.2d 572, 577 (Ill. 1995) (citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)); see also *Village of Broadview v. Illinois Labor Relations Bd.*, 932 N.E.2d 25, 32 (Ill. App. 2010); *Quality Saw & Seal, Inc. v. Illinois Commerce Comm'n*, 871 N.E.2d 260, 266 (Ill. App. 2007); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 840 N.E.2d 704, 709-10 (Ill. App. 2005). Consistent with these standards, the Illinois Appellate Court has held that "[t]he Illinois Liquor Control Commission's interpretation of the statute it was created to enforce is entitled to great weight." *Erfor Corp. v. State Liquor Control Comm'n*, 361 N.E.2d 776, 777 (Ill. App. 1977).

In addition, although deference to an administrative construction of a statute is most commonly applied to a construction that has been "consistently adhered to for a long period of time, . . . consistency and duration are not requisites for applying the rule" of deference. *Illinois Consol. Tel. Co.*, 447 N.E.2d at 300; see also *Quality Saw & Seal, Inc.*, 871 N.E.2d at 266; *Illinois Bell Tel. Co.*, 840 N.E.2d at 709. Thus, the rule requiring deference to an agency's interpretation of an ambiguous statute "holds true even if the agency only recently arrived at the interpretation." *Quality Saw & Seal, Inc.*, 871 N.E.2d at 266; see also *Illinois Consol. Tel. Co.*, 447 N.E.2d at 300-01; *Illinois Bell Tel. Co.*, 840 N.E.2d at 709; cf. *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399-400 (2008) (holding that agency staff's "uneven" implementation of relevant statutory provision did not prevent giving deference to agency's official position or demonstrate that this position, in effect for over five years, "was framed for the specific purpose of

aiding a party in this litigation").

Under principles of federalism, the deference owed to a state agency's interpretation of a state statute has at least as much force in federal court as the similar deference owed to a federal agency's interpretation of a federal statute, and this Court therefore should be "exceptionally reluctant to go against" the Commission's interpretation of the Act in the absence of any contrary Illinois case law. *Fidelity & Cas. Co. of New York v. Tillman Corp.*, 112 F.3d 302, 305 (7th Cir. 1997); see also *Eakin v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 875 F.2d 114, 117 (7th Cir. 1989); *Huggins v. Isenbarger*, 798 F.2d 203, 209 (7th Cir. 1986) (Easterbrook, J., concurring). Such deference to the Commission's interpretation of the Act is therefore warranted in this case and supports the conclusion that the Act does not permit out-of-state beer producers to be licensed beer distributors.

In support of its contrary argument, Anheuser-Busch makes much of the fact that, from the time of the 1982 amendments to the Act until 2005, it continued to receive a distributor's license in its own name. (Pl. Br. at 35, 41.) Anheuser-Busch overstates the significance of this circumstance, however, and further ignores the many other actions and statements by the Commission indicating that the Act did *not* authorize the issuance of such licenses. Among other things, in 2000 the Commission issued Trade Practice Policy 39, reflecting the considered position of its legal staff that out-of-state brewers and other producers may not be licensed distributors. (53-8/6; 91/63-64.) At about the same time, letters were sent to out-of-state brewers holding non-resident dealer licenses (including Miller Brewing Co., who apparently never used its distributor's license)

notifying them of the Commission's position that they could not continue to hold a distributor's license, and they then relinquished those licenses (although, for reasons that are not clear, Anheuser-Busch could not find such a letter in its files and possibly never received one). (A 74-78, 84.) The same position about the Act's meaning was maintained thereafter through the tenure of the Commission's chief legal counsel at the time, John Stanton, and by the Commission's current chief legal counsel, Mr. Haymaker. (A 18-23, 118.)

Even more significant, as the district court acknowledged (SA 31), is the unanimous position of the full Commission itself, after Anheuser-Busch squarely raised the issue and the Commission then conducted a public hearing at which Anheuser-Busch and other interested persons, including persons involved in the business for many years, had the opportunity to present their positions fully. Thus, whatever significance might otherwise attach to the actions of the Commission staff in issuing a distributor's license to Anheuser-Busch (but, after 2001, not to Miller and other out-of-state beer producers), which the Commission explained could have been due to a mistake by the staff (which processes thousands of license renewals each year) or some form of "de facto grandfathering" for Anheuser-Busch, which had an operating distributorship before the law was changed (A 77-78, 143), that significance is negated not only by the issuance of Trade Practice Policy 39, but even more significantly by the full Commission's unanimous current position, adopted after a complete airing of the issue.

In short, the district court correctly treated Illinois law as permitting only in-state beer producers (who may obtain a brewer's license), not out-of-state beer producers (who

may not obtain a brewer's license, but must instead obtain a non-resident dealer license) to be a licensed beer distributor.

### B. The District Court's Remedy Properly Respects the Illinois Liquor Control Act's Paramount Concern for Preserving the Three-Tier System of Alcohol Distribution.

Because, as explained above, Illinois law does not allow out-of-state beer producers to be distributors and sell beer directly to retailers, the district court's chosen remedy — terminating that ability for in-state brewers, whose numbers and production volume are dwarfed by those of out-of-state beer producers — represents a valid exercise of its discretion, as it preserves Illinois' strong commitment to the three-tier system and avoids the major disruption of Illinois' regulatory framework that extending distribution rights to all beer producers would entail. None of Anheuser-Busch's arguments defeats that conclusion.

The lion's share of Anheuser-Busch's contrary position is based on its erroneous contention that the Liquor Control Act allows it, as an out-of-state beer producer holding a non-resident dealer license, to be a distributor and sell beer to retailers. (Pl. Br. at 24-43.) Rejection of that contention thus goes a long way to negating its argument that the district court's remedy represented an abuse of discretion. And Anheuser-Busch's additional arguments for reversing the district court's remedy decision are equally unpersuasive.

As the district court correctly noted, *Heckler* points to several factors a court should consider when it invalidates a discriminatory burden or benefit and then must choose between eliminating the law's more favorable treatment for some persons or

extending that treatment to others. (SA 28-29.) *Heckler*, which involved an equal protection claim, initially quoted *Califano v. Westcott*, 443 U.S. 76, 89 (1979), which observed that "[i]n previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." *Heckler*, 465 U.S. at 739 n.5. The opinion in *Heckler* (which found no equal protection violation, and so did not have to address the remedy issue, 465 U.S. at 739 n.5), then continued:

> [T]he court should not, of course, use its remedial powers to circumvent the intent of the legislature, and should therefore measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

*Id.* (citations and internal quotation marks omitted).

The district court's decision is faithful to these principles as applied to the particular situation presented in this case. Thus, the district court appropriately concluded that denying distribution rights to all beer producers would cause the least disruption to Illinois' three-tier statutory scheme for regulating the sale of alcoholic beverages, require the fewest changes to the Act's provisions, and avoid imposing additional "significant efforts in regard to the State's licensing, enforcement, and tax collection scheme." (SA 33-34.)

Of paramount importance, as the district court properly recognized, is Illinois' strong commitment to the three-tier system. (SA 33-34.) Apart from the Act's self-distribution right for in-state brewers, its limited departures from that system involve on-site sales to consumers by brew pubs, wine makers, and craft distillers, and direct

shipments by wine makers of modest quantities of wine to consumers. 235 ILCS 5/1–3.33, 5–1(i), (n), 6–4(e), (g), 6–29. Those departures amount to a "drop in the bucket" compared to the volumes of alcoholic beverages passing through the three-tier chain of distribution. The same is effectively true for the provisions of the Act allowing in-state brewers to engage in self-distribution. As noted above (at 12-13), the combined production of the two craft brewers in Illinois who have engaged in such self-distribution (Argus and Big Muddy) represent a minute fraction of the total volume of beer sold annually in Illinois, and indeed is less than 0.1% of Anheuser-Busch's Illinois sales alone.

Anheuser-Busch insists, however, that the relevant criterion is not *how much* these craft brewers sell, but *how long* the Liquor Control Act has permitted in-state beer producers to distribute their own product, and that the district court therefore erred when it commented that Illinois' commitment to such self-distribution is not "deep or lasting." (Pl. Br. at 44-45.) Anheuser-Busch's argument strains to find error where none exists. When the General Assembly required out-of-state beer producers to obtain a non-resident dealer's license and sell their product only to a licensed distributor, the modern craft brewing movement had not begun, and no traditional in-state brewers remained. (A 125-26.) Thus, the fact that the statutory amendment that created non-resident dealer's licenses for out-of-state beer producers left intact the self-distribution privilege for in-state producers apparently reflected little more than a legacy from the days before the advent of beer distribution in refrigerated trucks, when all beer producers distributed their own beer in a limited geographic area around their brewing facilities (*id.*), not any strong commitment to maintaining such rights for potential

future in-state beer producers. And against this background, the district court correctly looked at the recency and modest extent of in-state brewers' *actual* use of those rights when balancing the potential elimination of those rights against the alternative of making self-distribution available to *all* out-of-state beer producers (including Anheuser-Busch, MillerCoors, and others), which would raise the prospect of effectively nullifying the three-tier system entirely for beer in Illinois.

Anheuser-Busch's contention that the evidence in the record does not affirmatively *disprove* the existence of more in-state brewers with distribution rights in recent years (Pl. Br. at 46) wrongly assumes that Defendants, not Anheuser-Busch, had the burden of proof regarding the extent of Illinois' residual commitment to allowing self-distribution by in-state brewers. To the extent Anheuser-Busch's position on the remedy issue would be strengthened by proof of more in-state brewers with distributor's licenses and more production by such brewers than the record shows, it had the burden to present such proof, and it cannot carry that burden by speculating about what other evidence on this issue might show.

Nor is there any real weight to Anheuser-Busch's contention that the Illinois General Assembly, when it amended Section 6–29 of the Act, generally "voiced a clear preference for extension to out-of-state manufacturers." (Pl. Br. at 52; see also *id.* at 54.) As noted above (at 14-15), the district court legitimately considered this amendment to be a limited, specific change in the Act intended to address the immediate problem presented by the Supreme Court's decision in *Granholm*, not some manifestation of a broader desire to abandon the three-tier system for every potential Commerce

Clause problem that might arise, regardless of its specific nature.

Anheuser-Busch finally complains that there is no actual evidence in the record to support the district court's conclusion that extending distribution rights to all out-of-state brewers would impose on Illinois authorities a greater regulatory burden to ensure compliance with the Act and the collection of applicable taxes. (Pl. Br. at 50-51.) But numerous cases have recognized the common-sense notion that the three-tier system helps ensure regulatory control, including the efficient collection of taxes. See, e.g., *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30 (1st Cir. 2007); *Beskind*, 325 F.3d at 516; *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1255-56 (W.D. Wash. 2005). Formal evidence on that point therefore was unnecessary to sustain the district court's conclusion.

At bottom, then, what this situation called for is exactly the type of balancing the district court engaged in, from which it concluded that the relevant considerations "point strongly in the direction of removing the exception for in-state brewers, rather than extending the exception for all brewers." (SA 31-33.) That conclusion is sound.

Embracing a similar analysis, which focused in particular on what remedy would inflict the "minimum damage" to a State's regulatory scheme, the Fourth Circuit in *Beskin* reversed the district court's decision to extend direct-shipment rights to all wineries, instead of nullifying the provisions of North Carolina's statute granting such rights only to in-state producers. 325 F.3d at 519-20. Summarizing its conclusion, the Court stated that it had "little difficulty in concluding that it causes less disruption to North Carolina's ABC laws to strike the [local preference provision] as unconstitutional

and thereby leave in place the three-tiered regulatory scheme that North Carolina has employed since 1937 and has given every indication that it wants to continue to employ." *Id.* at 519. Similar considerations justified the district court's corresponding conclusion here. See also *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n*, 463 F. Supp. 2d 1294, 1307 (W.D. Okla. 2006) (holding that "that it would be much less disruptive to Oklahoma's long-standing regulatory scheme to remove the exception to the three-tier system which is now unconstitutionally extended to in-state wineries, than it would be to extend the exception to all wineries"); *Costco Wholesale Corp.*, 407 F. Supp. 2d at 1254-56 (concluding, in light of Washington State's longstanding commitment to three-tier system, that appropriate remedy was prohibiting domestic producers from distributing directly to retailers rather than extending such distribution rights to out-of-state producers, which would "require more significant changes in the State's licensing, enforcement, and tax collection efforts for beer and wine than withdrawing the privilege from in-state producers").

The Fifth Circuit's decision in *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), on which Anheuser-Busch relies (Pl. Br. at 24), has limited persuasive value because it suggested that the choice of a remedy depends heavily on what relief the parties bringing the action requested. 336 F.3d at 407-09. That is not only contrary to *Heckler*, 465 U.S. at 739 n.5, but also invites ready manipulation of the litigation process to achieve a desired outcome. In any event, *Dickerson* affirmed the remedy adopted by the district court — nullification of statutory provisions that prohibited only out-of-state vintners from making direct shipments to consumers — based on its conclusion that the alterna-

tive would require it to "assume the mantle of super legislature, actively rewriting substantial portions" of the Texas statute. 336 F.3d at 409. By contrast, it is the remedy requested by Anheuser-Busch in this case, not the one the district court adopted, that would effect major revisions to the Illinois Liquor Control Act.

In sum, the district court did not abuse its discretion by adopting the remedy of disallowing self-distribution rights in Illinois to all beer producers — in-state and out-of-state — rather than giving such rights to all beer producers. That remedy should therefore be affirmed.

## CONCLUSION

For the foregoing reasons, the district court's ruling on the remedy aspect of this case should be affirmed.

Respectfully submitted,

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**Certificate of Compliance with**
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I certify that this brief complies with the type volume limitations set forth in Fed. R. App. P. 32(a)(7)(B), in that the text of the brief, including headings, footnotes, and quotations, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 8,478 words. In preparing this certificate, I relied on the word count of the WordPerfect X4 word processing system used to prepare this brief. I further certify that this brief complies with the type format requirements of Circuit Rule 32.

s/ *Richard S. Huszagh*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on May 25, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Richard S. Huszagh*