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

BRIEF OF THE ASSOCIATED BEER DISTRIBUTORS OF ILLINOIS AND MARIN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' BRIEF

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FED. R. APP. P. AND CIRCUIT RULE 26.1

DISCLOSURE STATEMENT

The undersigned, counsel of record for *amici curiae* Associated Beer Distributors of Illinois and Marin Institute, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

Associated Beer Distributors of Illinois and Marin Institute

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in party:

Not applicable.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

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INTERESTS OF *AMICI CURIAE*

Since 1939, the Associated Beer Distributors of Illinois ("ABDI") has served as the state membership organization of the beer wholesaling industry in Illinois. It presently represents over 60 licensed Illinois beer distributors. In 2008, direct sales by Illinois beer distributors reached $598 million dollars. Illinois beer distributors paid over $220 million dollars in wages. The total federal, state, and local consumption taxes paid in Illinois on the sale of beer is over $511 million dollars.

For the past 25 years, Marin Institute has been a nationally-recognized authority on alcohol industry practices and the public health harm caused by underage drinking and adult overconsumption of alcohol. Marin Institute monitors and exposes the alcohol industry's harmful actions related to products, promotions, and political influence and supports communities in their efforts to reject these damaging activities. In 2009, Marin Institute published a report entitled "Big Beer Duopoly: A Primer for Policymakers and Regulators," which detailed the public health and safety threats posed by consolidation and vertical integration in the beer industry.[1]

This case implicates the essential interests of ABDI, its members, and the Marin Institute. The extension remedy sought by Appellants threatens to dismantle Illinois' three-tier regulatory system. Through this system, Illinois has addressed several fundamental interests: preventing vertical integration of the liquor industry, inhibiting overly aggressive sales and marketing, moderating consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of Prohibition.

[1] This *Amici Curiae* Brief filed in support of the Appellees was authored solely by counsel for Associated Beer Distributors of Illinois and Marin Institute. This Brief was funded by Associated Beer Distributors of Illinois and National Beer Wholesalers Association.

The District Court was correct in adopting the remedy of nullification and denying all brewers the right to self-distribute. This remedy, consistent with the intent of the General Assembly, is least disruptive to Illinois' liquor regulatory system. The decision preserved the integrity of the State of Illinois' three-tier system and prevented the world's largest brewer from vertically integrating the beer industry in Illinois.

ARGUMENT

I. Introduction.

This case arises out of a declaratory judgment action filed by Appellant Anheuser-Busch, Inc. ("ABI") *et al*. challenging the Illinois Liquor Control Commission's ("ILCC") interpretation of the Illinois Liquor Control Act of 1934 ("Act") as a violative of the Commerce Clause, Procedural Due Process, and the Contract Clause.[2] Judge Dow issued his Memorandum and Order dated September 3, 2010 (hereinafter "Memorandum & Order"). In pertinent part, Judge Dow held that, under the dormant Commerce Clause as construed by *Granholm v. Heald*, 544 U.S. 460 (2005), "Illinois may not permit in-state brewers to distribute their products directly to retailers while withholding that privilege from out-of-state retailers." (SA 37, Short Appendix to Appellant's Brief). Concluding under *Heckler v. Mathews*, 465 U.S. 728 (1983) that the remedy most consistent with the intent of the Illinois General Assembly was restriction, rather than extension, Judge Dow denied Appellants' request to extend the self-distribution privilege to Appellants and out-of-state brewers and instead held that no brewer may self-distribute in Illinois. In deference to the General Assembly's ultimate authority over Illinois public policy, Judge Dow stayed his decision to afford the legislature the opportunity to fashion its own remedy. The <u>sole</u> issue on appeal is whether Judge Dow abused his discretion in so ruling.

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[2] Shortly after filing their Notice of Appeal, Appellants dismissed with prejudice their Contract and Due Process claims.

Subsequent to Judge Dow's ruling, the General Assembly passed Senate Bill 754. This Bill would permit small brewers, defined as those producing 15,000 barrels of beer or less, whether located in or out-of-state, to self-distribute their own beer. All other brewers would be prohibited from self-distribution. If signed by the Governor, Senate Bill 754 would moot this appeal.

II. **Standard of Review**.

As acknowledged by the parties and noted by the District Court, "fashioning the appropriate remedy in this case lies within a court's 'zone of discretion'" Memorandum & Order (SA 38, Short Appendix to Appellant's Brief) (citing to the June 16, 2010 transcript at 48 and to Appellants' Reply Brief at 14-15), and consequently is subject to review only for abuse of such discretion. Under the abuse of discretion standard of review, "the relevant inquiry is not how the reviewing Judges would have ruled if they had been considering the case in the first place, but rather, whether any reasonable person could agree with the District Court." *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir. 1984). In light of Judge Dow's careful analysis, it is clear that there was no abuse of discretion and that the District Court imposed the correct remedy.[3]

III. **Nullification v. Extension**.

A. ***Heckler v. Mathews***.

Contrary to Appellants' assertion, *Heckler v. Mathews*, 465 U.S. 728 (1983) does not reflect a preference for extension rather than nullification. Indeed, citing to a Brandeis opinion,

[3] In an effort to avoid this highly deferential standard of review, Appellant mischaracterizes Judge Dow's exercise of discretion in adopting the remedy of nullification as an "error in statutory interpretation." Appellant's Brief at 23. ABI does not and cannot cite any case holding that a decision like that reached by Judge Dow constitutes such an error of law. Judge Dow ruled that *Pennhurst v. Halderman*, 465 U.S. 89 (1984), required, as ABI insisted, that he must assume for purposes of litigation, that the LCC interpretation correctly stated Illinois law. In the absence of such a holding, there would be no constitutional violation and no federal jurisdiction.

the *Heckler* Court noted that "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id*. at 740 (emphasis in original); *Iowa-De Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931). The Court further observed that "we have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others." *Id.* at 738, n. 8.

The *Heckler* Court also stated:

> Although the severability clause would prevent a court from redressing the inequality by increasing the benefits payable to appellee, we have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Welsh v. United States*, 398 U.S. 333, 361, 90 S.Ct. 1792, 1807, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in the result). *See Califano v. Westcott*, 443 U.S. 76, 89-91, 99 S.Ct. 2655, 2663-2664, 61 L.Ed.2d 382 (1979).

Heckler v. Mathews, 465 U.S. 728, 738 (1984). In footnote 5, immediately following the language upon which Appellants rely, the *Heckler* Court stated that "the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature.'" *Id*. at n.5 (quoting in part *Califano v. Westcott*, 443 U.S. 76, 89 (1979)).

Heckler thus stands for two propositions. First, the selection of the appropriate remedy (nullification v. extension) is left to the discretion of the trial court. Second, the remedy selected should respect and be consistent with the "intent of the legislature." *Heckler v. Mathews,* 465 U.S. 728, 738-39 n.5 (1984).

B. <u>Legislative intent regarding three-tier law</u>.

Judge Dow correctly observed that the judicial function was not to choose the best policy, but the one most likely to reflect the choice that the legislature would have made if it had been compelled to do so. (SA 35, Short Appendix to Appellant's Brief). The "minimal damage" approach, articulated by the *Beskind* Court and accepted by Judge Dow, is an application of this approach. *See also Costco*, 407 F.Supp. 2d 1247, 1256 (D. Wash. 2005) (cited in Judge Dow's decision). "Minimal damage" is another articulation of the presumption that the legislature would have chosen to keep the bulk of its statutory regime and would have abandoned what was less important to it.

A review of the general structure and history of Illinois' alcoholic beverage regulatory system makes clear that nullification rather than extension is the remedy most consistent with the legislative goal to effectuate "sound and careful control and regulation of alcoholic beverages" and the remedy least disruptive to the regulatory structure. Specifically, the three-tier system prohibits vertical integration and mandates separation of the alcoholic beverage industry into separate tiers: suppliers, distributors, and retailers. The system facilitates the enforcement of trade practice rules by which the state restricts the pursuit of the profit motive in order to limit the stimulation of alcoholic beverage sales which would otherwise threaten temperance. The aim is moderation in the sale of alcoholic beverages to promote moderation in their consumption. States regulate to control certain aggressive competitive practices, including, particularly, tied-house arrangements, that had characterized pre-Prohibition alcoholic beverage distribution and sale.[4]

[4] As described in <u>Toward Liquor Control</u>, written as a text for state legislatures considering post-Repeal regulation: "The tied house system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales." <u>R.B. Fosdick & A.L. Scott, Toward Liquor Control</u>, at 43 (1933).

As recently expressed by Michele Simon, Research and Policy Director of Marin Institute, in her testimony to the House Judiciary Committee:

> Maintaining the integrity of the three-tier alcohol control system is necessary for insuring the health and safety of the public. The three-tier system insures that alcoholic beverages are distributed and sold in a responsible manner . . . . The three-tier system creates a structure that ensures that the State has adequate oversight of alcohol sales. It is in this way that the three-tier system helps prevent aggressive and abusive marketing and sales techniques, as well as encourage moderation.

Testimony of Michele Simon. *See* http://judiciary.house.gov/hearings/pdf/Simon100929.pdf.

Illinois introduced a three-tier system for the sale of spirits and wine in 1947. It did not do so with beer at that time probably because beer was still a very local industry with scores of breweries selling their own beer directly to local retailers and consumers. In 1982, however, Illinois clearly extended the three-tier system to beer with the creation of the non-resident brewer's license. At that time, the brewing industry was rapidly consolidating, a process which has continued to the extent that ABI now accounts for the sale of over 37% and MillerCoors accounts for the sale of over 44% of all beer sales in Illinois. Nationally, ABI accounts for approximately 50% and MillerCoors accounts for approximately 30% for all beer sales. In other words, two large brewers now account for over 80% of all beer sales in the United States. (Marin Duopoly Report) (R. 804-816, Appendix to Defendant's Response to Plaintiff's Motion for Summary Judgment). Between 1982 and 1994 a series of legislative amendments to the Illinois Liquor Control Act fortified the three tier system (Public Acts 83-1254 and 96-1367). In 1993, when Illinois licensed brew-pubs, it did not permit them to self-distribute, a manifestation of this policy of restriction applied even to small - and in-state - brewers.

The system created by Illinois assures that beer must be sold to in-state distributors who are licensed and subject to audit and enforcement by the Commission. Illinois has created a transparent and accountable distribution system. It provides for retailer independence by prohibiting brewer ownership of retailers and by the insertion of distributors as a buffer between brewers and retailers. Brewers may not utilize their dominant market power to encourage excessive retail capacity, excessive sales stimulation, and cutthroat competition, all to the detriment of the state's goal of promoting temperance through maintaining orderly and well-regulated alcohol markets.[5]

Illinois can only investigate and enforce these provisions, of course, within its own borders. Appellants have informed the ILCC that it already can own and operate distributorships in other states. *Irene Bahr, LCC hearing* (A101). Illinois has no way of determining whether Appellants' owned and operated distributors in one or more of these states is offering special terms to a national chain retailer in return, at least in part, for privileged access to its retail

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[5] Illinois regulates to maintain a stable and orderly marketplace, which permits a transparent and accountable one. TPP-26 refers to "The Commission's inherent power to manage an orderly system of alcoholic beverage manufacture, delivery and sale." The Liquor Control Commission has acted repeatedly to assure that the prohibition against discrimination between retailers, against giving things "of value," can be enforced effectively. These rules are intended to be strict: "all 'of value' activities between the tiers are prohibited unless, specifically allowed..." TTP-2-11.

Illinois has many detailed procedures to assure that no retailers receive special benefits from distributors, whether initiated by distributors or by the retailers themselves. See in TTP-2(7). TTP-5-IV is replete with specific rules to assure that the law limiting credit to 30 days is enforced and enforceable, keeping sellers from providing something "of value" which would destabilize the market. TPP-9 and TPP-10 define "of value" with regard to signage. TPP-11 provides rules to control coupons and rebates to prevent "of value" violations.

Importantly, in TPP-11- IV, the Commission recognized that its "of value" rules might restrict supplier participation in the programs of "certain large retailers" who "wish to have a uniform coupon/rebate program which is regional, state-or-nation-wide." TPP-25 gives rules with regard to Stocking, Rotating and Resetting of Products. TPP-28 details Employment/Ownership Arrangements between Classes of Licensees, again to enforce the "of value" regulations, as does TPP-32, on Breaking; Replacement of Damaged or Defective Products and TPP-32 on Indirect Payments through Third-Party Arrangements (R. 1068-1116).

accounts in Illinois.[6] Policing such serious violations becomes impossible when the 'subterfuge' is implemented on a multi-state basis. Effective control would be put at risk.

All the history ABI submits of legislation, LCC actions, a report of the Attorney General, or any other events occurring before 1982 is completely irrelevant. It was in that year that the LCC considered the legislature to have prohibited self-distribution by out-of-state breweries and that Wine & Spirit Distributors of Illinois ("WSDI") and ABDI submit that the legislature prohibited self-distribution by all breweries. The "grandfathering" of ABI's distributor license after 1982 is also irrelevant; there is no due process claim before the Court. [7]

Judge Dow appropriately compared the importance and depth of commitment of the two policies in terms of their duration, scope, and disruption to the rest of the regulatory system if one or the other were abandoned. As Judge Dow correctly observed: "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." (SA 34, Short Appendix to Appellant's Brief).

Judge Dow, in addition, correctly rejected ABI's argument that Illinois' post-*Granholm* direct shipping statute reflects a general policy of leveling up. (SA 29, Short Appendix to

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[6] In rejecting an assertion that distributors pricing policies "can never constitute a violation" of Illinois law, the Illinois Supreme Court underscored the importance of such "of value" supervision of prices:
"A distributor might furtively grant large discounts to impermissibly influence retailers and therefore violate section 6-5. In this respect, we agree with the courts in that '[i]n some circumstances a pricing arrangement might be used as a 'subterfuge' to disguise a grant of financial assistance given to create a tied house, or to obtain an exclusive sales agreement.'" *Ted Sharpenter, Inc. v. Illinois Liquor Control Commission*, 119 Ill. 2d 169, 178 (1987) (reh. den. 1988) (referencing to *National Distributing Co. v. United States Treasury Dept*., 626 F.2d 997 (D.C. Civ. 1980).

[7] Whatever the extent of the "grandfathering" of ABI's previous activity, what ABI is now attempting is much larger in scale. ABI is also not the only large brewer that would be affected if its interpretation of Illinois law were accepted. Furthermore, any purported "grandfather" rights that ABI may have had were clearly negated by the 2005 surrender of its distributor license as a result of the sale of its distributorship. *See, 41 News, Inc. v. County of Lake*, 2010 U.S. Dist. Lexis 17448, 8-9 (N.D. Ill. February 24, 2010); *Wine & Spirits Merchandisers, Inc. v. Illinois Liquor Control Commission*, 104 Ill. App. 377, 379-380 (1st Dist. 1982); H*arris v. Alcoholic Beverage Control Appeals Board*, 61 Cal 2d 305 (1984).

Appellant's Brief). The legislature did not opt for a general extension of direct shipping privileges to all wineries, whether in or out of state, but only to small wineries producing no more than 25,000 gallons. Such an act cannot support an inference that the legislature would want to dismantle its regulatory system and permit all brewers, of any size, to self-distribute.

As interpreted by the LCC, the Liquor Control Act reflects a strong commitment to prohibiting out-of-state self-distribution – which really reflects the fear that large brewers, all of whom happen to be out of state, could threaten the effectiveness of state trade practice regulation if they were allowed to self-distribute. This policy goes back at least prior to 2001 when Miller surrendered its distributor license. Furthermore, this policy was, as the District Court observed, the subject of a lengthy adversarial review by the LCC at the hearing requested by ABI. The LCC concluded this reexamination by reaffirming its interpretation of state law and its view that this policy is important.

The commitment to permitting self-distribution by small, in-state brewers is much weaker. The LCC has only very recently permitted self-distribution by two very small in-state breweries, in 2009, in one instance, and in 2010 in the other. The policy is of very brief duration. Furthermore, this policy has not been carefully reviewed or evaluated in any public hearing.

As Judge Dow noted, the prohibition against self-distribution is focused on the threat to control posed by large brewers. The prohibition has an important purpose. It prevents the world's largest brewer from implementing a strategy of vertical integration which would undermine regulatory control and market stability. If such control and stability is weakened, the sale of liquor cannot be effectively constrained, which would ultimately threaten temperance and public health and safety. In contrast, the policy objectives underlying the short-lived law which permitted two tiny breweries to self-distribute are not clear. The state's stake in this law, as implemented to date by the LCC, appears trivial; its decision almost off-handedly reached.

Permitting these two tiny brewers to self-distribute has no effect on reducing ABI's sales in Illinois, nor was it conceivable that it might do so. This belies any suspicion that the law was intended to shift the proportion of sales between in-state and out-of-state products. The prohibition against self-distribution exists in most states and becomes increasingly important as brewer consolidation continues. Judge Dow correctly determined that the three-tier distribution system was the more important policy to the legislature and that leveling down would cause less damage to the totality of the Illinois regulatory system.

C. <u>Stay of Order</u>.

In deference to "the importance of 'comity and harmony' in understanding the delicate task that federal courts from time to time must perform in conforming state law to constitutional command," Judge Dow took one further step – he stayed enforcement of his Order in order "to provide an opportunity for the General Assembly to act on this matter if it so desires." (*Memorandum & Order* (SA 34 & 35, Short Appendix to Appellant's Brief). In doing so, he specifically noted the special status of state liquor regulations which implicate "legislative judgments with respect to temperance, public safety, taxation, licensing, and consumer protection, which courts are not as well equipped to make." *Id*. at 35.

D. <u>No abuse of discretion</u>.

Other courts have recognized that restriction, rather than extension, is normally the preferred remedy in the event of a constitutionally impermissible exception to the three-tier system being granted only to in-state producers. The general default position with alcoholic beverage regulation is restriction, not permission.

In *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, 463 F.Supp. 2d 1294 (2006), the U.S. Court for the Western District of Oklahoma struck down state constitutional and statutory provisions permitting Oklahoma winemakers, but not out-of-state winemakers, from selling direct to retail. The Court stayed its Order so that the people of Oklahoma and the Legislature had an opportunity to fashion a remedy for the constitutional violation. If they failed to act, however, the Court made clear that it would impose nullification as the appropriate remedy.

> Finally, to make sure there is no uncertainty regarding the nature of any future judicial remedy which the court will put in place should the Oklahoma Legislature fail to act, the court states here its conclusion 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. *See, Id.* (finding that it would cause less disruption to the Washington scheme to withdraw the limited exception to Washington's long-standing three-tier system than would be caused by significantly expanding the exception, although the court stayed its judgment to allow legislation). This conclusion regarding the best judicially crafted remedy, however, is of no force or effect at this time.

Id. at 1307.

Similarly, in *Costco Wholesale Corp v. Hoen*, 407 F.Supp. 2d 1247 (2005), the U.S. District Court for the Western District of Washington struck down statutes permitting domestic producers of alcohol, but not out-of-state producers, from selling direct to retail. The trial court explained its adoption of the nullification remedy.

> In this case, the remedy proposed by Defendants would appear to create the "minimum damage" to the existing statutory and regulatory scheme in Washington. Defendant's remedy would require portions of only two statutory provisions (RCW 66.24.170(3)) and (RCW 66.24.240(2)) to be invalidated. By contrast, a proposed order submitted by Costco would require six statutory provisions to be amended in order to extend the self-distribution privilege to out-of-state producers. (RCW 66.12.030(2), 66.28.070(1), 66.24.170(3), 66.24.206; 66.24.240(2), and 66.24.270). Defendant's proposed remedy would remove a limited exception to Washington's long-standing three-tier system, while Plaintiff's proposed remedy would significantly expand this exception. Extending

> ***1256** the self-distribution privilege to out-of-state producers would also 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.

Id. at 1255-1256. Like the Oklahoma Court, and the Court below, the *Costco* Court also stayed its Order so that the Legislature could fashion its own remedy.

Judge Dow discussed at length and cited with approval the Fourth Circuit case of *Beskind v. Easley*, 325 F.3d 506 (4^{th} Cir. 2003). In *Beskind*, the District Court struck down as violative of the commerce clause North Carolina laws which permitted in-state wineries to ship direct to consumers but prohibited out-of-state wineries from doing so. The District Court imposed the remedy of extension to rectify the constitutional violation. On appeal, the Fourth Circuit reversed on the issue of remedy and adopted nullification holding as follows:

> "Finally, we can accept a presumption that North Carolina would want to uphold and preserve all of its ABC laws against constitutional challenges. Accordingly, when presented with the need to strike down one or more of those laws as unconstitutional, we can assume that North Carolina would wish us to take the course that least destroys the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment. *See North Dakota*, 495 U.S. at 433, 110 S.Ct. 1986 (plurality opinion) ("Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly"). And as a matter of comity and harmony, we are duly bound to give effect to such a policy, disturbing only as much of the State regulatory scheme as is necessary to enforce the U.S. Constitution. When applying this "minimum-damage" approach, we have little difficulty in concluding that it causes less disruption to North Carolina's ABC laws to strike the single provision-added in 1981 and creating the local preference-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.

As noted by the Fourth Circuit, the very first provision of North Carolina liquor laws, (§18B-100), explicitly states that the ABC laws "shall be liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter." The Illinois statutory proscription of all commercial activity in alcoholic beverages that is not explicitly licensed similarly reflects a default position of restriction rather than permission. Leveling down conforms to this legislative policy.

This Court is to review the trial court's determination of which of the two constitutionally incompatible choices – permitting self-distribution for in-state brewers, but prohibiting it for out-of-state ones – would have been the one chosen by the Illinois legislature if it had known that this was impermissible: that it only could choose either a three-tier system or self-distribution for both in- and out-of-state brewers. The trial court correctly asked which choice is more compatible with the overall regulatory structure and causes less damage to it. The only question is whether this constitutes an abuse of discretion. Clearly it does not.

ABI is not arguing that the Illinois legislature would choose, if compelled, to extend self-distribution. Instead, ABI argues that the legislature actually did choose to permit self-distribution by all brewers. This argument must be rejected. ABI's entire dormant commerce clause claim was predicated on the polar opposite argument, namely that Illinois law <u>permits</u> in-state brewers to self-distribute but prohibits out-of-state brewers from doing so. Federal court jurisdiction is based exclusively upon federal question jurisdiction to consider the dormant commerce clause claim. If, as ABI now contends, there is no discrimination embodied in Illinois law between in-state and out-of-state brewers, then there would be no constitutional claim and no basis for federal jurisdiction. Accordingly, whether on the basis of *Pennhurst* or estoppel, ABI cannot argue, in challenging the law's constitutionality, that Illinois law discriminates between in-state and out-of-state brewers and then argue, in the remedy phase, that it does not. Judge Dow correctly rejected this sophistry and conducted the appropriate inquiry under *Heckler*.[8]

Three different interpretations of Illinois law were presented to Judge Dow. ABI argued that state law had always permitted both in- and out-of-state brewers to self-distribute. WSDI, supported by ABDI, maintained that self-distribution was prohibited for both in - and out-of-state brewers. The LCC declared that self-distribution was permitted for in-state brewers, but prohibited for out-of-state brewers. Only this last interpretation gave rise to a federal constitutional claim. The interpretations of ABI, WSDI, and ABDI only gave rise to state statutory claims. Such claims were closed to the federal courts by *Pennhurst.* Because ABI's constitutional claim, and the Court's jurisdiction, is predicated on the interpretation of Illinois law propounded by the LLC, ABI's inconsistent interpretations and its argument for extension must be rejected.

In footnote 16 of its Opinion, the Court pointed out that Appellants were asserting a different and inconsistent interpretation of the Act with respect to remedy. Judge Dow made clear that Appellants had been "hoist on their own petard." He took issue with Appellants' assertion that they did "not seek to modify any provisions of the Liquor Control Act (and consequently that accepting their remedy will not do violence to the statute) . . ." (SA 34, Short Appendix to Appellant's Brief).[9] Most importantly, he was persuaded that Appellants'

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[8] If ABI's statutory interpretation were adopted, it would have the effect of negating the court's basis for jurisdiction. In these circumstances, if there were to be any reconsideration of the meaning of Illinois law, such as ABI invites this Court to undertake, it should be undertaken by the state court, as both *Pennhurst* and *Pullman* instruct. In addition, any reexamination of Illinois law must also consider the argument, presented below by WSDI and supported by ABDI, that the Illinois regulatory regime in fact prohibits all brewers self-distribution.

[9] Appellants may be judicially estopped from arguing inherently contradictory interpretations of the Act in the constitutional and remedial phases. As noted by the Seventh Circuit:

"proposed remedy would significantly expand the exception far beyond the three licenses that the Commission has granted in the past fifteen months" and thereby create the "disruption to the statutory scheme" that *Heckler* analysis is intended to avoid.

The only question before Judge Dow was the nature of the hypothetical severability clause. Would the Illinois legislature have chosen to preserve the permission granted to in-state brewers by extending it to out-of-state ones? Or, to the contrary, would the legislature have chosen to maintain the separation of the tiers by extending the self-distribution prohibition for out-of-state brewers to in-state ones?

Heckler's call to consider "the intensity of commitment to the residual scheme" and "the degree of potential disruption of the statutory scheme," more simply put, asks the court to determine which of the constitutionally incompatible provisions the legislature would have given up if it had understood that it could not have its cake and eat it too. Was the benefit provided to in-state entities so important that the legislature would have preserved it by extending the benefit to out-of-state entities as well? On the other hand, would such an extension so damage the overall regulatory structure so much that the legislature, to the contrary, would have determined to withdraw the benefit from in-state entities rather than it make it generally available.

> Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982). It is to be applied where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum designed for suitors seeking justice," *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953), to prevent litigants from "playing fast and loose with the courts." *Id*. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895). The doctrine of estoppel is intended to protect the courts rather than the litigants, so it follows that a court, even an appellate court, may raise the estoppel on its own motion in an appropriate case. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1168 n.5 (4th Cir. 1982).

Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990). In *Cassidy*, the Court held that application of the doctrine is appropriate "where a clearly inconsistent position is taken" and where the party to be estopped convinced the court of its position. Both requirements appear to be satisfied here.

Judge Dow decided that the legislature would have chosen to make the self-distribution ban universal. His decision was not an abuse of his discretion. It was indeed correct.

IV. **Conclusion**.

For the foregoing reasons, *Amici* request that the District Court decision be affirmed in all respects.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,265 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) 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 in 12-point Times New Roman.

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CERTIFICATE OF SERVICE

The understand attorney hereby certifies that on June 1, 2011, I caused the foregoing Brief of the Associated Beer Distributors of Illinois and Marin Institute as *Amici Curiae* in Support of Appellees' Brief and a digital version of the Brief to be served via the CM/ECF system to all parties of record.

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