No. 15-1213

IN THE

Supreme Court of the United States

DEERE & COMPANY, CNH AMERICA LLC, AND AGCO CORPORATION,

Petitioners,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

On Petition for a Writ of Certiorari to the New Hampshire Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATION OF EQUIPMENT MANUFACTURERS, FARM EQUIPMENT MANUFACTURERS ASSOCIATION, AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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May 19, 2016

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Association of Equipment Manufacturers ("AEM") is a non-profit trade association comprised of more than 850 member companies engaged in the manufacture and sale of mobile, portable, and hand-held equipment used in the construction, agriculture, equipment, forestry, and mining industries and products and services related to these industries. AEM is committed to, *inter alia*, enhancing the competitiveness of manufacturers by shaping an environment conducive to economic growth and to increasing understanding amongst policymakers, the media, and the general public regarding the vital role of equipment

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certify that no counsel for any party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of *amici curiae's* intention to file this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

manufacturing to the economic future and standard of living in the U.S. and worldwide.

The Farm Equipment Manufacturers Association ("FEMA") is comprised of over 740 manufacturers, suppliers, and distributors of specialized agricultural equipment. The vast majority of FEMA's members are multi-generational, family-owned and operated businesses. FEMA provides member businesses operating in the agricultural industry with leadership to further enhance business opportunities, and acts as the voice of a specialized industry that strives to bring choice, value, and innovation to agriculture. As part of this mission, FEMA monitors legislation affecting its members and the relationship with their authorized dealers and weighs in, where appropriate, through legislative submissions.

Most of the equipment manufacturer members of NAM, AEM, and FEMA distribute their products through independent dealers located throughout the world. Over the decades, these manufacturers and their dealers have developed solid business relationships that have stood the test of time and the marketplace. The dealer agreements that have evolved are a function of the type of products, the nature of the local markets, and the combined experience of the contracting parties. They are freely and voluntarily signed by the parties. They are tailored to benefit both parties, with a goal to maximize customer service and promote inter-brand competition, that is, the ability of a manufacturer and its dealers to compete against other equipment brands. The contracts memorializing these relationships reflect the parties' combined experience in markets as unique and varied as the products they sell.

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this Court in cases to ensure that the government is not permitted to unfairly deprive citizens of their contractual and private property rights.[2]

Amici's interest here concerns the unprecedented intrusion of protectionist state legislation into the private contractual relationships between manufacturers and their dealers. This case presents an issue of critical importance and national scope to *amici* and their members—can a state legislature enact a law that retroactively rewrites or essentially voids existing dealer agreements, long after the ink has dried, in order to "level the playing field" between two contracting businesses? *Amici* are alarmed by the New Hampshire Supreme Court's willingness to tolerate retroactive legislation that unquestionably frustrates the reasonable expectations of private parties who have entered into otherwise binding, perfectly legal contracts. Because the decision below goes to the heart of the long-standing debate over what role the Contracts Clause continues to play in protecting economic liberty, *amici* believe that certiorari is warranted to prevent the Clause from being rendered a dead letter.

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[2] *See, e.g., DIRECTV v. Imburgia*, 136 S. Ct. 463 (2015); *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

Laws such as New Hampshire's, which expanded coverage of motor vehicle dealer franchise law to agriculture, construction, forestry, and lawn and garden equipment with little concern for the differences between the industries, exist solely for the benefit of in-state dealers. It was only a matter of time before other industries followed the blueprint drafted by automobile dealers so that they, too, could wrap themselves in the comforting blanket of protectionist state legislation. *Amici* write to advise the Court of the nature and effect of these restrictions on manufacturers, consumers, and the national economy.

SUMMARY OF THE ARGUMENT

With the stated purpose of "leveling the playing field," and at the behest of the New Hampshire Automobile Dealers Association, the New Hampshire Legislature passed Senate Bill 126 in 2013. This act dramatically expanded the scope of New Hampshire Revised Statutes Chapter 357-C—the state statute governing the relationship between motor vehicle manufacturers and their dealers—by amending the definition of "motor vehicle" retroactively to include farm, forestry, industrial, construction, and yard and garden equipment. At the same time, the New Hampshire Legislature repealed Chapter 347-A, the state statute that had governed in a far more limited manner the relationships between equipment manufacturers and dealers for nearly 20 years and upon which equipment manufacturers and dealers had negotiated their contractual expectations. In doing so, New Hampshire has shoe-horned "equipment" into a significantly more complex and ill-fitting regulatory scheme that has come under increasing criticism from economists, industry professionals, and regulators as outdated, anti-competitive, and harmful to consumers.

The Legislature's bald and unsupported assertion that equipment dealers, like automobile dealers before them, require protection from unidentified "abusive" practices by manufacturers was accepted with nary a critical glance by the New Hampshire Supreme Court in upholding legislation intended to "level the playing field." In lieu of any meaningful review of Senate Bill 126's substantial impairment to existing contractual relationships, the New Hampshire Supreme Court seems to have assumed that *any* stated public purpose was sufficient to justify the retroactive evisceration of all existing manufacturer agreements with New Hampshire equipment dealers.

The court thus left standing protectionist legislation designed solely to benefit equipment dealers at the expense of equipment manufacturers and the public, justified almost entirely by a so-called imbalance of bargaining power. That alleged imbalance has been used historically to justify motor vehicle dealer protection laws, but as discussed in Section I, *infra*, that alleged imbalance has not existed in the motor vehicle industry in decades. Rather than restrict the reach of these laws given the questionable justification for their continued existence, the New Hampshire Legislature has expanded this obsolete regulatory scheme to cover industries with no more in common with passenger vehicles than wheels, motors, and transmissions.

In light of these realities, retroactive expansion of Chapter 357-C to cover equipment manufacturers yields no public benefit and serves no legitimate policy objective. Rather, as discussed in Section II, *infra*, numerous academic and governmental economic studies, including those by the Federal Trade Commission ("FTC"), have confirmed that statutes like

Chapter 357-C serve only to augment dealer profits while potentially reducing warranty coverage and other consumer benefits due to higher costs. It is little wonder then, that the FTC and prominent economists question why automobile dealers require special protection in the form of anti-competitive protectionist legislation that drives up costs for manufacturers and consumers while shielding dealers from ordinary and healthy market forces. The New Hampshire legislature has now retroactively extended this flawed and harmful regulatory regime to even more industries and manufactured goods through Senate Bill 126.

As discussed in Section III, *infra*, this case presents the Court with an opportunity to ensure that statutes impairing contracts are subject to meaningful review that analyzes not only the ostensible public purpose or local benefit, but also the extent of the imposed restrictions. If allowed to stand, the New Hampshire Supreme Court's dismissal of the parties' Contracts Clause challenge will foreclose manufacturers' ability to contest such protectionist legislation in any meaningful way.

ARGUMENT

I. THE EXTENSION OF PROTECTIONIST MOTOR VEHICLE DEALER STATE LEGISLATION TO UNRELATED EQUIPMENT INDUSTRIES UNCONSTITUTIONALLY UPENDS EXISTING CONTRACTUAL RELATIONSHIPS

The commercial relationship between manufacturers of "farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts"

and their dealers has long been governed by privately-negotiated agreements.[3] Since 1995 in New Hampshire, those relationships were also governed by a limited statutory framework that largely left the contracting parties to their own negotiations. That changed dramatically with the passage of Senate Bill 126 in 2013, which repealed the existing statute—specifically tailored for the equipment manufacturer-dealer relationship—and expanded the definition of "motor vehicle" in the New Hampshire motor vehicle franchise statute to cover, among other things, such diverse products as forklifts and mining scalers.

Under the Contracts Clause, a state regulation that substantially impairs a contractual relationship "must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem."[4] Senate Bill 126 cannot meet this requirement because, among other reasons, it thrusts all manner of equipment upon a statutory framework based on outdated notions of a so-called imbalance of bargaining power between automobile manufacturers and dealers. This alleged "imbalance," which has been used historically to justify traditional motor vehicle dealer protection laws, no longer exists, and no evidence suggests that such an imbalance has *ever* existed with regard to equipment manufacturers. Despite the lack of any actual "social or economic problem" with regard to equipment manufacturers and dealers, Senate Bill 126 subjects equipment manufacturers and their dealers to a fundamentally flawed and outdated

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[3] N.H. Rev. Stat. Ann. § 357-C:1(I).

[4] *Energy Reserves Grp. v. Kan. Power & Light*, 459 U.S. 400, 411-412 (1983)(internal citation omitted).

system of automobile dealer regulation with which it has little shared history and few common attributes. By doing so, Senate Bill 126 compounds already existing market distortions while simultaneously and unconstitutionally upending long-standing contractual relationships between equipment manufacturers and dealers.

The unique history of automobile dealer regulation and lack of comparable experience by equipment manufacturers demonstrate that Senate Bill 126 has no significant and legitimate public purpose.

Beginning in the 1940s and 1950s, auto "dealers who had made large investments [in establishing their dealerships] became concerned that they would be at the mercy of their affiliated manufacturers—especially with few automobile manufacturers to turn to as alternatives."[5] "Dealers turned to policymakers about what they believed were abusive and coercive practices by manufacturers, and the regulation of auto distribution ensued,"[6] sweeping aside automobile manufacturers' and dealers' contractual relationships.[7] At the time many of these automotive prohibitions were originally enacted, motor vehicle manufacturers were large, powerful, and concentrated. The "Big Three" (Ford, General Motors, and Chrysler)

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[5] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Opening Remarks at the Fed. Trade Comm'n Workshop, Auto Distribution: Current Issues and Future Trends 4 (Jan. 19, 2016) [hereinafter FTC Workshop], https://www.ftc.gov/system/files/documents/public_events/895193/auto_distribution_transcript.pdf.

[6] *Id*.

[7] *See* Daniel A. Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, Univ. of Mich. Law & Econ. Research Paper No. 15-009 2 (Feb. 1, 2015), http://ssrn.com/abstract=2566436.

dominated the U.S. market, accounting for the vast majority of new motor vehicle sales.[8] The typical motor vehicle dealer, on the other hand, was perceived to be a small business with limited financial resources. Since then, "despite dramatic changes that have swept across other retail sectors," the "current system of auto distribution . . . has remained remarkably unchanged."[9]

For example, the motor vehicle manufacturing industry is far less concentrated today than it was in the mid-20th century.[10] The market share of U.S. vehicle sales of the Big Three domestic manufacturers fell from more than 80% in the 1970s to approximately 41% in 2014 alone.[11] "Inter-brand rivalry among manufacturers fostered a competitive climate for dealers, where many dealers now have franchise agreements with multiple manufacturers and

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[8] Francine Lafontaine & Fiona Scott Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSPECTIVES 233, 243 (2010); Crane, *supra*, at 2.

[9] Ramirez, *supra*, at 2.

[10] Thomas B. Leary, Comm'r, Fed. Trade Comm'n, *State Auto Dealer Regulation: One Man's Preliminary View*, Speech at the Int'l Franchise Ass'n 34th Annual Legal Symposium (May 8, 2001), https://www.ftc.gov/public-statements/2001/05/state-auto-dealer-regulation-one-mans-preliminary-view; Mark Cooper, Consumer Fed'n of Am., *A Roadblock on the Information Superhighway: Anticompetitive Restrictions on Automotive Markets* 28-32 (Feb. 2001), http://www.consumerfed.org/pdfs/internetautosales.pdf.

[11] Lafontaine & Morton, *supra*, at 243-44; Ass'n of Global Automakers & Am. Int'l Auto. Dealers Ass'n, *The Redefined American Auto Industry: The Growing Impact of International Automakers and Dealers on the U.S. Economy 2015* 5, https://www.globalautomakers.org/system/files/redfinedautoindustry.2015.spreads.pdf.

relatively fewer dealerships are dependent on a single manufacturer than in the past."[12]

Further, the scale, strength and economic resources of motor vehicle dealers have increased significantly in recent decades. As a result, the putative public-interest rationale for ever-expanding dealer "protection" laws—that dealers should be favored because they are small businesses or because they lack bargaining power—bears no relation to the reality of how automobiles are distributed and sold in the United States today.[13] Despite this rebalancing of economic strength, at the behest of politically powerful state dealer groups and associations, dealer protection laws have expanded exponentially to cover virtually every aspect of the manufacturer-dealer relationship in an increasingly one-sided way.[14]

While automobile dealer protection statutes serve no rational economic purpose, this case does not represent a wholesale attack on their constitutionality. Rather, this case addresses Senate Bill 126's

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[12] Gerald R. Bodisch, Econ. Analysis Grp., U.S. Dep't of Justice, Competition Advocacy Paper #EAG 09-1 CA, *Economic Effects of State Bans on Direct Manufacturer Sales to Car Buyers* 8 (May 2009), https://www.justice.gov/sites/default/files/atr/legacy/-2009/05/28/246374.pdf.

[13] *See Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2618, 2629 (2013) (cautioning that legislation cannot stand forever on the basis of "conditions that originally justified the[] measures," particularly where continued exercise of governmental authority is based on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs").

[14] *See* Jerry Ellig and Jesse Martinez, Mercatus Ctr. at George Mason Univ., *State Franchise Law Carjacks Auto Buyers* 1-2 (Jan. 20, 2015), http://mercatus.org/publication/state-franchise-law-carjacks-auto-buyers.

substantial retroactive impairment of equipment manufacturer's preexisting contractual rights for no legitimate public purpose.

In enacting Senate Bill 126, the New Hampshire Legislature plainly ignored the significant differences between the equipment and automobile industries. Equipment manufacturers have never enjoyed the concentration of market power that was once exhibited by the traditional motor vehicle manufacturing sector. Historically, they have been far more dispersed and varied than their automotive counterparts, as reflected by the hundreds of *amici* members that serve such varied industries as construction, agriculture, utility, industry, forestry, and mining. By their very nature, these companies largely serve the commercial sector and cater to specialized vocational applications, rather than the retail customer base shopping for personal use transportation that dominates the automotive industry.

Even the predominantly retail sectors of the equipment industry share few common attributes with the automotive industry. For instance, unlike cars, yard and garden equipment is typically sold alongside competitors' products by numerous dealers and retailers within a single market, and often through "big box" or multi-purpose hardware stores. This vibrant competitive environment provides customers with greater choices and lower prices. These pro-consumer benefits will be lost, however, if incumbent dealers are able to impede the entry or relocation of competitors, insist on artificially high warranty reimbursement rates, and resist termination even when appropriate.

Nonetheless, under the same guise of "protecting" dealers from unidentified harm and "level[ing] the

playing field,"[15] these protectionist statutes have been expanded to retroactively cover equipment dealers, which, as far as the record reflects, have experienced *no* history of "abuse" at the hands of manufacturers. Expanding that one-sided legislation to equipment manufacturers in New Hampshire rewrites their existing contracts by voiding key provisions related to franchised product lines, warranty reimbursement, and termination, among others, and inserting in their place statutory provisions completely at odds with the history of the parties' relationships. This "adjustment of the rights and responsibilities of contracting parties" is not based upon "reasonable conditions" and is not of a "character appropriate" to the purported public purpose for the legislation, particularly as applied to the equipment industry.[16]

For example, post-Senate Bill 126, manufacturers of wheel loaders must now assign "relevant market areas" ("RMA") to dealers, cannot themselves compete with a dealer in an RMA, and cannot add a competitive dealership within an RMA unless authorized in limited circumstances identified in the statute.[17] Excavator dealers may now unilaterally declare the price at which they will be paid by manufacturers for warranty parts and labor, a rate that by statute is calculated based on the average retail price the dealer charges for non-warranty work, thus incentivizing

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[15] *See* N.H. H. Rec. No. 43, at 1473 (May 22, 2013); N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013).

[16] *Energy Reserves Grp.,* 459 U.S. at 412 (internal quotations omitted).

[17] *See* N.H. Rev. Stat. Ann. §§ 357-C:3, III(k), (l); 357-C:9.

dealers to increase their retail rates for consumers.[18] Backhoe manufacturers must now give dealers notice of their intent to terminate a dealership and 180 days to remedy the breach, even when the breach is material or the result of fraud.[19] Even then, dealers are permitted to challenge any termination before the Motor Vehicle Industry Board, a process that takes months, and sometimes years, in the context of auto dealership terminations.[20] Manufacturers that market equipment to different industries and for different applications may no longer limit the product lines made available to specific dealers.[21] Instead, the manufacturer's entire "line make" must be made available to each and every dealer, regardless of the needs of the markets, the dissimilarities in the products or the capabilities of the dealer.[22]

The expansion achieved through Senate Bill 126 retroactively eviscerates existing contracts between equipment manufacturers and dealers and forces equipment manufacturers and dealers into a framework entirely foreign from that which has governed their relationships for decades. In the absence of meaningful review of the reasonableness and necessity of Senate Bill 126 as required under the Contracts Clause, such protectionist state laws will continue to proliferate across other industries and into other states.

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[18] *See id.* at § 357-C:5, II(b).

[19] *See id.* at § 357-C:7, II(a), (b).

[20] *See id.* at § 357-C:12.

[21] *See id*. at § 357-C:3, III(q).

[22] *Id.*

II. THE FEDERAL TRADE COMMISSION AND PROMINENT ECONOMISTS RECOGNIZE THAT PROTECTIONIST LEGISLATION LIKE SENATE BILL 126 IS ANTI-COMPETITIVE AND HARMS CONSUMERS.

Make no mistake: the New Hampshire statute is protectionist legislation designed to further the interests of a small group of New Hampshire constituents, not protect the general welfare of its citizens. The end result of that effort was to interject clambunk skidders and combines into the same regulatory framework governing the relationships between sport-utility vehicle and compact car manufacturers and dealers in the name of "protecting" dealers from harm at the hands of manufacturers.

The New Hampshire Supreme Court recognized that "[t]he requirement of a legitimate public purpose [under a Contracts Clause analysis] guarantees that the State is exercising its police power, rather than providing a benefit to special interests."[23] In order to survive a Contracts Clause analysis, the statute must be enacted to address a "broad and general social or economic problem."[24] Where it does not, the legislation cannot pass constitutional muster. Here, the very regulatory scheme the New Hampshire Legislature has foisted upon the equipment industry is neither "reasonable" nor "necessary" as required under the Contracts Clause,[25] and it has come under increasing criticism by regulators and economists for its special

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[23] *See Deere & Co., et al. v. State*, 130 A.3d 1197, 1207 (N.H. 2015) (quoting *Energy Reserves Grp.*, 459 U.S. at 412).

[24] *Energy Reserves Grp*., 459 U.S. at 411-412.

[25] *Id.* at 412-413.

interest nature.[26] According to growing economic consensus, such remedial franchise laws insulate dealers from competition and "prevent . . . manufacturer[s] from responding to the competitive marketplace in the most efficient manner."[27] Dealer protection laws "effectively freeze the retail network," making it difficult for manufacturers to adjust their distribution systems in response to changing demand or close unprofitable, inefficient dealerships.[28] By operating as a barrier to entry and a restraint on mobility, such legislative interference undermines the "competitive functioning of the marketplace,"[29] to the ultimate detriment of consumers in the form of higher vehicle prices and a lack of innovation in vehicle distribution.[30]

Economic studies evaluating these legislative restrictions have established that such laws directly result in reduced competition among dealers, higher vehicle prices and distribution costs, lower consumption, and lower levels of service for consumers.[31] In short, instead of remedying a "broad and general

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[26] *See, e.g.*, Lafontaine & Morton, *supra*, at 241-244 (discussing outcome of car dealership regulations arising from dealers' advantageous "political leverage in state legislatures").

[27] *See, e.g.*, Fed. Trade Comm'n Staff Comment to Hon. George W. Miller, Jr., Chairman of Finance Comm., N.C. House of Representatives 2 (June 9, 1999), https://www.ftc.gov/policy/policy-actions/advocacy-filings/1999/06/ftc-staff-comment-honorable-george-w-miller.

[28] Lafontaine & Morton, *supra*, at 243-44.

[29] Fed. Trade Comm'n Staff Comment to Hon. George W. Miller, Jr., *supra*, at 3.

[30] *See* Lafontaine & Morton, *supra*, at 248.

[31] *Id*. at 242-43, 248.

social or economic problem,"[32] these laws are anti-competitive and anti-consumer. For example, a study conducted by the FTC concluded that state laws granting motor vehicle dealers exclusive territorial rights in the form of RMAs—which Senate Bill 126 has now expanded to scooptrams and soil compactors—increased retail automobile prices by more than 6% compared to states without such laws.[33] Overall, laws restricting the ability of auto manufacturers to establish new dealerships have increased the amount consumers paid for new cars by about $3.2 billion (in 1985 dollars) per year in the 36 states that had such laws at the time of the analysis.[34] A similarly-timed study concluded that the combined effect of all state motor vehicle franchise restrictions was to raise new car prices by approximately 9%, while lowering the total number of cars sold.[35]

In their review of the empirical literature on vertical restraints across different industries—namely, exclusive territories, dealer licensing (protection from entry),

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[32] *Energy Reserves Grp.*, 459 U.S. at 411-412.

[33] Robert P. Rogers, Bureau of Econ. Staff Report to the Fed. Trade Comm'n, *The Effect of State Entry Regulation on Retail Automobile Markets* 108 (Jan. 1986), https://www.ftc.gov/sites/default/files/documents/reports/effect-state-entry-regulation-retail-automobile-markets/231955.pdf

[34] *Id.* at 10-11, 107-08. In 2016 dollars, that amount is over $7 billion. *See* Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm. *See also* Cooper, *supra*, at 20 (cost savings to consumers of $1500 to $2000 per vehicle without territorial restraints on auto distribution).

[35] *See* Richard L. Smith, II, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 J. L. & ECON. 125, 150-54 (1982).

and termination restrictions—two prominent economists found that while privately- or contractually-imposed restraints "seem to benefit manufacturers and consumers alike," restraints mandated by the government—as they are under Senate Bill 126—lead to "higher prices, higher costs, shorter hours of operation, lower consumption—and thus declines in consumer welfare."[36]

Economists have questioned why the automobile industry cannot simply rely on contracts as do other industries, including until 2013, New Hampshire's equipment dealers. University of Chicago Professor of Economics Dennis Carlton has pointed out that "[t]he mere assertion that there's a difference in bargaining power—that occurs in lots of places in our economy. We don't intervene in every single place. And we don't micromanage individual industries. So what is special about this industry?"[37]

In an effort to explain the extraordinary treatment afforded to motor vehicle dealers, others have called attention to their political influence over state legislators as an impetus for the passage of increasingly protectionist franchise laws. On average, states collect approximately 20% of all state sales taxes from dealers' new vehicle sales.[38] In some cities and counties, that number jumps to 40% of sales tax

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[36] *See* Lafontaine & Morton, *supra*, at 243.

[37] *See* Dennis Carlton, Professor of Econ., Univ. of Chicago, Keynote Presentation at FTC Workshop, *supra*, at 85.

[38] Jessica Higashiyama, *State Automobile Dealer Franchise Laws: Have They Become the Proverbial Snake in the Grass?*, Univ. of Cal., Hastings Coll. of Law Discussion Paper 18 (Apr. 1, 2009), http://ssrn.com/abstract=1394877.

revenue.[39] Dealers are also active in state and local politics, and state legislators often receive significant campaign contributions from state dealer associations and individual dealers.[40] Dealers are thus able to leverage their local connections and influence into state laws that "extract rent from manufacturers and redistribute it to franchise dealers"[41] under the semblance of protecting "small business owners" from "'coercive' practices and 'arbitrary' terminations."[42]

Not surprisingly, the FTC has openly questioned the justification for pro-dealer regulations and advocated for fewer restrictions on the manufacturer-dealer relationship and freedom of contract. In 2001, then-FTC Commissioner Thomas Leary expressed concern about state laws that insulate motor vehicle dealers from competition with manufacturers.[43] He observed the reality that, while dealers at one time tended to be small businesses operating in a highly concentrated auto manufacturing industry, by 2001, dealers were frequently much larger entities benefiting from a far

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[39] *Id.*

[40] *See, e.g.,* Michael Barbaro & Steve Eder, *Billionaire Lifts Marco Rubio, Politically and Personally*, N.Y. TIMES (May 9, 2015), http://www.nytimes.com/2015/05/10/us/billionaire-lifts-marco-rubio-politically-and-personally.html ("As he spoke . . . an aide interrupted, presenting [billionaire Norman] Braman with a yellow sticky note. The Florida Senate was about to vote on a bill he had sought, granting auto dealers like himself greater leverage over car manufacturers . . . Moments later, another adviser popped his head in, declaring victory."); Higashiyama, *supra*, at 18.

[41] Lafontaine & Morton, *supra*, at 241.

[42] Higashiyama, *supra*, at 18.

[43] Leary, *supra*.

more competitive manufacturing sector.[44] As a result, regulatory protections for dealers were now harder to justify, particularly where they interfered with the development of new and potentially more efficient methods of motor vehicle and service distribution.[45]

Earlier this year, Edith Ramirez, current Chair of the FTC, cautioned that, "[w]hile some regulation may be beneficial and necessary, regulation can have detrimental consequences for consumers if it harms competition or stifles innovation" and thus advised "[w]e must continue to consider whether the state [motor vehicle franchise] laws . . . are necessary to protect dealers against abuses by manufacturers, or if they serve some other purpose."[46] According to scholars, that "other purpose" is unlikely to involve benefits to consumers.[47] Particularly telling is who seeks heightened regulation: "[I]f this regulation . . . really is in the interest of consumers, is it the case that it's consumer groups that are asking for it? Or instead is it that the franchised dealers are asking? And if it's the franchised dealers, does that tell us something?"[48] We know that answer as it relates to Senate Bill 126. The New Hampshire Automobile Dealers Association proudly proclaimed that it was "instrumental in assisting the Legislature" in amending Chapter 357-C

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[44] *Id*.

[45] *Id*.

[46] Ramirez, *supra*, at 5.

[47] *See* Carlton, *supra*, at 85 ("[W]hy isn't this just the sort of garden variety special interest legislation that harms consumers, helps dealers, and maybe harms manufacturers?").

[48] *Id*. *Cf.* Fiona Scott Morton, Professor of Econ., Yale Univ., Panelist at FTC Workshop, *supra*, at 143 (unaware of any study supporting argument that "consumers want to see auto distribution organized the way it is").

to encompass equipment.[49] Nothing in the legislative record suggests that consumer groups were clamoring for the extensive protections delivered in Senate Bill 126.

New Hampshire's Senate Bill 126 laid the groundwork for other states to enact their own retroactive revisions to existing equipment dealer agreements. Vermont is poised to be the next in line to adopt anti-competitive restrictions on the equipment industry through passage of Senate Bill 224, which substantially modifies Vermont's existing machinery dealership statute's provisions on warranty obligations and termination, among other things, and also expands the statute's reach to equipment, snowmobiles, and off-road vehicles.[50] Vermont's Senate Bill 224, like New Hampshire's Senate Bill 126, purports to make the changes retroactive on existing dealer agreements. Left unchecked, the success of special interests in New Hampshire will only encourage resellers in other industries and states, such as Vermont, to pursue similar anti-competitive and commercially burdensome restrictions over the equipment industry.

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[49] *See* Memo. of Law of Amicus Curiae N.H. Auto. Dealers Ass'n in Support of the State of N.H. 1, *Deere & Co., et al. v. State*, No. 2162013-CV-00554, 2013 WL 11090355 (N.H. Super. Nov. 25, 2013).

[50] *See* S. 224, 2015-2016 Leg. Sess. (Vt. 2016).

III. THIS CASE PRESENTS AN OPPORTUNITY TO ENSURE THAT STATUTES VOIDING PRIVATE CONTRACTS ARE UPHELD ONLY IF A MEANINGFUL REVIEW DETERMINES THAT THEY REMEDY A BROAD AND GENERAL SOCIAL OR ECONOMIC PROBLEM.

The New Hampshire Supreme Court's dismissal of Petitioners' claims, based on rote recitations of the need to protect dealers from alleged abuses at the hands of manufacturers and with no review of the severity of the contractual impairments, shows that meaningful constitutional analysis by this Court is required. Otherwise, New Hampshire and other states may legislatively destroy preexisting contract rights with abandon, simply by parroting some speculative public purpose, untethered to the general welfare of their citizenry. The Contracts Clause does not countenance such a result.

Instead, a Contracts Clause analysis requires a court to first determine whether a state law has substantially impaired a contractual relationship and, if so, the severity of the impairment.[51] This in turn prescribes the level of scrutiny applied to the court's analysis.[52] "Severe impairment," such as the nullification of express terms of existing contracts, requires "a careful examination of the nature and purpose of the state legislation."[53] Where the record does not show that a "severe disruption of contractual expectations was necessary to meet an important general social

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[51] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978).

[52] *Id*. at 245, 247.

[53] *Id*.

problem," any deference to the legislature's judgment "cannot stand."[54] *Amici curiae* submit that Senate Bill 126 would not survive this analysis.

In lieu of actually analyzing the contractual impairments wrought by Senate Bill 126, the New Hampshire Supreme Court simply assumed impairment of an indeterminate level. In doing so, the court ignored Senate Bill 126's disregard of the regulatory environment manufacturers and dealers had known and relied upon for almost 20 years. Instead, Senate Bill 126 forced manufacturers and dealers of motor graders and forklifts into the same regulatory framework as minivans and mid-sized sedans. The result will impact manufacturers' and dealers' bargained-for financial expectations, impose a warranty parts and labor reimbursement process that will increase retail rates for consumers, mandate use of a pre-termination "cure" period in the case of every breach by a dealer no matter how egregious, and require manufacturers to offer dealers an entire "line make," despite the bargained-for limitations in existing contracts. Under this Court's Contracts Clause jurisprudence, the New Hampshire Supreme Court was obligated to consider the severity of these, and other, impairments and to determine whether those impairments are necessary to "meet an important general social problem."[55]

Having skipped the impairments analysis entirely, the court then accepted uncritically the Legislature's "concern" that "manufacturers shifted costs onto dealers and ultimately consumers through the use of . . . one-sided, non-negotiable contracts."[56] In so doing,

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[54] *Id*. at 247.

[55] *Id*.

[56] *See Deere*, 130 A.3d at 1209 (internal quotations omitted).

the New Hampshire Supreme Court relied heavily on case law concerning the relationship of automobile manufacturers and dealers while dismissing as irrelevant or distinguishable analogous cases in which federal courts have concluded that state attempts to "level the playing field" by retroactively revising the private contracts negotiated by equipment manufacturers and dealers violate the Contracts Clause.[57]

The New Hampshire Supreme Court entirely avoided any consideration of Senate Bill 126's contractual impairments, suggesting an inaccurate belief that *any* stated public purpose automatically trumps *any* contractual impairment. That is not the case. For example, in *Cloverdale Equipment Co. v. Manitowoc Engineering Co.*, the Sixth Circuit held that though there was a legitimate public purpose for Michigan's Farm and Utility Equipment Act—a purpose very similar to that advanced here—retroactive application of the act impermissibly impaired the contract between a manufacturer of lift-cranes and excavators and a dealer/servicer because, among other reasons, the parties' existing agreement did not require the parties to "furnish good cause prior to termination."[58]

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[57] *See, e.g., Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 861 (8th Cir. 2002) ("leveling the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest"); *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 608-609 (S. D. Iowa 1993) (concluding retroactive application of amendments to franchise law to "adjust the balance of power between contracting parties" not based on "significant and legitimate public purpose such as a 'broad and general social or economic problem' sufficient to justify the substantial impairment" of existing contracts).

[58] 149 F.3d 1182 (Table), 1998 WL 385906, at *4-*5 (6th Cir. 1998). *See Reliable Tractor v. John Deere Const. & Forestry Co.*, 376 F. App'x 938, 942 (11th Cir. 2010) (impairment to "material

Legislative decisions are neither infallible nor unreviewable. Under a Contracts Clause analysis, not only does a court not need to defer to the legislature's assessment of the reasonableness and necessity of retroactive legislation, but it must instead make its own determination of the reasonableness and importance of the law.[59] The New Hampshire Supreme Court utterly failed in this respect. Had it done so, the court would have concluded that there was no significant and legitimate public purpose behind Senate Bill 126. Analyzing the stated public purpose for Senate Bill 126 within the framework of the contractual impairments it works—as a court must under a proper Contracts Clause analysis—it is clear that this regulation does not just impermissibly "level the playing field," it digs it up entirely.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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provision" of existing contract "granting the right to terminate . . . without cause" was substantial).

[59] *See Allied Structural Steel*, 438 U.S. at 247.

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