No. 15-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Constitution's Contract Clause prohibits States from passing any "Law impairing the Obligation of Contracts." In 2013, the New Hampshire legislature amended its existing automobile dealer franchise law by deeming heavy equipment like tractors and excavators to be "motor vehicles," thus extending the reach of the automobile-dealer law to the heavy-equipment industry. The law voided all of the preexisting contracts between petitioners and their New Hampshire dealers, on pain of criminal penalties for any attempt to enforce their provisions. The New Hampshire Supreme Court sanctioned the destruction of these contracts against a Contract Clause challenge, holding that it was reasonable and necessary to advance a significant and legitimate public purpose—specifically, "leveling the playing field" in the private dealings between equipment dealers and manufacturers. That holding placed the New Hampshire Supreme Court squarely in conflict with the holdings of multiple other courts on essentially identical facts.

The question presented is whether the Contract Clause prohibited the New Hampshire legislature from retroactively voiding petitioners' private contracts, in the name of "leveling the playing field" between the parties to those contracts.

PARTIES TO THE PROCEEDING

Deere & Company, CNH America LLC, and AGCO Corporation, petitioners on review, were plaintiff-appellants below.

Kubota Tractor Corporation and Husqvarna Professional Products, Inc. also were plaintiff-appellants below.

Frost Farm Service, Inc. and the New Hampshire Automobile Dealers Association were intervenors below.

The State of New Hampshire, respondent on review, was the defendant-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

1. Deere & Company is a publicly held company whose shares are traded on the New York Stock Exchange. No public company owns 10% or more of its stock.

2. CNH America LLC, now known as CNH Industrial America LLC, is wholly owned by Case New Holland Industrial Inc., which is in turn wholly owned by CNH Industrial N.V., a publicly held company whose stocks are traded on the New York Stock Exchange.

3. AGCO Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. No publicly held company owns 10% or more of its stock.

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Deere & Company, CNH America LLC, and AGCO Corporation (collectively, petitioners) respectfully petition for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

OPINIONS BELOW

The New Hampshire Supreme Court's opinion is reported at 130 A.3d 1197. Pet. App. 1a-33a. The Merrimack Superior Court's order on cross-motions for summary judgment is unreported. *Id.* at 34a-50a. The Hillsborough Superior Court, Northern District's order entering a preliminary injunction is also unreported. *Id.* at 51a-77a.

JURISDICTION

The New Hampshire Supreme Court entered

judgment on December 29, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, Clause 1 of the U.S. Constitution provides, in relevant part:

"No State shall * * * pass any * * * Law impairing the Obligation of Contracts, or grant any Title of Nobility."

New Hampshire Senate Bill 126 is reproduced in the appendix to this petition.[1] Pet. App. 78a-103a. The as-amended N.H. Rev. Stat. Ann. § 357-C follows. Pet. App. 104a-182a.

INTRODUCTION

This Court has described the Contract Clause in our Nation's early days as "the strongest single constitutional check on state legislation." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 (1978). It is found alongside prohibitions against bills of attainder and ex post facto laws, all of which "reflect the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property." *City of El Paso* v. *Simmons*, 379

[1] Senate Bill 126 revised N.H. Rev. Stat. Ann. § 357-C and simultaneously repealed § 347-A. The bill was signed into law on June 25, 2013 and became effective on September 23, 2013. Petitioners include the final Senate Bill in their Appendix, followed by the as-revised statute, to show exactly which changes were effected by the 2013 legislation.

U.S. 497, 522 (1965) (Black, J., dissenting). As James Madison put it in describing the necessity of the Contract Clause: "The sober people of America are weary of the fluctuating policy which has directed the public councils." The Federalist No. 44 at 279 (James Madison) (C. Rossiter ed., 2003).

While in subsequent decades the force of the Contract Clause receded somewhat from its early high-water mark, this Court repeatedly has confirmed that the Clause "remains part of the Constitution. It is not a dead letter." *Spannaus*, 438 U.S. at 241; *see also United States Tr. Co.* v. *New Jersey*, 431 U.S. 1, 16 (1977) (noting that the "Contract Clause [is not] without meaning in modern constitutional jurisprudence").

The New Hampshire Supreme Court did not heed that message. Its decision below, which deferred entirely to the state legislature's retroactive reallocation of rights and responsibilities, has stripped the Contract Clause of all force and meaning, rendering it precisely the "dead letter" this Court warned against. *Spannaus*, 438 U.S. at 241.

Before New Hampshire passed Senate Bill 126, heavy equipment manufacturers and their dealers contracted relatively freely. Unlike motor vehicle manufacturers and their dealers, who for 40 years had been bound by the Automobile Dealer's Bill of Rights, N.H. Rev. Stat. Ann. § 357-C, the statute governing the equipment industry was passed only in 1995. *Id.* § 347-A. And unlike its motor-vehicle counterpart, the equipment-industry statute contained only rudimentary ground rules; it did not regulate dealer area, did not impose statutory limits upon a manufacturer with regard to establishing or

relocating a dealership, did not outlaw pre-dispute arbitration agreements, did not include an administrative enforcement mechanism, did not provide for criminal penalties, and did not dictate a list of practices deemed unfair and deceptive.

That all has now radically changed. In 2013, the New Hampshire legislature passed Senate Bill 126, which redefined "motor vehicle" in the Automobile Dealer's Bill of Rights to include certain types of heavy equipment, like tractors and construction equipment. Pet. App. 80a. The legislature simultaneously repealed Section 347-A, the provision that previously governed the contractual arrangements between equipment manufacturers and their dealers. *Id.* at 103a. The new law was heralded by one of its sponsors, Senator Joseph E. "Jeb" Bradley, as "necessary to protect dealers, make sure that we have a level playing field." N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013).

Thus, in two quick strokes, the legislature razed the landscape for equipment manufacturers and their dealers. Following Senate Bill 126, large swaths of petitioners' contracts, entered into between 1990 and 2012, were retroactively rendered void as against public policy. And by the statute's own terms, equipment manufacturers risked *criminal liability* if they sought to enforce the terms of those contracts.

There could be no clearer example of legislation running afoul of the Contract Clause. Far from furthering a significant and legitimate societal interest, Senate Bill 126 served only to retroactively renegotiate private contracts among equipment

manufacturers and their dealers, as a sop to the dealers' lobby. It is exactly that retroactive meddling with private contracts the Framers sought to prevent. Hence the conflict the New Hampshire Supreme Court creates with other state courts of last resort and with the federal courts of appeals.

Nor is the constitutional problem presented here one reserved to tractors and harvesters; absent this Court's intervention, any industry could be the next target of legislative overreach.

Certiorari should be granted.

STATEMENT

The Contract Clause. In order to provide a "constitutional bulwark" against a State's attempts to rewrite private contracts pursuant to "fluctuating policy," The Federalist No. 44, the Contract Clause provides that "[n]o State shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. This language is not as absolute as it may at first appear. States may, for example, " 'promot[e] the common weal' " and act " 'for the general good of the public' " despite some ancillary effects on private contracts. *Spannaus*, 438 U.S. at 241 (quoting *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905)). *See, e.g., Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 487-488 (1987) (approving law passed to protect the public from mining subsidence damage); *Energy Reserves Grp., Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 416-417 (1983) (approving law passed to mitigate escalating energy costs); *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 444-445 (1934) (approving law passed to ameliorate mass losses of homes at time of economic crisis). But States may *not*

substantially impair a private contractual relationship absent a significant and legitimate public purpose that justifies the extent of the impairment. *Energy Reserves Grp.*, 459 U.S. at 411-412; *Spannaus*, 438 U.S. at 244.

New Hampshire's Automobile Dealer Bill of Rights. The Automobile Dealer Bill of Rights, formally titled "Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors, and Dealers," was passed by the New Hampshire legislature in 1981. The Automobile Dealer Bill of Rights is detailed and demanding. It contains 20 sections and requires those it regulates to participate in an administrative process before the New Hampshire Motor Vehicle Industry Board to resolve disputed issues related to warranty, relevant market area, and termination. *See*, *e.g.*, N.H. Rev. Stat. Ann. §§ 357-C:5; 357-C:7; 357-C:9; 357-C:12. The statute restricts a manufacturer's ability to terminate, cancel, or fail to renew dealerships unless it can show "good cause" for doing so. *Id.* § 357-C:3.III(c). It restricts a manufacturer's ability to add a new franchise to an existing franchise's "relevant market area" or to change the coverage of that area absent a showing of good cause. *Id.* § 357-C:3. III(l), (o). It requires manufacturers to sell or offer to sell all models manufactured for a line make to all franchisees of that line make. *Id.* § 357-C:3.III(q). It prohibits manufacturer-owned dealerships from competing against dealers unless the manufacturer-owned dealer is able to obtain relief from the Board. *Id.* 357-C:3.III(k). Any violation of the statute is chargeable as a misdemeanor. *Id.* § 357-C:15.

The Automobile Dealer Bill of Rights had long been

in place when the state legislature passed the statute governing equipment manufacturers, N.H. Rev. Stat. Ann. § 347-A (repealed 2013), in 1995. But the legislature took a different approach to those manufacturers. Section 347-A permitted equipment manufacturers to terminate dealerships for any breach of the dealership agreement. N.H. Rev. Stat. Ann. § 347-A:2.I. It imposed no restrictions on manufacturers with respect to adding new dealerships or selling only certain segments of a line make to certain dealers. It permitted manufacturer-owned dealerships without restriction. It did not require manufacturers to obtain permission from an administrative board before taking certain actions. It allowed for pre-dispute mandatory arbitration agreements. And the statute made no provision for criminal liability.

Because the contracts at issue in this case were entered into against the backdrop of Section 347-A, they provided negotiated answers to the statute's open questions. Manufacturers and dealers provided by contract how termination would be handled, how new dealerships would be added, which models of a line make would be sold to which dealers, and whether conflicts arising under the contract's provisions would be resolved by mandatory arbitration.

Senate Bill 126. All that changed in 2013. At the urging of the New Hampshire Automobile Dealers Association, *see* NHADA Mot. For Leave to File Amicus Curiae Br. 1 (Merrimack Super. Ct., No. 216-2013-CV-554), the New Hampshire legislature passed Senate Bill 126, which simultaneously repealed Section 347-A and brought equipment manufacturers and dealers within the sweep of the

Automobile Dealer Bill of Rights. State Representative Edward A. Butler explained that the new law sought to "level the playing field," to repair what he viewed as an "autocratic relationship" between manufacturers and New Hampshire tractor and equipment dealers. *See* 35 N.H. H. Rec. No. 43, at 1473 (May 22, 2013). Senator Jeb Bradley agreed, acknowledging that although "[s]ome say that this is an unnecessary intrusion into what is essentially a contract dispute, [*it is*] *necessary to protect dealers*, make sure that we have a level playing field." N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013) (emphasis added).

Under the regime now in place, equipment manufacturers can no longer immediately terminate a dealer, N.H. Rev. Stat. Ann. § 357-C:7, no longer have cause to terminate a dealer under many circumstances that previously would have supported termination for cause under their agreements, *id.* § 357-C:7.III(a), (c)-(e), and may only terminate a dealer for "good cause" in two narrow circumstances, *id.* § 357-C:7.II. And before a manufacturer may terminate, cancel, or even decline to renew a dealership, it now must preemptively litigate the issue before the Motor Vehicle Industry Board. *Id.* § 357-C:7.I(d).

Nor can equipment manufacturers alter a dealer's sales territory at their discretion, as their contracts previously provided. The new statute converts these non-exclusive territories into "relevant market areas" that may not be changed by a manufacturer without "good cause." N.H. Rev. Stat. Ann. § 357-C:3.III(a), (k)(l); *id.* § 357-C:9. For the first time, manufacturers are prohibited from competing or authorizing others to compete within a "relevant market area."

Id. § 357-C:3. Nor can they add a dealership or relocate a dealership within a "relevant market area" without showing "good cause" and securing a finding from the Board that good cause (in the Board's wisdom) exists. *Id.* § 357-C:9.

The statute not only affects *where* a dealer may sell, but also *what* it may sell. N.H. Rev. Stat. Ann. § 357-C:1.XXVII defines a "line make" as all equipment that manufacturers "offer[] for sale, lease, or distribution under a common name, trademark, service mark, or brand name." The statute now renders it an "unfair and deceptive practice" for a manufacturer to "[f]ail or refuse to sell or offer to sell to all motor vehicle franchisees of a line make, all models manufactured for that line make." *Id.* § 357-C:3.III(q). That is true without regard to the type of equipment involved or to whether there is market demand for these models in the relevant market area. But petitioners' preexisting contracts specifically contemplated that a dealer would be limited to selling only certain equipment within a given line make. *See* Pet. App. 62a. That makes sense: Unlike the automotive industry, in which a line make refers to a limited variety of cars or trucks, a line make in the equipment industry encompasses a wide variety of equipment sizes, shapes, prices, and functions. Within a single line make, for example, Deere & Company manufactures construction, forestry, agriculture, landscaping and golf course maintenance products. John Deere, John Deere Products, Machines & Equipment, https://goo.gl/MnyEXc (last visited Mar. 27, 2016).

The statute also upends contracting parties' settled expectations that any disputes will be resolved by binding arbitration. The statute renders it an "un-

fair and deceptive practice" for petitioners to require equipment dealers to agree to a term or condition in a dealership agreement containing a binding pre-dispute arbitration clause. N.H. Rev. Stat. Ann. § 357-C:3.III(p)(3). Instead, the statute requires warranty disputes and disputes relating to termination, cancellation, and non-renewal to be litigated first before the Board. *Id.* § 357-C:5, C:7. Certain disputes related to adding or relocating dealerships to an existing "relevant market area" must also be presented first to the Board for resolution. *Id.* §357-C:9. In fact, Section 357-C:12.II provides that only the Board has "exclusive powers" to enforce the statute, except where the Superior Court is expressly authorized to do so.

Section 357-C:15 of the law makes any violation of the statute a misdemeanor.

This Litigation. Petitioners promptly challenged the constitutionality of the statute under the Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, and its New Hampshire counterpart, N.H. Const. pt. I, art. 23.[2] They also argued that the statute violated the Supremacy Clause of the U.S. Constitution by voiding the arbitration provisions of Deere & Company's and AGCO Corporation's contracts in contravention of the

[2] Part I, Article 23 of the New Hampshire Constitution provides: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." This proscription is read to be coextensive with the federal Contract Clause with respect to the impairment of contracts. *Tuttle* v. *New Hampshire Med. Malpractice Joint Underwriting Ass'n*, 992 A.2d 624, 640-641 (N.H. 2010).

Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. They sought declaratory and injunctive relief.

Before the statute went into effect, the Hillsborough County trial court granted a preliminary injunction on the ground that petitioners had demonstrated a likelihood of success on the merits of their claim that the new law violated the federal and state Contract Clauses. Pet. App. 51a-77a. On the State's motion, and over petitioners' objections, the court subsequently transferred the case to Merrimack Superior Court.

Petitioners and the State then filed cross-motions for summary judgment. Pet. App. 34a-35a. Petitioners' motion set forth the standard courts apply when assessing whether legislation passes muster under the Contract Clause: Has the law substantially impaired a contractual relationship? How severe is the impairment? *Spannaus*, 438 U.S. at 244. Is there a "significant and legitimate public purpose behind the regulation"? *Energy Reserves Grp.*, 459 U.S. at 411-412. And if there is, is the contractual intrusion "necessary to meet an important general social problem"? *Spannaus*, 438 U.S. at 247.

Invoking that test, petitioners explained that Senate Bill 126 violated the federal and state Contract Clauses because it retroactively and substantially impaired—in at least ten respects—valid contracts between manufacturers and their dealers without a genuine legitimate and significant public (as opposed to special, private) purpose. *See* Plaintiffs' Mem. In Support of Mot. For Summ. J. 12-26 (Merrimack Super. Ct. No. 216-2013-CV-00554). It thus was impermissible special-interest

legislation. Petitioners also argued that Senate Bill 126 violated the Supremacy Clause because its prohibition against arbitration violated the Federal Arbitration Act. *Id.* at 46-49.

The State, needless to say, resisted petitioners' arguments at nearly every turn. As to the substantiality of the impairment, the State responded that the statutory changes worked by Senate Bill 126 were merely "refinements" to the State's prior regulation of the equipment industry. Defendants' Mem. In Support of Mot. For Summ. J. 8 (Merrimack Super. Ct. No. 216-2013-CV-554). As to the statute's "public purpose," the State claimed that it was designed to prevent abuses by manufacturers against dealers and by manufacturers and dealers against the public. *Id.* at 14. And with regard to the Supremacy Clause, the State noted only that if the statute's provisions prohibiting arbitration agreements were held to violate the Federal Arbitration Act, the law's severability clause would allow the remaining provisions to remain in force. *Id.* at 20-21. (The State failed to explain, however, how that was possible, given the pervasive nature of the preempted provisions; nor did the State explain how petitioners could shield themselves from potential criminal liability if they ran afoul of the State's view of the required compliance.)

The trial court ruled against petitioners on their Contract Clause claims. While agreeing with them that the statute plainly "created added requirements by which [petitioners] must act," the court found such additions to represent mere "refinements in the law," not substantial impairments of their existing contracts. Pet. App. 42a. Therefore, the court concluded, neither the federal nor the state Contract

Clause was violated. The court added that certain provisions of Senate Bill 126 conflicted with the Federal Arbitration Act and were therefore invalid. *Id.* at 48a-49a. But because the statute contained a severability provision, the remaining provisions continued in force. *Id.* at 49a.

Petitioners appealed.

The New Hampshire Supreme Court affirmed.[3] It first assumed that the new law indeed terminated petitioners' existing contracts with their dealers in whole or in significant part, thereby substantially impairing them. Pet. App. 12a-13a. The court should next have addressed the severity of that impairment. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 504 & n.31. It did not. Instead, it turned immediately to the public-purpose element, applying a standard it described as similar but "not identical to rational basis review in the equal protection or due process context." *Id.* at 18a. Applying that most deferential of constitutional standards, the court held that the statute served a significant and legitimate public purpose by protecting equipment dealers and consumers from perceived abuses, *id.* at 17a, and that retroactive application of Senate Bill 126 was reasonable and necessary to further this public purpose. *Id.* at 19a-21a. The court did not, however,

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[3] The New Hampshire Supreme Court's opinion in this case also resolved a consolidated appeal brought by Husqvarna Professional Products, Inc. This petition is being filed concurrently with the petition in that case. Because the petitioners present some overlapping, but not identical, issues, petitioners in both cases believe the petitions both should be granted. The Court may then wish to consolidate the cases for oral argument.

pause to assess the fit of the law to its purported purpose.

Petitioners sought a stay of the New Hampshire Supreme Court's mandate pending the filing and resolution of a petition for a writ of certiorari, explaining that if the statute were to be permitted to enter into force, they would immediately risk criminal penalties merely by enforcing their preexisting agreements with dealers. The New Hampshire Supreme Court denied the motion to stay and issued the mandate. Petitioners' request for a stay of enforcement of the judgment in this Court was denied. *See* Docket, No. 15A910.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE LEVEL OF SCRUTINY TO BE APPLIED TO A STATUTE THAT SUBSTANTIALLY IMPAIRS PRIVATE CONTRACTS.

Any Contract Clause analysis proceeds in four steps. First, a court must determine whether the state law has substantially impaired a contractual relationship. *Spannaus*, 438 U.S. at 244. If it has, the court must analyze the severity of the impairment to "measure[] the height of the hurdle the state legislation must clear." *Id.* at 245. Once the severity of the impairment and the applicable level of scrutiny have been established, the State must present a "significant and legitimate public purpose behind the regulation." *Energy Reserves Grp.*, 459 U.S. at 411-412. The court then compares the fit of the statute to the asserted purpose to determine whether the intrusion in private contracts

was "necessary to meet an important general social problem." *Spannaus,* 438 U.S. at 247.

The New Hampshire Supreme Court went off the rails at Step 2. It never analyzed the extent to which Senate Bill 126 impaired the private contracts between manufacturers and dealers. And because it did not, the court also never calculated the appropriate level of scrutiny to be applied in assessing the statute's constitutionality.

In *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987), this Court stated in no uncertain terms that the extent-of-the-impairment analysis is "essential to determine the 'severity of the impairment,' which in turn affects 'the level of scrutiny to which the legislation will be affected.' " *Id.* at 504 & n.31 (quoting *Energy Reserves Grp.*, 459 U.S. at 411). By failing to engage in this analysis, the New Hampshire Supreme Court acted in flat contravention of *Keystone*'s admonishment.

The New Hampshire Supreme Court's failure to assess the level of impairment in this case was not just in conflict with this Court's precedent; it was outcome-determinative. "[T]he more severe the impairment, the closer scrutiny the statute will receive." *Equipment Mfrs. Inst.*v. *Janklow*, 300 F.3d 842, 854 (8th Cir. 2002) (citing *Spannaus*, 438 U.S. at 245). And here, the statute worked *several* substantial impairments on multiple private contracts; indeed, it destroyed them.

For just one example, the New Hampshire statute did away with the petitioners' contractual rights to terminate dealers unilaterally for breach of the dealership agreement. Compare N.H. Rev. Stat. Ann. § 357-C:7, with *id.* § 347-A:2 (1995) (repealed

2013). Courts have repeatedly found impairment of the right of unilateral termination, *standing alone*, to be a fundamental impairment for purposes of Contract Clause analysis. *See Garris* v. *Hanover Ins. Co.*, 630 F.2d 1001, 1006 (4th Cir. 1980) (noting that the "right of unilateral termination * * * must be accounted a critical feature of [Hanover's] total contractual relationships"); *Reliable Tractor, Inc.* v. *John Deere Const. & Forestry Co.*, 376 F. App'x 938, 942 (11th Cir. 2010) (per curiam) (law extending dealer agreements indefinitely absent proof of "good cause" to terminate violates Contract Clause).

Other statutes purporting to eliminate termination rights regularly have been found to violate the Contract Clause. The Eighth Circuit has concluded, for example, that a statutorily imposed, retroactive limitation on a manufacturer's ability to terminate dealership agreements unconstitutionally impaired those agreements. *Equipment Mfrs. Inst.*, 300 F.3d at 856, 862. The Delaware Supreme Court similarly has concluded that a statute prohibiting cancellation of franchise agreements except for "just cause" and on reasonable notice substantially impaired those agreements in violation of the Contract Clause. *Globe Liquor Co.* v. *Four Roses Distillers Co.*, 281 A.2d 19, 20 (Del.), *cert. denied*, 404 U.S. 873 (1971). The termination restrictions at issue in these cases are essentially indistinguishable from those present in § 357-C:7.

The New Hampshire Supreme Court parted company with all these decisions, many of them on closely comparable facts. This Court's guidance is needed to establish the appropriate level of scrutiny to be applied to a statute's substantial retroactive

impairment of private contracts.

II. THE NEW HAMPSHIRE SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS REQUIRING THAT RETROACTIVE LEGISLATION MUST BE REASONABLE AND NECESSARY TO EFFECTUATE A PUBLIC PURPOSE.

1. Another casualty of the New Hampshire Supreme Court's analytical errors and omissions was its failure to make any but the most superficial inquiry into whether the retroactive destruction of petitioners' contracts was reasonable and necessary to accomplish the State's ostensible objective. Consistent with the "deeply rooted presumption against retroactive legislation," *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484, 1486 (2012), the Contract Clause thus "must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Spannaus*, 438 U.S. at 242. After all, if a State could justify any intrusion into private contracts by reference to some distant collateral effect on the public interest, the Framers' "constitutional bulwark in favor of personal security and private rights," The Federalist No. 44 at 279, has been divested of all vitality.

That is why "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" in a Contract Clause analysis. *See United States Tr. Co.*, 431 U.S. at 26. A court instead "must undertake its own independent inquiry to determine the reasonableness of the law and the importance of the purpose behind it." *Id.*

The New Hampshire court did not. Rather, it uncritically reviewed the State's proffered rationale for the law under a "rational speculation" standard that *no* other court of appeals appears ever to have adopted in the Contract Clause context. Pet. App. 19a.

That approach cannot be the law. The inquiry *must* be "more searching" than rational basis review as applied to due process or equal protection analysis. *Mercado-Boneta* v. *Administracion del Fondo de Compensacion al Pacienteo*, 125 F.3d 9, 13 (1st Cir. 1997). After all, it is always possible to "rationally speculate" that a law dedicated to advancing *some* interests could collaterally enhance the *public* interest, according to some sort of vague "trickle-down" public-interest theorem. A State could, for example, conclude that it will eradicate the student loans or mortgages of a select group of people; that in turn might advance a public purpose by permitting those persons to open a small business, to advance their station in life, or to inject those saved funds into the economy through investment, donations to charity, or buying more local products. And thus one group's improved bargain may leach through to the indirect benefit of others.

But the Contract Clause was designed in our Nation's earliest days to prohibit exactly this: It was intended to preclude the government from using private bills to relieve certain persons or groups from their contractual obligations. The Federalist No. 44 at 279. And thus before a State may enact a broadly sweeping statute that destroys many contracts, it must do more than offer a naked and generalized claim of public purpose to survive Contract Clause scrutiny. After all, "[l]egislation adjusting the rights and responsibilities of contracting parties must be

upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Tr. Co.*, 431 U.S. at 22; *see also Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (noting contrast between "limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses").

2. When a court applies its "more searching" standard of review to state legislation, it must also ensure that a State has not "impose[d] a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Tr. Co.*, 431 U.S. at 31. Although the New Hampshire Supreme Court purported to "assume" contractual impairment, Pet. App. 12a-13a, it neither assessed the substantiality of that impairment, as we have explained, *nor* did it rigorously assess whether the statute's degree of interference with private contracts was properly tailored to the public interest it purported to protect. *Home Bldg. & Loan Ass'n*, 290 U.S. at 445.

It should have. A court hearing a Contract Clause challenge must consider "the ends and means chosen by the state legislature" and apply its "independent, considered judgment as to whether the legislative enactment makes a rational accommodation between the affirmative power exercised by the state and the negative safeguard embodied in the Contract Clause." *Garris*, 630 F.2d at 1009 (footnotes omitted) (citing Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 37-41 (1962)). Exercise of that "independent, considered judgment" sometimes means that the language of the Act will not be found to be "reasonably related to the

public purpose asserted [therefor] by the legislature." *Id.* at 1009-10. *See W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 433-434 (1934) (striking down Arkansas law under the Contract Clause because it was not appropriately tailored to its purpose; it was not "temporary nor conditional" and contained "no limitations as to time, amount, circumstances, or need"); *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935) (striking down another Arkansas law because "[e]ven when the public welfare is invoked as an excuse" a mortgage security cannot be destroyed "without moderation or reason or in a spirit of oppression").

3. The State, for its part, "must do more than mouth the vocabulary of the public weal in order to reach safe harbor" from a Contract Clause challenge. *McGrath* v. *Rhode Island Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996). This is important: the State must offer a substantial and legitimate *public* purpose to "guarantee[] that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Grp.*, 459 U.S. at 412. One need only review the backdrop against which Senate Bill 126 was passed to understand that this law is precisely the special-interest legislation the Contract Clause forbids.

By its own admission, the New Hampshire Automobile Dealers Association "has been instrumental in assisting the Legislature to enact amendments to New Hampshire RSA 357-C." NHADA Mot. For Leave to File Amicus Curiae Br. 1 (Merrimack Super. Ct., No. 216-2013-CV-554). The bill's legislative history confirms as much, with both Representative Butler and Senator Bradley invoking the legislature's interest in "level[ing] the playing

field." *See* 35 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).

But retroactive renegotiation of contracts is not a prize to be awarded for dogged lobbying or political largesse. Quite the contrary. The very purpose of the Contract Clause was to prevent "legislative interferences" directed by "enterprising and influential speculators" at the expense of "the more-industrious and less-informed part of the community." The Federalist No. 44 at 279. Senator Bradley's refreshingly candid admission is a quintessential example of prohibited special-interest legislation, and no amount of "mouth[ing] the vocabulary of the public weal" can adequately transform it.

Senate Bill 126 lays waste to all of petitioners' contracts—all of them. New Hampshire was bound to justify such a complete impairment by showing that Bill 126 was both a reasonable and necessary way to protect dealers from manufacturers. It is manifestly neither. The State of New Hampshire offers no explanation of how destroying existing dealership agreements through its retrospective legislation is preferable to more measured, prospective, constitutional alternatives that would leave functioning agreements intact. The New Hampshire Supreme Court, for its part, flatly declined to measure the constitutional validity of the law by the yardstick of its asserted purpose, as this Court's precedents require. Certiorari should be granted for this reason as well.

III. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER "LEVELING THE PLAYING FIELD" BETWEEN PRIVATE CONTRACTING PARTIES IS A LEGITIMATE AND SUBSTANTIAL PUBLIC PURPOSE JUSTIFYING RETROACTIVE LEGISLATION.

1. Applying a unique and markedly deferential level of scrutiny, the New Hampshire Supreme Court held that Senate Bill 126 possessed a significant and legitimate "public purpose" sufficient to pass constitutional muster. It did so in the face of the numerous statements made by House representatives that the purpose of the law was not "public" in the least, but indeed was quintessentially private: to "level[] the playing field" between equipment manufacturers and their dealers. 35 N.H. H. Rec. No. 43, at 1473 (May 22, 2013). According to the New Hampshire Supreme Court, however, the State has a significant and legitimate interest in protecting dealers from their own contracts. Pet. App. 13a-19a. This aspect of the New Hampshire Supreme Court's decision supplies an equally strong ground for certiorari.

Indeed, there is a split among the federal courts of appeals and state courts of last resort as to whether "leveling the playing field"—essentially reallocating settled contractual rights from one side of the contract to the other—is a substantial and legitimate "public purpose." The Eighth Circuit has answered that question in the negative, explaining that "directly adjust[ing] the rights and responsibilities of dealers and manufacturers under the pre-existing dealership agreements" was not a substantial and

legitimate public purpose. *Equipment Mfrs. Inst.*, 300 F.3d at 861. The Southern District of Iowa, in a decision later affirmed by the Eighth Circuit, agreed, explaining that "adjust[ing] the balance of power between contracting parties * * * does not supply a broad societal interest." *McDonald's Corp.* v. *Nelson*, 822 F. Supp. 597, 608-609 (S.D. Iowa 1993), *aff'd sub nom. Holiday Inns Franchising, Inc.* v. *Branstad*, 29 F.3d 383 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994). As the *McDonald's* court explained, there was no substantial and legitimate "broad societal interest" where the Act's goals were "the equalization of bargaining power, the promotion of fair dealing, and the protection of franchisees from fraudulent and abusive practices by franchisors." *Id.* at 608.

The Sixth Circuit, however, has concluded that such a purpose *is* legitimate and substantial—to a point. In *Cloverdale Equipment Co.* v. *Manitowoc Engineering Co.*, 149 F.3d 1182 (6th Cir. 1998) (tbl.), 1998 WL 385906, the court reviewed the retroactive application of Michigan's Farm and Utility Equipment Act to an existing contract between an equipment manufacturer and its dealer. The court blessed the statute's public purpose, describing it as an "attempt to balance the bargaining power of farm equipment dealers, usually small businesses, against that of manufacturers, typically large corporations, by regulating the terms of contracts between dealers and manufacturers." *Id.* at *4. The court went on to conclude, however, that retroactive application of the statute to a preexisting contractual relationship *was not reasonable* and necessary to effectuate the stated purpose. *Id.* at *5.

2. The New Hampshire Supreme Court selectively followed the Sixth Circuit's reasoning. Like the

Sixth Circuit, the New Hampshire court concluded that the New Hampshire legislature's goal of retroactively altering a perceived disparity in bargaining power between private contracting commercial parties was a significant and legitimate public purpose. *Unlike* the Sixth Circuit, however, the New Hampshire court found that purpose sufficient to justify retroactive legislation—by applying a "rational speculation" theory no other court of appeals appears ever to have applied. *See supra* at 18.

3. Because it parted ways with the Sixth Circuit on the question whether retroactive application of the law was necessary to effectuate New Hampshire's averred "public" purpose, the New Hampshire Supreme Court began, and largely ended, its analysis of the legitimacy and substantiality of the State's asserted public purpose by citing this Court's decision in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978). *See* Pet. App. 3a-4a. In that case, an automobile manufacturer and two automobile dealers brought a substantive due process challenge to the California Automobile Franchise Act. 439 U.S. at 104. The Court upheld the statute, explaining that the state legislature "was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." *Id.* at 107.

That is all true as far as it goes. But *New Motor Vehicle Board*—and all but one of the other decisions the New Hampshire Supreme Court cited for that proposition—were not Contract Clause cases evaluating the power of a State to legislate retroactively. They were, rather, decisions

addressing whether state legislatures may legislate *prospectively* to prevent what they believe to be "injurious practices." *See id.* at 107 (citation omitted). Of course they may. But that a state legislature may prospectively change the regulatory allocation of benefits and burdens does not mean that it may retroactively legislate without consequence. That is precisely why this Court was careful to specify in *New Motor Vehicle Board* that States' power to legislate extends only "so long as their laws do not run afoul of some specific federal constitutional prohibition," *id.* at 107—such as, for example, the Contract Clause.

The one decision on which the New Hampshire Supreme Court relied that *did* involve a Contract Clause challenge, *Alliance of Auto. Mfrs.* v. *Gwadosky*, 430 F.3d 30 (1st Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006), relied on a "dispositive" finding that the particular recoupment bar at issue, which precluded motor vehicle manufacturers from recovering their reimbursement costs for a dealer's warranty repair parts and labor, did not substantially impair the franchise agreements at issue. *Id.* at 42. In light of that dispositive finding, the court's musings on the legitimacy of the statute's public purpose are nothing more than dicta.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED.

This petition presents a clean, clear opportunity to address and resolve the question presented here.

First, the question presented is outcome-determinative. If New Hampshire Senate Bill 126 violates the Contract Clause, petitioners' contracts with their dealers remain in place, without the manufacturers risking criminal liability. If it does not violate the Contract Clause, petitioners' contracts are no more.

Second, there is an existing split among the lower courts on the operation of the Contract Clause *in precisely this context*. The Eighth Circuit has concluded that retroactive legislation significantly impairing contracts between equipment manufacturers and their dealers does not pass constitutional muster when the State is attempting only to "level the playing field" by reshuffling the contractual rights and obligations assigned to manufacturers and dealers. *Equipment Mfrs. Inst.*, 300 F.3d at 862. So has the Sixth. *Cloverdale Equip. Co.*, 1998 WL 385906, at *4. So has the Eleventh. *Reliable Tractor*, 376 F. App'x at 942. All those decisions squarely conflict with the New Hampshire Supreme Court's decision in this case—meaning that if New Hampshire were somehow gerrymandered into the Sixth, Eighth, or Eleventh Circuits, its special-interest legislation would not fly. *See also Cloverdale Equip. Co.*, 1998 WL 385906, at *4; *Reliable Tractor*, 376 F. App'x at 942.

Third, there is no need for further percolation on the issue. Multiple courts of appeal have set forth their views on the topic, and they clash. In future,

lower courts will merely be selecting one or the other analytical framework, giving no further assistance to this Court's consideration of the issue.

And there is much to be gained through the Court's intervention now. The New Hampshire Supreme Court has given its blessing to retroactively rejiggering the private contracts of favored groups. Its view of a toothless Contract Clause sets no practical limits on a State's ability to target any industry's contracts. Without knowing which is next in a legislature's sights, confidence in any manner of private contracts is imperiled. This slippery slope has been evident since the Framing, when James Madison warned that "one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." The Federalist No. 44 at 279.

For example, Kentucky has passed—and Florida is currently considering passing—an unclaimed life insurance statute requiring life insurance companies to investigate each year whether policy holders have died so that beneficiaries can be paid. *See* Kentucky Unclaimed Life Insurance Benefits Act, Ky. Rev. Stat. Ann. § 304.15-420 (2014); H.B. 1041, Reg. Sess. (Fl. 2016). These statutes would retroactively rewrite the terms of existing life insurance policies, which had assigned to the beneficiary the duty to inform the insurer of a policyholder's death. Nevada, for its part, has passed a law, at the urging of the fossil fuel lobby, to revise the State's solar energy policy. S.B. 374, 78th Leg., Reg. Sess. (Nev. 2015). Regulations enacted pursuant to the new law, Senate Bill 374, retroactively altered the energy contracts of net-metering customers who put solar panels on

their property. Those customers previously could receive credits against their energy bills in proportion to the energy the panels produced, but regulations enacted pursuant to the new law cut those credits by three-quarters and tripled the monthly fees customers had expected would remain constant for the twenty- or thirty-year life of their contracts. Nevada S.B. 374; Jacques Leslie, Opinion, *Nevada's Solar Bait-and-Switch*, N.Y. Times, Feb. 1, 2016.

The Court should grant review to decide this important question. It should not wait for the next blatant incursion on an industry's settled contractual rights.

V. THE DECISION BELOW IS SO MANIFESTLY INCORRECT THAT SUMMARY REVERSAL IS WARRANTED.

The New Hampshire Supreme Court did not only skip analytical steps (setting it in conflict with this and multiple other courts), and did not only bless an impermissible protective statute by a hat-tip to a thinly disguised "public purpose" (again setting it in conflict with this Court and multiple others). The court simply got it wrong, and in several respects. Given the New Hampshire Supreme Court's utter failure to comply with this Court's precedents setting forth the proper Contract Clause analysis, the Court should summarily reverse and remand to the New Hampshire Supreme Court. *See Maryland* v. *Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam) (summarily reversing a judgment

inconsistent with the Court's Fourth Amendment precedents); *Martinez* v. *Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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