MEMORANDUM

To: Right to Repair Task Force
From: David P. Hall Esq., Legislative Counsel
Date: September 10, 2018
RE: Legal considerations arising from "right to repair" legislation

I. Origins of Right to Repair – On-Board Diagnostic (OBD) Systems; Clean Air Act Amendments of 1990; California Automobile Emission Regulatory Framework

A. Federal Clean Air Act Legislation

1. 1990 - Clean Air Act amendments; section 202(m)(4)-(5): 42 U.S.C. § 7521(m)

a. Requires that passenger vehicles and light trucks sold in the U.S. be equipped with an on-board diagnostic system that monitors the performance of the vehicle's emissions system and alerts the driver of a possible pollution control device malfunction.

b. Directs EPA to require by regulation: that connectors through which OBD systems are accessed be standard and uniform on all vehicles and engines; that access to OBS systems is unrestricted and not require any access code or device only available from a manufacturer; that output of emissions data is usable without any unique decoding information or device; and that, subject to protections for trade secrets; and

c. Directs EPA to require "manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such person, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines."

2. 1995 – EPA Final OBD Service Information Rule; 60 F.R. 40474-01; 40 C.F.R. Parts 9 and 86

a. Regulates the diagnostic and repair information that manufacturers must deliver to independent repair businesses, which includes "information regarding any system, component, or part of a vehicle that controls emissions and any system, components and/or parts associated with the powertrain system, including… the fuel system and ignition system … and for any system, component, or part that is likely to impact emissions, such as transmission systems.

b. Manufactures are required to disclose the same information they provide to authorized dealers or others, at a reasonable price, in a standard format to be developed.

c. Manufacturers are not required to disclose other proprietary information or trade secrets if not also disclosed to franchise dealers or others.

d. Manufactures are required to either provide information to aftermarket tool and equipment companies information necessary to produce generic diagnostic tools, or

to sell their enhanced diagnostic equipment to aftermarket technicians for a reasonable price.

e. Manufacturers are required to provide recalibration or reprogramming information[1] to the same extent as they provide it to franchise dealers; however, manufacturers are not required to provide the underlying computer software, code, or data directly to independent technicians, nor to aftermarket parts manufacturers. Allows, but does not require, manufacturers to adopt security and anti-tampering measures.

f. Aftermarket business interests argued that EPA should require manufacturers to release all vehicle-related service information and information necessary to manufacture aftermarket parts. EPA concluded it did not have such authority, and specifically noted the limitations of the CAA amendments to emissions-related diagnosis and repair, and expressly protected trade secrets.

3. 2003 Final Rule – 68 FR 38428-01; 40 C.F.R. part 86 - EPA updates rules requiring manufacturers to provide diagnostic and repair information to repairers, including in part to fill identified gaps in information and asserting the authority to not only require manufacturers to provide additional information to independent dealers, but to franchise dealers if necessary.

4. 2014 Final Rule – 79 FR 23414-01; current requirements, including "Tier 3" regulations, intended to reduce emissions and harmonize EPA OBD requirements with California's Low Emission Vehicle program. Includes manufacturer duties to provide emission control diagnostic service information to any person engaged in repairing or servicing motor vehicles and engines. 40 C.F.R. § 86.1808-1(f).

B. California Clean Air Act Legislation

1. 1982-1988 – California develops and ultimately implements requirement under its express authority to regulate emission pursuant to the Clean Air Act that vehicles sold in the state beginning must include an on-board diagnostic system beginning in 1991 (OBD I).

2. 1994 – California mandates revised regulations (OBD II) governing OBD systems beginning with model year 1996 vehicles, with full implementation by 1999.

3. 1998 – *Motor Equipment Man. Assoc. v. Nichols/EPA*, 142 F.3d 449; against challenge from aftermarket business interests, D.C. Circuit Court upholds EPA's approval of California waiver and "deemed compliance" ruling, effectively upholding California's mandate that manufacturers equip OBD systems with anti-tampering and security measures.

[1] "An engine calibration is the set of instructions the computer module uses for operating many of the engine systems (e.g., fuel and ignition). These instructions are made up of preset values and algorithms that are located in a computer chip. Recalibration is the act of revising the preset values and/or algorithms for an existing engine calibration in a particular vehicle model/engine configuration. Reprogramming is the act of installing a 'new' engine calibration (i.e., a recalibration) into the module of a specific vehicle." *Id.* at 40490.

3. 2000 – CA HLTH & S § 43105.5; 13 CCR § 1969 – California statute and regulations require manufacturers to provide OBD information, tools, etc. to all "covered persons."

4. 2013; most recent round of CARB OBD statutes and regs; bases of 2014 revised EPA regulations; requirement to provide diagnostic information remains valid law. CA HLTH & S § 43105.5; 13 CCR § 1969.

C. Federal Motor Vehicle Right to Repair Legislation

1. 2001 – U.S. Senate Bill S.2617, "Motor Vehicle Owners' Right to Repair Act of 2001" introduced by Sen. Wellstone.

a. Based on Commerce Clause jurisdiction, bill would require manufacturers to provide to owners, independent repair facilities, and the FTC information necessary to repair vehicles and to use replacement equipment.

b. FTC to adopt rules; includes provision for protection of trade secrets, and a private right of action based on unfair and deceptive act in commerce.

2. 2001-2011 – a "Motor Vehicle Owners Right to Repair Act" was introduced in either the U.S. Senate or House in 2003, 2005, 2007, 2009, 2010, and 2011.

3. No bill ever passed out of a House or Senate committee.

II. Massachusetts Automotive Right to Repair; State R2R Proposals

A. Massachusetts Experience – Automotive Right to Repair Timeline

1. December 2011 – Massachusetts voters approve an initiative petition for a law that would require vehicle owners and independent repair facilities in Massachusetts to have access to the same vehicle diagnostic and repair information, and diagnostic tools, made available to the manufacturers' Massachusetts dealers and authorized repair facilities (applicable to model years 2002-2014; access to common interface for onboard diagnostic and repair information for new vehicles beginning with 2015).

2. January 2012 – initiative petition introduced in Mass. Legislature, which was required to adopt the language by May, or else it would be offered to voters to enact the law in the November general election (provided signatures were gathered and submitted by July).

3. March-May 2012 – Mass. Legislature considered the initiative petition; passed Senate but House did not hold a vote.

4. July 2012 – petitioners submitted requisite signatures to have initiative petition offered to Mass. voters for approval in November general election.

5. August 2012 – Mass. adopted session law chapter 241 (2012), an automotive right to repair law similar to the initiative petition, but based on a legislative compromise among manufacturers and repair proponents. (applicable to model years 2002-2017; access to common interface for onboard diagnostic and repair information for new vehicles beginning with 2018; no telematics)

6. November 2012 – the initiative petition, still on the general election ballot, is approved by Mass. voters and creates another automotive right to repair law ~ session law chapter 368 (2012).

7. November 2013 – Mass. legislature adopts session law chapter 165 (2013), which repeals the statutes created by chapters 241 and 368 (2012) and replaces them with new language based heavily on chapter 241 (2012) (applicable to model years 2002-2017 and heavy duty vehicles 2013 and after; access to common interface for onboard diagnostic and repair information for new vehicles beginning with 2018; no telematics).

8. January 2014 – Memorandum of Understanding and Right to Repair Agreement executed by the Automotive Aftermarket Industry Association, Coalition for Auto Repair Equality, Alliance of Automobile Manufacturers, and Association of Global Automakers.

a. *Memorandum of Understanding*

- manufacturers agree to comply with MOU and R2R Agreement in all 50 states and DC (individual manufacturers must individually sign on);
- AAIA and CARE agree to work through 2018 to implement MOU and to oppose, and not otherwise fund or support, any new state R2R legislation;
- parties agree to bring any new market entrants into the agreement; to work to resolve new issues and amend agreement if necessary; to meet at least semi-annually to assess implementation;
- parties agree to call a meeting with 30 days notice to discuss viability of agreement if circumstances change, and that a manufacturer may elect to withdraw for

b. *R2R Agreement*

- virtually identical to Mass. statute (but excludes heavy duty vehicles; separate MOU in 2015 addresses heavy duty vehicles);
- creates a 5-member Dispute Resolution Panel to attempt to resolve disputes.

B. Beyond Automobiles – State Right to Repair Initiatives

1. Legislation relating to the right to repair electronic products has been introduced in 19 states. With some exceptions, the legislation is virtually identical, and seeks to require the original equipment manufacturer of an electronic product (however defined in the legislation) to provide to owners and independent repair providers the same

diagnostic and repair information, tools, and equipment as the manufacturer provides to its authorized repair providers.

2. To date no state has enacted a right to repair bill for electronic products other than Vermont, which is also the only state to enact legislation to study the issue.

3. The following states have introduced legislation, as indicated below:

a. California – 2017 AB-2110; filed 2/8/18; 4/17/18 first committee hearing canceled at request of author.

b. Hawaii – H.B. No. 1649; introduced 1/17/2018; 2/2/18 committee recommends measure be deferred.

c. Illinois – HB 4747; filed 2/13/18; passed committee 4/12/18; floor - referred back to rules committee 4/27/18.

d. Iowa – HF556/SF2028; introduced and referred to committee 3/8/2017.

e. Kansas – HB 2122; introduced 1/23/2017; "died in committee" 5/4/18.

f. Massachusetts – S.96/H.143 first referred 1/23/2017; accompanied new draft – S.2430 (resolution to create study commission) on 4/17/18; new draft substituted – S.2630 (resolution to create study commission) on 7/25/18; S.2630 passed Senate on 7/25/18; referred to House Ways and Means on 7/26/2018.

g. Minnesota – SF 15; introduced and referred on 1/5/2017; HF 287; introduced and referred on 1/17/2017.

h. Missouri – HB 2204 introduced 1/23/2018 and referred 5/18/2018; HB 2254 introduced 1/24/2018 and referred 5/18/2018; HB 1178 introduced 3/1/2017 and referred on 5/12/2017.

i. Nebraska – LB 67 introduced 1/5/17; indefinitely postponed 4/18/18.

j. New Hampshire – HB 1733 introduced 1/3/18; referred for interim study on 3/6/18; interim study scheduled for 9/18/2018 @ 1 pm.

k. New Jersey – AB 589 introduced and referred 1/9/18; SB 1638 introduced and referred 2/5/18; A4934 introduced and referred 6/5/17

l. New York

- AB 8192 referred to committee 6/2/17; amended at recommitted to committee on 1/29/18.

- SB 618 referred to committee 1/4/17; amended at recommitted to committee on 4/18/17, 6/5/17; referred on 1/3/18 and recommitted to committee on 1/31/18.

- SB 9058 (mobile device and computer fair repair act) introduced 6/15/18 and referred to rules committee.

m. North Carolina – HB 663 ("Fair Repair Requirements Act") filed 4/6/17 and referred to committee 4/11/17.

n. Oklahoma - HB 2551 ("Right to Repair Farming Act") introduced 2/5/18 and referred to committee on 2/6/18

o. Tennessee – SB 888 introduced on 2/9/17 and referred to committee on 2/13/17, and to subcommittee on 3/24/17; HB 1382 introduced 2/9/17, referred to committee on 2/15/17, and action deferred by subcommittee on 3/29/17;

p. Vermont

– S.180 introduced 1/3/18; amended to create Right to Repair Task Force and passed Senate on 3/15/18; further amended and passed House 5/4/18; Senate concurred with further amendment 5/9/18; session ended without passage.

- H.9, "An act relating to the fair repair of consumer electronic devices" (2018 Special Session) introduced and passed House on 5/30/18; passed Senate on 6/7/19; Governor approved 6/22/18. Creates Right to Repair Task Force.

q. Virginia

– HB 20 introduced and referred to committee on 11/22/17, assigned to subcommittee on 1/25/18, approved by subcommittee 1/25/18, left in committee on 2/13/18;

- HB 486 introduced on 1/7/18 and passed by indefinitely by committee on 1/29/18; would prohibit an original equipment manufacturer of a digital device from deactivating embedded software, defined in the bill, in the digital device or altering embedded software so as to substantially alter the functioning of the digital device as a response to its being repaired by an independent repair provider.

r. Washington – HB 2279 introduced and referred on 1/8/18, substituted with recommendation to pass on 1/24/18, referred to Rules committee on 1/26/18

s. Wyoming – HB 91, right to repair farm equipment, introduced on 2/9/18, referred on 2/14/18, and postponed indefinitely on 2/22/18.

II. Scope of Potential Vermont Legislation

The task force, and ultimately committees of jurisdiction, will face several fundamental questions if pursuing legislation governing the right to repair:

1. What is the problem you are trying to solve, on whose behalf?

2. What are potential solutions to the problem?

3. What are corresponding costs and benefits?

4. If Vermont will attempt to create a statutory "right to repair," what does that actually mean?

a. *What is the scope of products?*
- smartphones, tablets, computers?
- household appliances and gadgets?
- farm equipment?
- recreational vehicles?
- airplanes?

b. *What is the scope of the duty? ~ What will the law require someone to do?*
- Manufacture and sell diagnostic equipment?
- Manufacture and sell repair tools?
- Manufacture and sell parts?
- Provide training?
- Provide information necessary to perform repairs?
- For how long?
- In what format?

c. *To whom does the duty apply?*
- Original manufacturers?
- Multiple manufacturers, designers, licensors?
- Who has responsibility to coordinate provision of equipment, tools, parts, information?

d. Who are the beneficiaries?
- First purchasers, subsequent purchasers, "independent" repair shops, aftermarket parts producers, anyone?

III. Magnuson-Moss Warranty Act

1. The purpose is not to require consumer warranties, but rather, to ensure that consumers get complete information about warranty terms and conditions when offered; to enable consumers to compare available warranty coverage; to promote competition on the basis of warranty coverage; and to provide incentives for timely, and less costly, resolution of disputes.

2. Applies to written warranties—if offered—to consumer goods (not services, and not products sold for resale or other commercial purposes).

3. FTC has adopted three rules under the act - Rule on Disclosure of Written Consumer Product Warranty Terms and Conditions (the Disclosure Rule), the Rule on Pre-Sale Availability of Written Warranty Terms (the Pre-Sale Availability Rule), and the Rule on Informal Dispute Settlement Procedures (the Dispute Resolution Rule).

4. Rules establish three basic requirements to warrantors or sellers:

(1) Warrantor must designate, or title, the written warranty as either "full" or "limited"

(2) Warrantor must state certain specified information about the coverage of the warranty in a single, clear, and easy-to read document.

(3) Warrantor or seller must ensure that warranties are available in the location where the warranted consumer products are sold so that consumers can read them before buying.

5. Rules establish three prohibitions:

(1) Warrantor cannot disclaim or modify implied warranties (implied warranty of merchantability is guaranteed), except that for a time-limited warranty, warrantor can limit implied warranties to the time period of the limited warranty.

(2) Absent a waiver from FTC, no “tie-in sales” – warrantor cannot condition the warranty on a requirement that the consumer buy an item or service from a particular company.

(3) No deceptive warranty terms.

6. Includes provisions for dispute resolution, providing federal cause of action and recovery of costs and fees for consumers, but also permitting mandatory alternative dispute resolution before court filing.

Other Laws of Potential Applicability

Public Intellectual Property - patents, copyrights, trademarks
Nonpublic Intellectual Property – trade secrets
Antitrust - Sherman and Clayton Acts; tying; refusal to deal

IV. Potential Constitutional Considerations

A thorough presentation of potential constitutional issues is beyond the scope of this memo. Furthermore, absent bill language, a complete constitutional analysis is not possible. Depending on its content, a "right to repair" law that would require a business to produce and sell equipment, parts, tools, or information may raise issues under the following constitutional provisions:

A. Commerce Clause

The Commerce Clause grants Congress the power "[t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl.3. The U.S. Supreme Court has said that under the "dormant" or negative aspect of the Commerce Clause, a state may not discriminate against interstate commerce, and a state may not impose undue burdens on interstate commerce. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93 (1994).

1. Discrimination

a. A state law that discriminates against interstate commerce on its face is subject to "a virtually *per se* rule of invalidity," *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2091 (2018), and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Dep't of Revenue of Ky. V. Davis*, 553 U.S. 328, 338 (2008).

b. A state law may also be discriminatory in effect if it provides for differential treatment of similarly situated entities based on their contacts with the state, or has the effect of providing a competitive advantage to in-state interests vis-à-vis similarly situated out-of-state interests. *Ford Motor Co. v. Texas Dept. of Transportation*, 264 F.3d 493, 501 (5th Cir. 2001).

2. Undue Burden

a. Absent facial discrimination, "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970).

3. Extraterritoriality

a. A state law that is extraterritorial in effect is *per se* invalid.

b. A state law may not apply to commerce wholly outside the state's borders; legislative intent is not relevant if the law controls commerce wholly outside the state's borders; and, the Commerce Clause prohibits on state projecting its laws into another state. *See Healy v. Beer Inst.*, 491 U.S. 324 (1989).

Concerning "right to repair" legislation – could an out-of-state business successfully challenge a Vermont law on one or more of the following theories:

(1) The statute discriminates against interstate commerce in effect because it creates a competitive advantage for Vermont-based independent repair providers over out-of-state providers.

(2) Even if not discriminatory in effect, under *Pike* the statute is unconstitutional because:

(a) Vermont does not have a legitimate local public interest;

(b) the effects on interstate commerce are more than incidental; and

(c) the burden imposed on interstate commerce is clearly excessive in relation to any putative local benefit.

(3) The statute is invalid because of its extraterritorial effects:

(a) If an out-of-state business does not provide diagnostic or repair services in Vermont, does not sell parts into Vermont, etc., a Vermont law that purports to force that business to conduct such activity in Vermont could be extr

B. First Amendment

1. Compelled Commercial Speech

Would a court characterize the statute as compelled commercial speech? If so, what level of scrutiny would apply?

a. Rational Basis Review

i. Would the court conduct a rational basis review under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (challenger must demonstrate that the law is not rationally related to any legitimate governmental interest)?

ii. This standard applies to compelled commercial speech that is "purely factual and uncontroversial" and is "reasonably related to the State's interest in preventing deception of consumers?" *Id.*

b. Intermediate Scrutiny

i. Would a court apply intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566) (1980)—whether:

(1) the regulated expression is false or misleading;

(2) the government interest is substantial;

(3) the statute directly and materially advances the governmental interest asserted; and

(4) the statute is no more extensive than necessary to serve that interest.

ii. Does the *Zauderer* standard apply only to "purely factual and uncontroversial" and "reasonably related to the State's interest in preventing deception of consumers," or does it extend beyond preventing deception? The answer is unclear in light of recent jurisprudence.

2. Compelled Speech

Would a court characterize the statute as non-commercial compelled speech, insofar that it is not a "disclosure" requirement, but rather, compels content-based speech? Consequently, would the statute be subject to strict scrutiny?

a. See *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018); *CTIA-The Wireless Association v. City of Berkeley, California*, 138 S.Ct. 2708 (2018).

b. Arguably, a content-based statute that forces disclosure of information to competitors is not aimed directly at consumers, or simply proposing a commercial transaction, or an advertisement that must be regulated to avoid deception. Rather, it is a government mandate that forces a speaker to convey a particular message (to business competitors) in order to [increase consumer choice] [save consumers money] [indirectly, and potentially, reduce waste and protect the environment] [increase business competition].

C. Contracts Clause

1. A legislative enactment that constitutes a substantial impairment of a contractual relationship must have a significant and legitimate public purpose. *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983).

2. Concerning "right to repair" legislation – are there existing contracts between the manufacturer and others (e.g., license holders, authorized service providers) that would be impaired by the law?

3. If so, can Vermont demonstrate a "significant and legitimate public purpose" that justifies the impairment of contracts?

D. Takings Clause

1. Under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the Supreme Court identified factors that a court must balance to determine whether a law effects a compensable government taking of property:

a. the regulation's economic impact on the claimant;

b. the extent to which it interferes with distinct investment-backed expectations; and

c. the character of the government action.

2. Concerning "right to repair" legislation, to what extent could manufacturers, authorized dealers, or others claim compensation from Vermont for a compensatory taking?