No. 15-____

IN THE
Supreme Court of the United States

Husqvarna Professional Products, Inc.

Petitioner,

v.

The State of New Hampshire

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Earl Bennett
General Counsel
HUSQVARNA GROUP N.A. & L.A.
9335 Harris Corners Parkway
Suite 500
Charlotte, NC 28269
earl.bennett@husqvarnagroup.com
(704) 921-7008

Thomas J. Collin
Counsel of Record
Jennifer S. Roach
Mark R. Butscha, Jr.
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
tom.collin@thompsonhine.com
(216) 566-5500

Counsel for Petitioner

QUESTIONS PRESENTED

New Hampshire amended its automobile dealer statute in 2013 to subject manufacturers of lawn mowers and other yard and garden equipment to the same regulation as automobile manufacturers, including mandatory adjudication of disputes by a Motor Vehicle Industry Board. It did so by defining "motor vehicle" to include "yard and garden equipment." The amended statute nullified essential terms in petitioner's dealer contracts, including the right to arbitrate disputes, but the New Hampshire Supreme Court upheld it.

The questions presented are:

1. Whether a court deciding a Contract Clause case may use "rational speculation" review to uphold retroactive application of a law substantially impairing private contracts based on legislative findings that are contradicted by undisputed evidence.

2. Whether a court deciding an Equal Protection case may rely upon legislative findings to hold that a classification has a rational basis when the findings are contradicted by undisputed evidence.

3. Whether a statute requiring disputes between a manufacturer and its dealers to be submitted to a state administrative agency for adjudication violates the Supremacy Clause as to disputes subject to arbitration under the manufacturer's dealer contracts.

PARTIES TO THE PROCEEDING

Petitioner is Husqvarna Professional Products, Inc.

Respondent is the State of New Hampshire.

Other parties in the consolidated proceeding below before the New Hampshire Supreme Court were plaintiff-appellants Deere & Company, CNH America LLC, AGCO Corporation and plaintiff-appellant Kubota Tractor Corporation.

RULE 29.6 STATEMENT

Husqvarna Professional Products, Inc. is a wholly owned subsidiary of Husqvarna AB, a publicly held Swedish corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Husqvarna Professional Products, Inc. ("Husqvarna"), respectfully petitions for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is unreported but is available at 2015 N.H. LEXIS 134 and is reprinted in the Appendix to this Petition ("App.") at App. 1a. The order of the Superior Court denying summary judgment for petitioner and granting summary judgment for respondent is not reported and is reprinted in the Appendix at App. 41a.

JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 29, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The Contract Clause in Article I, Section 10 of the Constitution provides: "No state shall … pass any … law impairing the obligation of contracts." U.S. Const. art. I, § 10.

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or shall any State … deny

to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

The Supremacy Clause of the Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Federal Arbitration Act provides in pertinent part: "A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Relevant portions of the Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers, N.H. Rev. Stat. Ann. ch. 357-C, as amended in 2013 by SB 126, are reproduced in the Appendix. App. 80a.

Relevant portions of the Regulation of Equipment Dealers, N.H. Rev. Stat. Ann. ch. 347-A, are reproduced in the Appendix. App. 102a.

INTRODUCTION

This case raises issues of great importance about judicial review of state legislation. In affirming the constitutionality of legislation enlarging the scope of New Hampshire's motor vehicle dealership statute – known as the Automobile Dealer Bill of Rights – to reach yard and garden equipment dealers, the New Hampshire Supreme Court invented a new test for evaluating a statute under the Contract Clause, refused to consider evidence of arbitrary and irrational classification under the Equal Protection Clause, and ignored the legislation's conflict with the Federal Arbitration Act under the Supremacy Clause. If allowed to stand, the court's decision will provide a roadmap for other state courts on how to sidestep the constitutional analysis mandated by this Court when addressing challenges to protective economic regulation.

Related Case. Deere & Company, CNH America LLC and AGCO Corporation, parties to the consolidated appeals below, filed a motion with this Court on March 3, 2016 to stay enforcement of the same judgment which is the subject of this Petition, docketed as *Deere & Co. et al. v. State of New Hampshire*, No. 15A-910, and they will be filing contemporaneously with Husqvarna a petition for certiorari seeking review of the New Hampshire Supreme Court's disposition of their claims.

STATEMENT OF THE CASE

A. Statutory Background.

Husqvarna manufactures yard and garden equipment. It sells lawn mowers, snow throwers, trimmers, chainsaws and other yard and garden equipment through independent dealers and national retail chains, including Lowe's, Home Depot and Sears. Dealers handle multiple brands of products, including competitive brands, and they do not make any financial investments to carry Husqvarna products beyond purchase of products for resale.

Prior to 2013, Husqvarna's relationship with its more than 40 New Hampshire dealers was subject to the terms of dealer contracts and an equipment dealer statute, N.H. Rev. Stat. Ann. ch. 347-A ("Equipment Dealer Act"), which governed relationships between manufacturers and dealers of "yard and garden equipment" (N.H. Rev. Stat. Ann § 347-A-1(II)).

The Equipment Dealer Act required good cause for termination, inventory repurchase after termination, and processing of warranty claims within 30 days. It was repealed by Senate Bill 126 ("SB 126"), signed into law on June 25, 2013. SB 126 also amended the State's motor vehicle dealer statute, N.H. Rev. Stat. Ann. ch. 357-C ("Dealership Act"), known as the Automobile Dealer Bill of Rights. Husqvarna and other manufacturers that had previously been within the coverage of the Equipment Dealer Act were now, by operation of the

amendment, subject to the Dealership Act. Under the Dealership Act, the definition of "motor vehicle" was enlarged to include "yard and garden equipment." (N.H. Rev. Stat. Ann. § 357-C:1(I).)

Repeatedly amended since its initial passage in 1981, the Dealership Act regulates every aspect of a motor vehicle manufacturer's relationship with its dealers. By moving Husqvarna into the Dealership Act, SB 126 nullified key provisions of its dealer contracts, all of which had been compliant with requirements of the now-repealed Equipment Dealer Act. Immediate termination of a dealer for fraud is no longer possible, and any termination, for fraud or otherwise, now requires a prior factual finding of good cause by an administrative agency, the Motor Vehicle Industry Board. Husqvarna's contractual right to add dealers to a market area has been voided, and any change affecting intrabrand competition is now subject to a prior factual finding of good cause by the Motor Vehicle Industry Board. SB 126 voided Husqvarna's right to set reimbursement rates for warranty service performed by dealers. It has effectively destroyed Husqvarna's arbitration rights by requiring that all dealer disputes be adjudicated by the Motor Vehicle Industry Board.[1]

[1] A complete listing of contractual provisions that are nullified by SB 126 appears in the August 6, 2014 summary judgment opinion of the Superior Court. App. 48a-51a.

B. New Hampshire Proceedings.

Husqvarna filed a complaint on March 20, 2014 in the Merrimack County, New Hampshire Superior Court against the State of New Hampshire, seeking a declaration that (1) application of the Dealership Act to existing dealer contracts would substantially impair contract rights in violation of the Contract Clauses of the New Hampshire and U.S. Constitutions, (2) application of the Dealership Act to Husqvarna would violate its rights under the Equal Protection Clause of the U.S. Constitution and (3) the Dealership Act violates the Supremacy and Dormant Commerce Clauses of the U.S. Constitution. App. 43a-44a. Husqvarna filed a motion for summary judgment, and the State thereafter filed a cross-motion for summary judgment.

The Superior Court granted the State's motion and denied Husqvarna's motion in an August 6, 2014 Order.[2] It held that SB 126 did not substantially impair Husqvarna's contract rights in violation of either the New Hampshire or U.S. Constitutions (App. 43a-52a, 56a-57a); did not deprive Husqvarna of equal protection under the Fourteenth Amendment to the U.S. Constitution (App. 52a-54a, 57a); and did not violate the Supremacy Clause of

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[2] The Superior Court agreed that the Dealership Act's prohibition of arbitration was a violation of the Supremacy Clause, App. 52a, but it declined to enter judgment for Husqvarna on any of the counts in its complaint, including Count II, which alleged that this feature of the Dealership Act was unconstitutional, App. 56a-57a.

the U.S. Constitution, since provisions in SB 126 prohibiting arbitration could be severed from the statute (App. 52a).

Husqvarna filed an appeal in the New Hampshire Supreme Court on all issues decided by the Superior Court, which was consolidated with two other appeals challenging the constitutionality of SB 126 under the Contract Clauses of the New Hampshire and U.S. Constitutions and the Supremacy Clause of the U.S. Constitution, *Deere & Co. et al. v. State of New Hampshire*, No. 2014-0315, and *Kubota Tractor Corp. v. State of New Hampshire*, No. 2014-0441. App. 1a, 3a. In a December 29, 2015 opinion, the New Hampshire Supreme Court affirmed the Superior's Court's August 6, 2014 in all respects relevant to this Petition. App. 7a-32a, 39a-40a.[3]

Contract Clause Claim. Husqvarna argued in the New Hampshire courts that retroactive application of SB 126 would violate the Contract Clauses of both the New Hampshire and U.S. Constitutions. The New Hampshire Supreme Court assumed that SB 126 substantially impaired Husqvarna's contracts, App. 15a, but it held that retroactive application was permitted because SB 126 had a significant and legitimate public

[3] The New Hampshire Supreme Court vacated the Superior Court's summary judgment for the State on Husqvarna's Dormant Commerce Clause claim and remanded for fact-finding on whether SB 126 unconstitutionally burdened interstate commerce. App. 32a-39a. Husqvarna has since dismissed the Commerce Clause claim, App. 58a-59a, and it is not before this Court or the New Hampshire courts.

purpose, App. 16a, and because including equipment manufacturers within the Dealership Act was a reasonable and necessary way to address that purpose – *i.e.*, to prevent equipment manufacturers from engaging in abusive and oppressive trade practices, App. 25a. The court held that there was no violation of the Contract Clause under the New Hampshire Constitution. App. 26a. Since the Contract Clause of the U.S. Constitution affords no greater protection than does that of the New Hampshire Constitution, the court held that "we reach the same conclusion under the Federal Constitution as we do under the State Constitution." *Id.*

Significant and legitimate public purpose. Relying on a student law review note and a law school hornbook, the court held that rational basis was the standard for reviewing whether the Legislature had a significant and legitimate public purpose. App. 22a. It declined to examine any of Husqvarna's proof, since "it is not our role to second-guess this legislative determination." *Id.* Quoting from one of this Court's decisions evaluating an Equal Protection challenge to federal legislation,[4] the court stated that it will uphold a legislative choice based on "rational speculation." App. 22a-23a.

The court relied solely on a May 22, 2013 entry in the House Journal to divine the purpose of SB 126. App. 15a-16a. The entry is taken verbatim from the

[4] *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

May 16, 2013 Majority Report of the House Commerce and Consumer Affairs Committee, titled "Statement of Intent,"[5] and it will be referred to herein as the Statement of Intent. The court summarized the legislative findings as follows, quoting from the Statement of Intent:

> The legislature deemed such protection necessary because it considered the "relationship between equipment dealers and manufacturers" to be "identical to that [between] car/truck dealers" and car/truck manufacturers. … The legislature determined that "[e]quipment dealers … have business operations that are nearly identical in all respects to car/truck/motorcycle etc. dealers." … The legislature further found that equipment dealership agreements, like automobile dealership agreements, had been "one-sided" and reflected that the dealers and manufacturers had "an autocratic relationship." … It concluded that equipment manufacturers, like automobile manufacturers previously, "were abusing their power in the relationship" and that New Hampshire "businesses and consumers were being harmed as a result."

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[5] The Majority Committee Report is reproduced at App. 105a-108a. The May 22, 2013 House Journal entry, N.H.H.R. Jour. 765, is reproduced at App. 109a-11a.

App. 15a-16a.(citations omitted).

The Statement of Intent showed, according to the court, that the purpose of SB 126 was "to protect equipment dealers and consumers from perceived abusive and oppressive acts by manufacturers." App. 16a. This was "unquestionably" a significant and legitimate public purpose. *Id.*

The court acknowledged that Husqvarna contended that there was no such purpose, because a crucial legislative finding – *i.e.*, that the relationship between yard and garden equipment dealers and manufacturers is identical to that between car/truck dealers and manufacturers – "is unsupportable and made in an 'evidentiary vacuum.'" App. 22a. The finding was based on testimony and evidence from automobile dealers for Ford, Honda, Chevrolet and others, the New Hampshire Automobile Dealers Association ("NHADA") and farm equipment dealers for Case, New Holland, Case IH and Massey Ferguson, not any dealers of yard and garden equipment. App. 113a-15a.

The legislative findings were false and groundless as to Husqvarna. Husqvarna showed that the Legislature had not considered any facts about yard and garden equipment dealers, App. 113a-15a, 122a-24a, and that it therefore could not possibly have found that the relationship of a yard and garden equipment manufacturer with its dealers was identical, or even similar, to that between car/truck

dealers and manufacturers.[6] The Legislature heard testimony from farm equipment dealers and may have concluded that manufacturers of large farm equipment, such as balers and combines, should be subject to the Dealership Act because of similarities between automobile dealerships and farm equipment dealerships, App. 113a-15a, 122a-24a, but it had no information about dealers selling lawn mowers and snow throwers.

Husqvarna's undisputed evidence showed that yard and garden equipment dealers have none of the characteristics identified by the Legislature as making automobile dealers vulnerable to manufacturer actions, App. 115a-19a, 122a-24a:

[6] Excerpts from Husqvarna's main brief in the New Hampshire Supreme Court discussing the Legislative record and the absence of any consideration of the yard and garden equipment industry are reproduced in Appendix I.

Key Attributes of Automobile Dealers as Identified by Legislature	**Corresponding Attributes of Husqvarna Dealers**
Significant investment required in manufacturer's brand	No significant investment in petitioner's brand, dealer discretion what investment to make
A single line supplier and no competitive lines	Multiple suppliers and competitive lines
Cannot switch to another supplier	No limitation on switching to another supplier
Mandatory investment in expensive facility upgrades	No mandatory investment in facility upgrades

Reasonableness and Necessity. The court held that SB 126 "plainly survives scrutiny" under the "standards for evaluating impairments of purely private contracts." App. 24a (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 506 (1987)). According to the court, the provisions of the Dealership Act covering equipment manufacturers "reasonably accomplish the legislature's goal of preventing equipment manufacturers from engaging in abusive and oppressive trade practices." App. 25a.

Because the contracts at issue are private, the court refused to "second-guess" the Legislature's determination that "including equipment manufacturers within the aegis of RSA chapter 357-C was a reasonable and necessary way to address its concern." *Id.* (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 506). The court stated that the Legislature had determined that equipment manufacturers must be subjected "to the same level of regulation that it imposes upon automobile manufacturers." App. 24a.

Equal Protection Clause Claim. The court purported to apply rational basis review to Husqvarna's argument that classification of Husqvarna as a motor vehicle dealer was arbitrary and irrational. App. 30a-32a. Quoting from *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012), the court followed the same analysis that it used to dispose of the Contract Clause claim. App. 31a-32a. According to the court, "a law [is] constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render [the classification] arbitrary or irrational." App. 31a (quoting *Armour*, 132 S. Ct. at 2080-81).

The evidence showed that SB 126 as applied to Husqvarna suffered from exactly the failing listed in the court's quote: The legislative "facts" upon which the classification is based could not rationally have been considered to be true by the Legislature. The

evidence tendered by Husqvarna showed that the Statement of Intent was false and unsupported by even a single word of testimony as to yard and garden equipment, but the court refused to look behind the text. Ignoring the evidence, it engaged in *no review*, much less rational basis review.

Supremacy Clause Claim. Chapter 357-C authorizes the Motor Vehicle Industry Board to decide disputes between a dealer and a manufacturer. The statute gives a dealer the right to appeal to the Board in the event of any dispute as to the results of a warranty claim audit (§ 357-C:5(II)(d)(5)), any attempt by a manufacturer to terminate or not renew the dealer agreement (§ 357-C:7), or any attempt by a manufacturer to add a dealer to the dealer's market area (§ 357-C:9).

Husqvarna sought a declaration under Count II of its complaint that the foregoing and other provisions are preempted by the Supremacy Clause because they conflict with the Federal Arbitration Act. Husqvarna requested that the trial court and the New Hampshire Supreme Court rule "that a dealer with an agreement containing an arbitration clause … may not resort to the Board for resolution of any dispute arising under or in connection with the dealer relationship." App. 29a-30a, 124a-25a. The trial court did not address the request in its August 6, 2014 summary judgment ruling. App. 52a. The New Hampshire Supreme Court declined the request "without prejudice to Husqvarna raising this argument in any future litigated case between it and a dealer." App. 30a.

REASONS FOR GRANTING THE PETITION

I. The New Hampshire Supreme Court's Ruling Directly Conflicts With Decisions of This Court and a Contract Clause Decision of the Highest Court of Another State.

The New Hampshire Supreme Court's ruling directly conflicts with decisions of this Court applying the Contract Clause and Equal Protection Clause and interpreting the Supremacy Clause as applied to the Federal Arbitration Act. It directly conflicts with a decision by the Wisconsin Supreme Court applying the Contract Clause.

A. The New Hampshire Supreme Court's Ruling Conflicts With This Court's Contract Clause Decisions and with a Contract Clause Decision of the Wisconsin Supreme Court.

This Court has clearly staked out the steps needed for evaluation of a Contract Clause claim. If a state law substantially impairs vested contract rights, as SB 126 does, the state "must have a significant and legitimate public purpose behind the regulation, … such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983). Identification of such a purpose "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412 (footnote omitted).

Once such a public purpose has been identified, the next inquiry is whether impairment is "both reasonable and necessary" to serve the purpose claimed by the State. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 29 (1977). Where, as here, a statute "nullifies express terms of … [a] company's contractual obligations and imposes a completely unexpected liability," there must be a showing in the record that the "severe disruption of contractual expectations was necessary to meet an important general social problem." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978).

Instead of following this analytical framework, the New Hampshire Supreme Court invented its own. Since, in the court's judgment, review of a Contract Clause claim involving private contracts is "similar" to "rational basis review in the equal protection or due process context," it determined that it could "uphold a legislative choice 'based on rational speculation.'" App. 22a (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). Relying upon unsupported findings in the Legislature's Statement of Intent, the court concluded that SB 126 had a significant and legitimate public purpose and rejected any review of the findings. It accepted them as true, because "it is not our role to second-guess" the Legislature's determination. App. 22a.

The court was careful to distinguish review of legislation impairing private contracts from review of legislation impairing a State's own contracts or those in which a State's self-interest is at stake.

App. 23a-24a. Its newly-invented rational basis test applies only to private contracts.

The court's analysis directly conflicts with decisions of this Court and a decision of the Wisconsin Supreme Court and, if allowed to stand, would effectively immunize from Contract Clause review state legislation impairing private contract rights.

First, rational basis review has no place in Contract Clause analysis. There is no hint in the Court's Contract Clause decisions that rational basis review has any role to play, and it emphatically does not. The Court made this clear in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), when it rejected an invitation to apply Contract Clause principles in a due process challenge to retroactive application of federal pension legislation:

> We have never held … that the principles embodied in the *Fifth Amendment's Due Process Clause* are coextensive with prohibitions existing against state impairments of pre-existing contracts. … Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the *Contract Clause* with the less searching standards imposed on economic legislation by the Due Process Clauses.

Id. at 733 (italics in original). Consistently with this distinction, the Court of Appeals for the Third Circuit has noted that Contract Clause review of legislative action impairing vested contract rights "is more exacting than the rational basis standard applied in due process analysis." *American Express Travel Related Services, Inc. v. Sidamon-Eristoff,* 669 F.3d 359, 369 (3d Cir. 2012). *See also, e.g., Lipscomb v. Columbus Municipal Separate School District*, 269 F.3d 494, 504 (5th Cir. 2001) ("And while impairment of contract analysis has an air of due process about it, our analysis [under the Contract Clause] is distinct.").

The Wisconsin Supreme Court considered in *Society Insurance v. Labor & Industry Review Commission*, 326 Wis. 2d 444 (2010), the difference between rational basis review of a retroactive statute and Contract Clause review, and its examination is instructive here. The Wisconsin due process clause is substantially equivalent to the Due Process Clause in the Fourteenth Amendment, *id.* at 465 n.11, and Wisconsin interprets state and federal Contract Clauses "coextensively," *id.* at 479. At issue was a law repealing a statute of limitations for payment of worker compensation benefits. Society, an insurer, challenged retroactive application on both due process and Contract Clause grounds after it was required to pay for claims falling outside the original limitations period.

The court concluded that the retroactive statute violated Society's due process rights because it did not have a "rational basis." *Id.* at 466, 477 (citations omitted). In order to show a rational basis, the law

must have a "rational legislative purpose" that outweighs "the private interests … overturn[ed]" by the legislation. *Id.* at 467 (citations omitted). The court rejected an argument that proof of a "significant and legitimate public purpose" was needed, because this would "improperly subject … the retroactive legislation to a heightened level of scrutiny." *Id.* at 468 n.12 (citation omitted).

In contrast, the court applied a heightened level of scrutiny when considering whether retroactive application violated Society's rights under the Contract Clause. It observed that "the level of scrutiny to which the legislation is subjected" depends on how severely the contractual relationship has been impaired. *Id.* at 479 (citations omitted). Because the law created a substantial impairment, it was "subject to heightened scrutiny," and, as a result, "there must exist a significant and legitimate public purpose behind the legislation." *Id.* at 483. Since the court had already concluded that the law could not be "justified by a rational legislative purpose" under due process analysis, it could not, *a fortiori*, be "justified by a significant and legitimate public purpose." *Id.* at 483. Retroactive application, thus, violated the Contract Clause.

The Wisconsin Supreme Court's analysis conforms to this Court's recognition of the need for heightened scrutiny in the face of substantial impairment: "The severity of impairment measures the height of the hurdle the state legislation must clear. … Severe impairment … will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co.*,

438 U.S. at 245. *See also, e.g., Lipscomb*, 269 F.3d at 505 ("The level of scrutiny to which a court subjects state law is proportional to the degree of impairment." (footnote omitted; citing *Allied Structural Steel Co.*)).

Unlike this Court and the Wisconsin Supreme Court, the New Hampshire Supreme Court was oblivious to the crucial distinction between rational basis review and Contract Clause review. When, as here, a law nullifies vested contract rights, Contract Clause analysis requires more than uncritical acceptance of self-serving legislative findings, and the lower court abdicated its constitutional duty under the Contract Clause to determine whether there was in fact a significant and legitimate public purpose for SB 126.

Second, the New Hampshire court's holding conflicts with this Court's insistence upon review of the legislative record in Contract Clause cases. In *Allied Structural Steel Co.*, the Court looked at a statute impairing rights under private employment contracts. The statute retroactively subjected the petitioner to a substantial pension funding charge when it determined to close its Minnesota office. 438 U.S. at 246-47. This Court stressed that such a "[s]evere impairment" of a contractual relationship necessitates "a *careful examination of the nature and purpose of the state legislation*." *Id.* at 245 (emphasis added).

Explaining that the statute "nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability," *id.* at

247, the Court looked to the legislative purpose for justification. It considered evidence "of legislative intent *in the record before us*," *id.* (emphasis added), and concluded that there was a complete failure of proof of any necessity for the statute: "[T]here is no showing *in the record before* us that this severe disruption of contractual expectations was necessary to meet an important general social problem." *Id.* at 247 (emphasis added).

This Court has repeatedly looked to the legislative record to understand the purpose and necessity for a state law under the Contract Clause. *See, e.g., Keystone Bituminous Coal Ass'n*, 480 U.S. at 486 n.14, 506 (considering legislative findings about the need for passage of a statute impairing contract rights); *Energy Reserves Group*, 459 U.S. at 417 n.25 (considering legislative history but finding that it was not dispositive on the question of whether a statute was special interest legislation); *United States Trust Co.*, 431 U.S. at 13-14 (considering circumstances of passage of New Jersey and New York statutes repealing contractual obligation to bondholders). *See also, e.g., Equipment Manufacturers Institute v. Janklow*, 300 F.3d 842, 861 (8th Cir. 2002) (holding that "the sparse legislative history" reinforced the conclusion that the purpose of an equipment dealer statute was to "change the obligations of the manufacturers and dealers"); *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 608 (S.D. Iowa 1993) (reviewing committee testimony and other legislative history to determine purpose of statute), *aff'd sub nom. Holiday Inns*

Franchising, Inc. v. Branstad, 29 F.3d 383 (8th Cir. 1994).

The New Hampshire Supreme Court refused to engage in any analysis of the legislative record, relying solely on the Statement of Intent.[7] If it had, it would have seen that findings in the Statement of Intent were pure invention – that is, there was no record at all – as applied to the relationship between yard and garden equipment dealers and manufacturers.

Third, the court's ruling conflicts with this Court's decisions recognizing the imperative for review of legislative findings when constitutional rights are at issue. The New Hampshire court's default to a "rational speculation" standard barred Husqvarna from demonstrating the fallacy of the very legislative findings relied upon by the court. Such a standard nullifies any inquiry, let alone review. There is nothing in this Court's case law to suggest that Contract Clause analysis can be satisfied by reliance upon demonstrably false legislative rationalizations.

Legislative findings are not holy writ, and a court "retains an independent constitutional duty to

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[7] The New Hampshire court held that it could review legislative history in determining whether SB 126 had a significant and legitimate public purpose, observing that it is not "precluded from examining a statute's legislative history when analyzing whether it offends the State or Federal Contract Clause." App. 21a-22a. It then failed to do so, except to lift quotes from the Statement of Intent.

review [legislative] factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.")). This Court noted in *Gonzales* that findings recited in the Partial-Birth Abortion Ban Act of 2003 were incorrect and that it would not, therefore, uphold the Act on the basis of congressional findings alone. 550 U.S. at 165. Even though a court reviews "congressional factfinding under a deferential standard," *id.*, there are limits. When "some recitations in the Act are factually incorrect, … [u]ncritical deference to Congress' factual findings … is inappropriate." *Id.* at 165-66. *See also United States v. Morrison*, 529 U.S. 598, 615 (2000) (rejecting congressional findings "that gender-motivated violence affects interstate commerce" because "they rely so heavily on a method of reasoning that we have already rejected as unworkable").

The same treatment of legislative findings should have been followed by the New Hampshire Supreme Court. Instead, it refused to consider evidence that would have demonstrated that the Legislature's findings were false. While this Court has cautioned that courts should ordinarily defer to legislative judgment as to the necessity and reasonableness of a particular measure, *Energy Reserves Group*, 459 U.S. at 412, there is nothing in this Court's decisions

that would approve the New Hampshire court's approach -- *forgoing any review of legislative findings.*

Fourth, the court's decision conflicts with this Court's decisions holding that retroactive legislation can be justified only if needed to meet an important general social problem. Failure by the New Hampshire court to consider the record tendered by Husqvarna blinded it to the fact that SB 126 is precisely the type of narrow special interest legislation condemned by this Court under the Contract Clause. It is not "necessary to meet an important general social problem," *Allied Structural Steel Co.*, 438 U.S. at 247, or remedy "a broad and general social or economic problem," *Energy Reserves Group*, 459 U.S. at 412. The Legislature stated explicitly that SB 126 was enacted for protection of a narrow sector of the economy: it "seeks to continue *to level the playing field for NH businesses.*" App. 106a, 109a (emphasis added). The New Hampshire Supreme Court's opinion carefully omitted any mention of this purpose.

Statutes purporting to "level the playing field" between manufacturers and dealers or equalize bargaining power between private contracting parties are paradigmatic special interest laws. They have repeatedly been held insufficient to justify retroactive impairment of contract rights. *E.g.*, *Equipment Manufacturers Institute*, 300 F.3d at 861 ("leveling the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest" (footnote omitted)); *Pepsico, Inc. v. Marion Pepsi-Cola Bottling Co.*, 2003

U.S. Dist. LEXIS 20060, at *20 (S.D. Ill. 2003) ("In spite of the general proclamations in the Act that it is for the public good, careful analysis of the Act's provisions leads to only one conclusion: it serves the private interest to one party in a contractual relationship by attempting to level the playing field, and it does nothing to promote the greater good of society."); *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F.Supp.2d 844, 876 (N.D. Ill. 2000) ("to the extent that the retroactive imposition of the good-faith requirement was intended to adjust contractual obligations retroactively to give one party what it was unable to obtain through negotiations at the time of contracting, the Act would seem not only unconstitutionally to impair the parties' contractual relationships but to have done so intentionally"); *McDonald's Corp.*, 822 F.Supp. at 608-09 ("the articulated overall purpose of the Act is specifically to adjust the balance of power between contracting parties," but the importance of franchising to the Iowa economy "does not supply a broad societal interest justifying the substantial impairment of *existing* contracts" (emphasis in original)).

Stressing that the contracts affected by SB 126 were "purely private," the New Hampshire court looked no further than the Statement of Intent to conclude that SB 126 "plainly survives scrutiny" as a reasonable and necessary way to address the legislative goal of preventing equipment manufacturers from engaging in abusive and oppressive trade practices. App. 24a. Husqvarna's evidence showed that, on the contrary, impairing its dealer contracts would address no important general

social problem or advance any "broad societal interest." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983). It showed that the Legislature was not exercising its police power but was instead "providing a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412.

B. The New Hampshire Supreme Court Ruling Conflicts with This Court's Equal Protection Clause Decisions.

Husqvarna showed that its classification as a motor vehicle manufacturer was arbitrary and irrational and a violation of its rights under the Equal Protection Clause. Borrowing from its Contract Clause analysis, the New Hampshire Supreme Court held, however, that Husqvarna had failed to prove that the classification "is not rationally related to the legislature's legitimate purpose of protecting the dealers of such equipment from perceived abusive and oppressive acts by manufacturers." App. 32a. It was able to arrive at this conclusion only by denying Husqvarna any review of the record at all, much less review satisfying the rational basis test.

Even under comparatively forgiving rational basis review, a classification is unconstitutional if, "in light of the facts known or generally assumed[,] it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Armour*, 132 S. Ct. at 2080. It is unconstitutional, likewise, if "the relationship of the classification to its goal is … so attenuated as to render the

distinction arbitrary or irrational." *Id.* The court's acceptance of the self-serving Statement of Intent and refusal even to consider evidence demonstrating its falsity directly conflict with this Court's decisions on rational basis review under the Equal Protection Clause.

This is not a case in which a court is free to speculate about a rational basis for state legislation. While the Court has noted that there is no requirement that a legislature "actually articulate at any time the purpose or rationale supporting its classification," *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992), the New Hampshire Legislature did exactly that in the Statement of Intent. Based on testimony from or about farm equipment dealers,[8] it subjected equipment manufacturers to the Dealership Act because their relationship with dealers "is identical to that of car/truck dealers" and the business operations of equipment dealers "are nearly identical in all respects to car/truck/motorcycle etc. dealers." App. 106a. SB 126 "seeks to continue to level the playing field for NH businesses and ensure consumer interests are safeguarded as well." *Id.* There is, thus, no room for speculation about the purpose for SB 126.

Husqvarna's undisputed record evidence showed that these legislative findings, based exclusively on testimony regarding farm equipment manufacturers,

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[8] The Superior Court pointed to some of this testimony in its April 15, 2014 order in *Deere & Co. v. State of New Hampshire* granting the State's motion for summary judgment. App. 73a-74a.

were false and groundless as applied to yard and garden equipment manufacturers and that Husqvarna's inclusion in the Dealership Act was therefore arbitrary and irrational. The evidence "precluded any plausible inference that the reason" for inclusion of Husqvarna in the Dealership Act was to achieve the purpose articulated by the Legislature, *Nordlinger*, 505 U.S. at 16, and there is no latitude for speculation about other possible purposes for SB 126. Since the Legislature "specifically declared … [its] purpose, … [there is] no room to conceive of any other purpose." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) (discussing *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)).

Even under the rational basis test, this Court's decisions contemplate *some review.* The "rational-basis standard is 'not a toothless one,'" *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981), but the New Hampshire court treated it that way. Faced with record evidence that the Statement of Intent was false and groundless, the court had a duty to consider the evidence.[9] *See, e.g., Gonzales*, 550 U.S. at 165 (a court "retains an independent constitutional duty to review [legislative] factual findings where constitutional rights are at stake"); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936) ("Legislative declaration or finding is necessarily subject to independent judicial review

[9] The court acknowledged that Husqvarna contended that a key finding in the Statement of Intent was "unsupportable and was made in an 'evidentiary vacuum,'" but it refused to "second-guess this legislative determination." App. 22a.

upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained.").

The relevant inquiry for Equal Protection analysis is whether action taken by the Legislature – defining "motor vehicle" in a way that swept yard and garden equipment manufacturers into the Dealership Act – was "rationally related to the … avowed purpose" of the legislation. *Armour*, 132 S. Ct. at 2084. It was not. A plaintiff may "negate a seemingly plausible basis for the law by adducing evidence of irrationality," *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (footnote omitted), and Husqvarna did just that. The New Hampshire Supreme Court's refusal to consider legislative history other than the veneer of afterthought "purpose" recitations in the Statement of Intent conflicts with this Court's Equal Protection Clause decisions and constitutes exactly the kind of "judicial blindness to the history of a challenged rule or the context of its adoption" that defeats any meaningful rational basis review. *Id.* at 226.

C. The New Hampshire Supreme Court's Ruling Conflicts with This Court's Decision in *Preston v. Ferrer*, Holding that a State Law Lodging Primary Jurisdiction in an Administrative Agency Is Superseded by the Federal Arbitration Act.

The Dealership Act, as amended by SB 126, makes it an unfair method of competition for a manufacturer to require that a dealer submit

disputes to arbitration (N.H. Rev. Stat. Ann § 357-C:3(III)(p)(3)) and prohibits inclusion of an arbitration clause in a new dealership agreement (N.H. Rev. Stat. Ann. § 357-C:6(III)). The New Hampshire Supreme Court, affirming the trial court's determination that the provisions conflicted with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. ("FAA"), held that they could be severed from the Dealership Act. App. 28a. The court failed to address, however, Husqvarna's contention that remaining provisions in the Dealership Act, giving the Motor Vehicle Industry Board jurisdiction to decide disputes between a dealer and manufacturer, were unconstitutional under the Supremacy Clause insofar as they would require disputes to be decided by the Board even for dealers with agreements containing arbitration clauses. The Court observed that Husqvarna could raise the contention "in any future litigated case between it and a dealer." App. 30a.

The issue was ripe for decision, and the State of New Hampshire at no time argued that the issue was not justiciable under the New Hampshire declaratory judgment statute. N.H. Rev. Stat. Ann. § 491:22.

The Dealership Act authorizes the Motor Vehicle Industry Board to decide disputes between a dealer and a manufacturer. It gives a dealer the right to appeal to the Board in the event of a dispute as to the amount of a chargeback resulting from a manufacturer's audit of warranty claims (§ 357-C:5(II)(d)(5)); in the event of any attempt by a manufacturer to terminate or not renew the dealer

agreement (§ 357-C:7); or in the event of any attempt by a manufacturer to add a dealer to the dealer's market area (§ 357-C:9). Regulations issued by the Board also provide for hearings concerning rights of survivorship and association, discounts offered to dealers, and other matters not explicitly addressed in the Dealership Act. (N.H. Code Admin. Rules, Mvi 209.04, 209.06, 209.08-.09.)[10] Section 357-C:12(IX) gives a dealer the right to bring a civil action in superior court for any violation of the statute. Except for such civil actions, the Board has "exclusive powers" to hear any protest "complaining of conduct governed by and violative of this chapter." (§ 357-C:12(II).)

The vast majority of Husqvarna's New Hampshire dealers have arbitration clauses in their agreements with Husqvarna. App. 127a-29a. The foregoing statutory provisions give them the right to submit disputes to the Motor Vehicle Industry Board, however, and Section 357-C:12(II) makes it clear that the Board has exclusive jurisdiction to hear and decide any disputes.

It was error for the New Hampshire court not to hold that the Supremacy Clause preempts any statutory right of resort to the Motor Vehicle Industry Board by a dealer whose contract with Husqvarna contains language requiring arbitration of "[a]ny dispute arising out of or relating to this Agreement." App. 128a. Its failure to do so directly

[10] In the interest of not further burdening the record, the text of the regulations has not been reproduced in the Appendix.

conflicts with this Court's decision in *Preston v. Ferrer*, 552 U.S. 346 (2008). The Court there considered a requirement under the California Talent Agencies Act that any dispute between a licensed talent agent and a client be submitted to the California Labor Commissioner for determination. The contract between an agent, Arnold Preston, and his client, Alex Ferrer, provided for arbitration. In response to Preston's demand for arbitration of a fee dispute, Ferrer filed a petition with the Labor Commissioner and thereafter filed an action seeking a declaration that the contract was not subject to arbitration. The California Court of Appeal ruled that the Labor Commissioner had exclusive original jurisdiction over the dispute, and the California Supreme Court denied Preston's petition for review.

This Court considered in *Preston* whether the FAA overrides "state statutes that refer certain disputes initially to an administrative agency," *id.* at 349, and it held that it does. The "FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative," for parties who have agreed to arbitrate all questions arising under a contract. *Id.* at 359.

The Dealership Act imposes on Husqvarna the same administrative agency review that this Court invalidated in *Preston*, and the New Hampshire court's refusal to bar Motor Vehicle Industry Board review of disputes otherwise subject to arbitration directly conflicts with this decision. The Court should grant the Petition and declare that Board adjudication of disputes subject to arbitration is preempted by the Supremacy Clause.

II. This Case Raises Matters of Great Importance and Urgency.

A. Judicial Review of State Laws Impairing Contract Rights Is a Matter of Continuing Importance, and the New Hampshire Ruling, if Allowed to Stand, Would Gravely Compromise Protection of Private Contract Rights from Overreaching State Economic Legislation.

The constitutional rights secured by the Contract Clause are more important now than ever before. In the face of federal and state economic regulation growing more pervasive and intrusive, the prohibition of retroactive laws impairing the obligation of contracts has increasing significance. This Court has not recently interpreted the Contract Clause, but it is continuously under review in the federal courts of appeals[11] and state supreme courts.[12]

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[11] For recent decisions, *see*, *e.g.*, *Powers v. United States*, 783 F.3d 570, 577-80 (5th Cir. 2015) (whether municipal ordinance impaired private contract); *Taylor v. City of Gadsden*, 767 F.3d 1124, 1133-36 (11th Cir. 2014) (whether change in pension contribution rate by city impaired contracts of city employees); *Cherry v. Mayor and City Council of Baltimore City*, 762 F.3d 366, 371-73 (4th Cir. 2014) (whether city's modification of pension plan gave rise to a claim under the Contract Clause); *Me. Ass'n of Retirees v. Bd. of Trustees of Me. Public Employees Ret. Sys.*, 758 F.3d 23, 29-32 (1st Cir. 2014) (whether Maine statute impaired claimed contractual right to cost of living adjustments for retirees); *Welch v. Brown*, 551 F. App'x 804, 810-12 (6th Cir. 2014) (whether city manager's orders

The Court should accept this case for review because the lower court has fashioned a rule for Contract Clause analysis that is dangerous and far-reaching, and the issue is clearly presented for review. The lower court's decision would effectively remove private contracts from Contract Clause protection.

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modifying contracts and collective bargaining agreements with respect to healthcare benefits of municipal retirees impaired their contract rights); *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359, 368-70 (3d Cir. 2012) (whether New Jersey statute reducing period after which travelers checks are deemed abandoned impaired American Express contract rights).

[12] For recent decisions, *see*, *e.g.*, *Justus v. State of Colo.*, 336 P.3d 202, 207-11 (Colo. 2014) (whether Colorado statute changing formula for calculating annual cost of living adjustments for retirees in public employees' pension program violated the Colorado or U.S. Constitution Contract Clauses); *CDA Dairy Queen, Inc. v. State Ins. Fund*, 2013 Ida. LEXIS 111, at *5-31 (Idaho 2013) (holding that court will apply federal Contract Clause principles when determining whether a statute violates state constitution prohibition against retroactive legislation); *In re Pension Reform Litig.*, 32 N.E.3d 1, 20-25 (Ill. 2015) (statute reducing retirement benefits of state funded retirement systems for public employees held unconstitutional under state and U.S. Constitutions); *Christiansen v. County of Douglas*, 288 Neb. 564, 576-85 (2014) (evaluating county resolution changing health insurance premium rates for retirees under state and U.S. Contract Clauses); *N. C. Ass'n of Educators v. North Carolina*, 776 S.E.2d 1, 8, 14-16 (N.C. Ct. App. 2015) (holding that repeal of statute establishing tenure for public teachers violated Contract Clause of U.S. Constitution), *pet. for review allowed*, 775 S.E.2d 831 (N.C. Aug. 20, 2015).

Retroactive legislation such as SB 126 "presents problems of unfairness … [and] can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). It is the office of the Contract Clause to impose limits upon the power of a State to abridge existing contractual relationships, "even in the exercise of its otherwise legitimate police power." *Allied Structural Steel Co.*, 438 U.S. at 242. The decision of the New Hampshire Supreme Court fatally vitiates the Contract Clause as applied to private contracts.

By substituting rational basis review for the scrutiny required by this Court's Contract Clause decisions, and recognized by the Wisconsin Supreme Court in *Society Insurance*, the New Hampshire court has ensured that any legislative action destroying private contract rights will be validated if a court can merely point to legislative findings, or the text of the statute itself, reciting a significant and legitimate public purpose. Whether the findings or text are after-the-fact fabrications intended to justify legislative overreaching will not matter and will never be discovered. Any attempt to demonstrate, as here, that a statute addresses no important general social problem will be blocked.

If allowed to stand, the New Hampshire Supreme Court's interpretation of this constitutional right may be followed by other courts, shielding from judicial review state legislative action impairing

private contracts.[13] It is precisely in the area of private contracts, however, that state legislatures may succumb to the lobbying power of well-organized private groups, like the NHADA, and enact laws giving their members contract rights they have been unable to negotiate on their own.

Husqvarna and other manufacturers of yard and garden equipment are already subject to statutes in more than 30 states regulating their relationships with dealers. The New Hampshire Legislature's decision to subject these relationships to a regulatory scheme for an industry – the manufacture and distribution of automobiles and trucks – bearing no resemblance to the outdoor power equipment industry is the first of its kind. App. 119a-22a. If the lower court's interpretation prevails, Husqvarna may find itself similarly hand-cuffed, and the Contract Clause stripped of any force or effect, in challenging retroactive application of comparably overreaching new laws in other states.

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[13] For representative cases in which impairment of private contract rights has been at issue, see, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Am. Express Travel Related Servs. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012); *N. C. Ass'n of Educators v. North Carolina*, 776 S.E.2d 1 (N.C. Ct. App. 2015), *pet. for review allowed*, 775 S.E.2d 831 (N.C. Aug. 20, 2015); *Kirven v. Cent. States Health & Life Co.*, 409 S.C. 30 (2014); *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 326 Wis.2d 444 (2010).

B. Judicial Review of State Economic Legislation Is a Matter of Continuing Importance, and the New Hampshire Ruling, if Allowed to Stand, Would Remove This Legislation from Rational Basis Review.

While purporting to apply rational basis review, the New Hampshire Supreme Court denied Husqvarna *any review*, refusing to look beyond glib assertions in the Statement of Intent. Even though it acknowledged that Husqvarna had assembled evidence showing that the legislative findings were false and groundless,[14] it would not consider the evidence. It is precisely this evidence that would have shown, however, that the classification of Husqvarna as a "motor vehicle" manufacturer "was not rationally related to the … avowed purpose" for SB 126, *Armour*, 132 S. Ct. at 2084, and that the relationship of the classification to the purpose was "so attenuated as to render the distinction arbitrary … [and] irrational," *Nordlinger*, 505 U.S. at 11. The evidence would have shown that "the legislative facts on which the classification is … based" could not rationally "have been considered to be true by the governmental decisionmaker," *i.e.*, the Legislature. *Id.*

If allowed to stand, the New Hampshire court's Equal Protection analysis could be followed by other courts to cut off any meaningful constitutional scrutiny of state economic legislation. There is no

[14] See note 9 *supra*.

question, of course, that great deference is owed to state legislation not impinging on the rights of protected classes, but deference does not mean abject abdication.

Where, as here, the industry subjected to statutory regulation was not even considered by the legislature in the first place, its inclusion in the statute is the very definition of arbitrary and irrational. A legislative choice may not be "subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data," *Beach Communications, Inc.*, 508 U.S. at 315, but a court cannot refuse to weigh evidence showing that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification," *id.* at 313.

This Court should reverse the New Hampshire Supreme Court's decision, because it would remove from Equal Protection review any state statute that was accompanied by legislative findings, no matter how pretextual or groundless, purporting to provide an explanation for a classification created by the statute.

C. The Dealership Act's Motor Vehicle Industry Board Review Provisions Are Symptomatic of Continuing State Hostility to the National Policy Favoring Arbitration and Should Be Declared Unconstitutional.

The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985), and embodies a "national policy favoring arbitration," *Nitro-Lift Technologies, L.L.C. v. Howard,* 133 S. Ct. 500, 501 (2012). Because state courts rather than federal courts are most frequently called upon to apply the FAA, it is "a matter of great importance … that state supreme courts adhere to a correct interpretation of the legislation." *Id.* The New Hampshire Supreme Court did not.

Prior to passage of SB 126, the Dealership Act's provisions requiring submission of dealer disputes to the Motor Vehicle Industry Board posed no conflict with the FAA. The Act applied only to "motor vehicles," as that term is commonly understood, and the Automobile Dealer's Day in Court Act ("ADDCA") had been amended in 2002 to specifically exempt "motor vehicle franchise contracts" from the reach of the FAA. (15 U.S.C. § 1226(a)(2).) Arbitration of a dispute under such a contract is permitted only if the parties consent to it. *Id.* The exemption applies only to dealers in motor vehicles, as "motor vehicle" is defined at 49 U.S.C. § 30102. (15 U.S.C. § 1226(a)(1)(A).) Section 30102(a)(6) defines a motor vehicle as "a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways …". The definition does not reach yard and garden equipment such as that manufactured by Husqvarna, and there is no possible argument that the ADDCA exemption from the FAA has any application to Husqvarna.

Sweeping yard and garden equipment manufacturers into the Dealership Act thus

subjected them to all of its Motor Vehicle Industry Board provisions for adjudication of dealer disputes.

Amendment of the Dealership Act to subordinate Husqvarna's arbitration rights to the exclusive jurisdiction of the Motor Vehicle Industry Board reflects state hostility to the FAA that this Court has repeatedly addressed and had to rectify, whether embodied in judicial rulings or legislation. *See, e.g., Nitro-Lift Technologies,* 133 S. Ct. at 504 (vacating order of Oklahoma Supreme Court interfering with authority of arbitrator to determine enforceability of noncompetition covenants); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that FAA preempted Montana statute purporting to restrict enforceability of arbitration agreement). The Court should grant the Petition to respond to New Hampshire's refusal to accommodate the national policy favoring arbitration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Earl Bennett
General Counsel
HUSQVARNA GROUP
N.A. & L.A.
9335 Harris Corners
Parkway
Suite 500
Charlotte, NC 28269
earl.bennett@husqvarnagroup.com
(704) 921-7008

Thomas J. Collin
Counsel of Record
Jennifer S. Roach
Mark R. Butscha, Jr.
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
tom.collin@thompsonhine.com
(216) 566-5500

Counsel for Petitioner Husqvarna Professional Products, Inc.

March 25, 2016

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THE SUPREME COURT OF NEW HAMPSHIRE

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DEERE & COMPANY & a.

v.

THE STATE OF NEW HAMPSHIRE

KUBOTA TRACTOR CORPORATION

v.

THE STATE OF NEW HAMPSHIRE

HUSQVARNA PROFESSIONAL PRODUCTS,

INC.

v.

THE STATE OF NEW HAMPSHIRE

Argued: September 10, 2015
Opinion Issued: December 29, 2015

Nixon Peabody LLP, of Manchester (Kevin M. Fitzgerald, Gordon J. MacDonald, and Anthony J. Galdieri on the brief, and Mr. MacDonald orally), for petitioners Deere & Company, CNH America LLC, and AGCO Corporation.

CullenCollimore, pllc, of Nashua (Brian J.S. Cullen and Shelagh C.N. Michaud on the brief, and Mr. Cullen orally), for petitioner Kubota Tractor Corporation.

McLane Middleton, Professional Association, of Manchester (Michael A. Delaney on the brief), and Thompson Hine LLP, of Cleveland, Ohio (Thomas J. Collin and Jennifer S. Roach on the brief, and Mr. Collin orally), for petitioner Husqvarna Professional Products, Inc.

Joseph A. Foster, attorney general (Francis C. Fredericks, assistant attorney general, on the brief and orally), for the respondent, the State of New Hampshire.

Holmes Law Offices PLLC, of Concord (Gregory A. Holmes on the brief and orally), for the intervenor, Frost Farm Service, Inc.

Douglas, Leonard & Garvey, P.C., of Concord (Jason R.L. Major and Charles G. Douglas, III on the brief), for Association of Equipment Manufacturers, as amicus curiae.

Upton & Hatfield, LLP, of Portsmouth (Russell F. Hilliard on the brief), for Northeast Equipment Dealers Association, and Peter J. McNamara, of Concord, by brief, for New Hampshire Automobile Dealers Association, as amici curiae.

Kelly Law PLLC, of Nashua (James D. Kelly on the brief), and Kelley Drye and Warren, of Washington, D.C. (William Guerry and Shaun Gehan on the brief), for Outdoor Power Equipment Institute, as amicus curiae.

DALIANIS, C.J. In these consolidated appeals, the petitioners, Deere & Company (Deere), CNH America LLC (CNH), AGCO Corporation (AGCO), Kubota Tractor Corporation (Kubota), and Husqvarna Professional Products, Inc. (Husqvarna), appeal orders of the Superior Court (Smukler, J.) granting summary judgment to the respondent, the State of New Hampshire, on the petitioners' constitutional challenges to Senate Bill (SB) 126. We affirm in part, vacate in part, and remand.

I. Brief Factual Summary

The pertinent facts follow. SB 126, enacted in 2013, amended RSA chapter 357-C to define "motor vehicle" as including "equipment," which "means farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts." Laws 2013, 130:1 (quotations omitted); see RSA 357-C:1, I (Supp. 2015); see also STIHL, Inc. v. State of N.H., 168 N.H. ___ (decided Oct. 27, 2015) (concluding that the statutory definition of motor vehicle, as amended by SB 126, pertains to equipment that is analogous to automobiles, that is, equipment with an engine, wheels, and a transmission). Because of this amendment, manufacturers, distributors, and dealers of such equipment are, for the first time, subject to the New

Hampshire Motor Vehicle Franchise Act, RSA chapter 357-C. See STIHL, Inc., 168 N.H. at ___; see also RSA ch. 357-C (2009 & Supp. 2015).

Like its federal counterpart and similar state statutes, RSA chapter 357-C, "the so-called 'dealer bill of rights,'" STIHL, Inc., 168 N.H. at ___, was enacted "to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers." New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 101 (1978) (discussing such laws in general), see id. at 100-01 n.4 (quoting Congressional report that gave rise to the federal legislation); see also Roberts v. General Motors Corp., 138 N.H. 532, 536 (1994). As first enacted in 1981, RSA chapter 357-C provided motor vehicle dealers certain protections from the actions of manufacturers. See Laws 1981, ch. 477; see also STIHL, Inc., 168 N.H. at ___. Over time, the legislature increased the level of regulation by, for instance, creating the New Hampshire Motor Vehicle Industry Board (Board) to enforce the statute, see Laws 1996, 263:8, and expanding the definition of motor vehicle to include off highway recreational vehicles, see Laws 2002, 215:4, and snowmobiles, see Laws 2007, 372:3. See STIHL, Inc., 168 N.H. at ___.

RSA chapter 357-C regulates, among other things, a manufacturer's delivery and warranty obligations and termination of dealership agreements. See RSA 357-C:4 (2009), :5, :7 (Supp. 2015). RSA chapter 357-C also defines unfair methods of competition and deceptive practices. See RSA 357-C:3 (Supp. 2015). Violation of any provision of RSA chapter 357-C constitutes a misdemeanor. See RSA 357-C:15 (2009).

Among other safeguards, RSA chapter 357-C "protects the equities of existing dealers by prohibiting" motor vehicle "manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intrabrand competition would be injurious to the existing franchisees and to the public interest." New Motor Vehicle Bd. of Cal., 439 U.S. at 101 (describing California Automobile Franchise Act, a law similar to RSA chapter 357-C); see RSA 357-C:9 (Supp. 2015). To enforce this prohibition, RSA chapter 357-C requires a motor vehicle manufacturer that seeks to establish a new motor vehicle dealership or relocate an existing new motor vehicle dealership "within a relevant market area where the same line make is then represented," to give written notice of such intention to the Board and to "each new motor vehicle dealer of such line make in the relevant market area." RSA 357-C:9, I; see New Motor Vehicle Bd. of Cal., 439 U.S. at 103 (describing California Automobile Franchise Act). RSA chapter 357-C defines the "[r]elevant market area" as "any area within the town or city where the motor vehicle dealer maintains his place of business or the area, if any, set forth in a franchise or agreement, whichever is larger." RSA 357-C:1, XXI (2009). If a new motor vehicle dealership protests to the Board within a statutorily-defined period of time, the Board then holds a hearing to determine whether there is "good cause," as statutorily-defined, for "not permitting such new motor vehicle dealership." RSA 357-C:9, I; see RSA 357-C:9, II, III. Among the factors to consider when determining whether "good cause" exists are: (1) "[a]ny effect on the retail new motor vehicle business and the

consuming public in the relevant market area," RSA 357-C:9, II(b); (2) whether establishing an additional new dealership "is injurious or beneficial to the public welfare," RSA 357-C:9, II(c); and (3) whether establishing an additional dealership "would increase competition, and therefore be in the public interest," RSA 357-C:9, II(e).

As the legislature expanded RSA chapter 357-C, it also enacted RSA chapter 347–A, a similar but less comprehensive regulatory scheme providing protections to equipment dealers. STIHL, Inc., 168 N.H. at ___; see Laws 1995, ch. 210. RSA chapter 347-A regulated: (1) the termination of dealer agreements; (2) a supplier's duty upon termination of such an agreement; (3) the terms for repurchasing inventory upon termination of such an agreement and exceptions thereto; (4) a dealer's right to transfer its business; (5) warranty obligations; and (6) the obligation of a successor in interest. See RSA 347-A:2-:6, :8, :11 (2009) (repealed 2013). Unlike RSA chapter 357-C, RSA chapter 347-A did not include an administrative enforcement mechanism, provide for criminal penalties, impose statutory limits upon the ability of a manufacturer to establish or relocate a dealership, or specify the methods of competition and practices that were deemed unfair and deceptive. See RSA ch. 347-A (2009) (repealed 2013).

When the legislature, through SB 126, amended the definition of "motor vehicle" in RSA chapter 357-C to bring certain equipment manufacturers and dealers within the aegis of that chapter, it also repealed RSA chapter 347-A. STIHL, Inc., 168 N.H.

at ___; see Laws 2013, ch. 130. SB 126 became effective in September 2013. Laws 2013, 130:19.

In August 2013, Deere, CNH, and AGCO, collectively referred to as the Deere petitioners, sued the State for declaratory and injunctive relief related to SB 126. The Deere petitioners manufacture agricultural, construction, forestry, industrial, lawn, and garden equipment, including commercial mowers, wheel loaders, backhoes, and agricultural tractors. Their complaint alleges that: (1) retroactive application of SB 126 substantially impairs their existing dealership agreements in violation of the State and Federal Contract Clauses; and (2) SB 126 violates the Supremacy Clause of the Federal Constitution because it voids or otherwise renders unenforceable mandatory binding arbitration clauses in existing dealership agreements, thereby conflicting with the Federal Arbitration Act (FAA). Thereafter, the Deere petitioners obtained a court order that preliminarily enjoined the State "from including farm and equipment manufacturers within the definition of motor vehicles" in RSA chapter 357-C "as provided for under SB 126." In October 2013, the trial court granted intervenor status to Frost Farm Service, Inc., an equipment dealer and franchisee of AGCO.

The Deere petitioners and the State subsequently filed cross-motions for summary judgment. In April 2014, the trial court granted the State's motion and denied the Deere petitioners' motion, concluding that the Deere petitioners had "not sustained their burden of showing that SB 126 unconstitutionally impairs existing contracts." The court observed that the

Deere petitioners had identified "ten substantial SB 126 impairments," but that "[n]ot all of the [identified] impairments . . . apply to each of the contracts in question." Ultimately, the court concluded that, although including the Deere petitioners "within the purview of RSA [chapter] 357-C has created added requirements by which [they] must act, such additions represent refinements in the law," and do not constitute substantial impairments of their existing contracts. For example, the court observed, although RSA chapter 357-C requires that a dealership agreement may not be terminated except upon "good cause," RSA chapter 347-A contained a similar mandate. RSA 357-C:7, I(c); see RSA 347-A:2, I. Under RSA chapter 347-A, a dealership agreement could not be terminated "without cause" and "cause" was defined as "failure by an equipment dealer to comply with requirements imposed upon the equipment dealer by the dealer agreement," provided that those requirements were not substantially different from those imposed upon other similarly situated dealers. Id.

The trial court further concluded that, even if SB 126 substantially impaired the Deere petitioners' existing contracts, their contract clause claim failed because SB 126 serves the legitimate and significant public purpose of safeguarding consumer interests and "constitutes broad-based economic legislation that is directed to meet a societal need." However, the court agreed with the Deere petitioners that, as applied to equipment manufacturers, portions of RSA 357-C:3, III(p)(3)

and RSA 357-C:6, III violate the Supremacy Clause because they conflict with, and are preempted by, the FAA. Nonetheless, the court rejected their argument that those provisions are so integral to RSA chapter 357-C that they are not severable. The Deere petitioners appeal the trial court's decision. The trial court stayed its summary judgment order pending the instant appeal.

Shortly before the court ruled upon the summary judgment motions in the Deere action, Husqvarna brought its own action challenging the constitutionality of SB 126. Husqvarna manufactures forestry, lawn and garden equipment, including mowers, garden tractors, and snow throwers, which it sells through more than 40 independent dealers in New Hampshire. In addition to alleging counts for unconstitutional impairment of contract and violation of the Supremacy Clause, Husqvarna alleges that SB 126 violates the Equal Protection and dormant Commerce Clauses of the Federal Constitution.

Thereafter, Husqvarna and the State filed cross-motions for summary judgment. In August 2014, the trial court granted the State's motion and denied Husqvarna's motion. Husqvarna appeals the trial court's order. The trial court stayed application of SB 126 to Husqvarna pending final disposition of this appeal.

In April 2014, Kubota brought its own action against the State, alleging a single count — that SB 126 substantially impairs its existing dealer agreements in New Hampshire in violation of the State and Federal Contract Clauses. Kubota

describes itself as "a long standing distributor of construction, farm, and lawn equipment." In June 2014, Kubota and the State filed a joint motion for a final order asking the trial court to confirm that the final order it had entered in the Deere action applied to Kubota. The trial court granted the motion and stayed application of the Deere order to Kubota pending the resolution of Kubota's appeal.

II. Analysis

On appeal, all petitioners argue that SB 126 violates the State and Federal Contract Clauses. See N.H. CONST. pt. I, art. 23; U.S. CONST. art. I, § 10, cl. 1. The Deere petitioners and Husqvarna assert that SB 126 also offends the Supremacy Clause. See U.S. CONST. art. 6, cl. 2. Finally, Husqvarna contends that SB 126 violates the federal Equal Protection Clause, see U.S. CONST. amend. XIV, and the dormant Commerce Clause, see U.S. CONST. art. I, § 8, cl. 3. We first address the petitioners' claims under the State and Federal Contract Clauses and then address claims arising only under the Federal Constitution. "Throughout, we keep in mind the elementary rule that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005) (quotation, brackets, and ellipses omitted). We confine our analysis to the questions raised on appeal and do not otherwise opine upon the wisdom and reasonableness of the legislature's decision to amend RSA chapter 357-C by defining "motor vehicle" to include "equipment." RSA 357-C:1, I. "The wisdom and reasonableness of the legislative scheme are for the legislature, not the courts, to

determine." Blackthorne Group v. Pines of Newmarket, 150 N.H. 804, 810 (2004).

A. Standards of Review

"In reviewing the trial court's rulings on cross-motions for summary judgment, we consider the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, we determine whether the moving party is entitled to judgment as a matter of law." Bovaird v. N.H. Dep't of Admin. Servs., 166 N.H. 755, 758 (2014) (quotation omitted). "If our review of that evidence discloses no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law, then we will affirm the grant of summary judgment." Id. (quotation omitted). "We review the trial court's application of the law to the facts de novo." Id. (quotation omitted).

We review the trial court's statutory interpretation de novo. Id. On questions of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. Eby v. State, 166 N.H. 321, 341 (2014). We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. at 341-42.

We review the constitutionality of a statute de novo. Am. Fed'n of Teachers — N.H. v. State of N.H., 167 N.H. 294, 300 (2015). "The party challenging a

statute's constitutionality bears the burden of proof." Id. (quotation omitted). "In reviewing a legislative act, we presume it to be constitutional and will not declare it invalid except upon inescapable grounds." Id. (quotation omitted). "In other words, we will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." Id. (quotation omitted). Thus, a statute will not be construed to be unconstitutional when it is susceptible of a construction rendering it constitutional. Id. "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." Id. (quotation omitted).

B. Contract Clauses

The petitioners' primary contention is that SB 126 violates the State and Federal Contract Clauses because it substantially impairs their existing New Hampshire dealership agreements. Part I, Article 23 of our State Constitution provides that "[r]etrospective 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." N.H. CONST. pt. I, art. 23. The Contract Clause of the Federal Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. Although Part I, Article 23 does not expressly reference existing contracts, "we have held that its proscription duplicates the protections found in the contract clause of the United States Constitution." State v. Fournier, 158 N.H. 214, 221 (2009) (quotation omitted). "The Federal and State Constitutions offer equivalent

protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract." Id. (quotation omitted). We first address the petitioners' arguments under the State Constitution and rely upon federal law only to aid our analysis. See State v. Ball, 124 N.H. 226, 231-33 (1983).

The threshold inquiry in a contract clause analysis is whether the law has a retroactive effect upon an existing contract. Fournier, 158 N.H. at 218 (explaining that in "testing legislation against Part I, Article 23," we first "discern whether the legislature intended the law to apply retroactively," and, if so, "we then inquire whether such retroactive application is constitutionally permissible"). Here, the parties do not dispute that the legislature intended SB 126 to apply retroactively. Accordingly, we assume for the purposes of this appeal that such is the case and confine our analysis to the remaining elements of the petitioners' claim of a contract clause violation.

When evaluating a contract clause claim, a court must determine "whether a change in state law has resulted in the substantial impairment of a contractual relationship." Am. Fed'n of Teachers — N.H., 167 N.H. at 301 (quotation omitted). "This inquiry, in turn, has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Id. (quotation omitted).

To survive a contract clause challenge, a legislative enactment that constitutes a substantial

impairment of a contractual relationship "'must have a significant and legitimate public purpose.'" Id. (quoting Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 411 (1983)); see Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc., 159 N.H. 627, 653 (2010) (using the phrases "important public purpose" and "significant and legitimate public purpose" interchangeably). "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Energy Reserves Group, 459 U.S. at 412; see Tuttle, 159 N.H. at 642 (explaining that "the core task involved in resolving Contract Clause claims" is "striking a balance between constitutionally protected contract rights and the State's legitimate exercise of its reserved police power").

Once a significant and legitimate public purpose is identified, the next inquiry

> is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

Energy Reserves Group, 459 U.S. at 412-13 (quotation, brackets, citations, and ellipsis omitted); cf. Tuttle, 159 N.H. at 653-55 (determining that traditional deference to legislature's judgment as to necessity and reasonableness of challenged law was unwarranted, even though State was not a contracting party, because State's financial self-interest was at stake).

Although, with regard to some of their challenges, it is questionable whether SB 126 substantially impairs the petitioners' existing agreements with their New Hampshire dealers, for the purposes of this appeal, we assume that it does. Nevertheless, we conclude that SB 126 does not violate the State and Federal Contract Clauses because it has a "significant and legitimate public purpose" and because the legislature's "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose" justifying the adoption of SB 126. Energy Reserves Group, 459 U.S. at 412 (quotation and brackets omitted).

1. Significant and Legitimate Public Purpose

SB 126 was enacted to provide to equipment dealers the same level of protection provided to automobile dealers under RSA chapter 357-C. See N.H.H.R. Jour. 765 (May 22, 2013). The legislature deemed such protection necessary because it considered the "relationship between equipment dealers and manufacturers" to be "identical to that [between] car/truck dealers" and car/truck manufacturers. Id. The legislature determined that

"[e]quipment dealers . . . have business operations that are nearly identical in all respects to car/truck/motorcycle etc. dealers." Id. The legislature further found that equipment dealership agreements, like automobile dealership agreements, had been "one-sided" and reflected that the dealers and manufacturers had "an autocratic relationship." Id. The legislature was concerned that manufacturers shifted costs "onto dealers and ultimately consumers" through the use of such "one-sided, non-negotiable contracts." Id. It concluded that equipment manufacturers, like automobile manufacturers previously, "were abusing their power in the relationship" and that New Hampshire "businesses and consumers were being harmed as a result." Id.

The purpose of SB 126 — to protect equipment dealers and consumers from perceived abusive and oppressive acts by manufacturers — is unquestionably a significant and legitimate public purpose. See New Motor Vehicle Bd. of Cal., 439 U.S. at 101. As the United States Supreme Court explained when examining a substantive due process challenge to the California Automobile Franchise Act, a state legislature is "empowered to subordinate the franchise rights of [motor vehicle] manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." Id. at 107. The Court specifically identified "the promotion of fair dealing and the protection of small business" as valid state interests. Id. at 102 n.7.

Numerous federal and state courts, addressing constitutional challenges to laws similar to RSA

chapter 357-C, have concluded that protecting dealers and consumers from the oppressive acts of manufacturers constitutes a legitimate public purpose. See, e.g., Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 218 (1st Cir. 1994) (analyzing argument that Rhode Island automobile dealership law violated the dormant Commerce Clause and explaining that "the state's desire to protect local dealers and consumers from harmful franchising practices is a lawful legislative goal"); Am. Motor Sales v. Div. of Motor Vehicles, Etc., 592 F.2d 219, 222-23 (4th Cir. 1979) (addressing dormant Commerce Clause claim and concluding that a "Virginia statute regulating the establishment of new automobile franchises serves a legitimate local purpose" because it fulfills the same interests identified by the Court in New Motor Vehicle Board of California); Acadia Motors, Inc. v. Ford Motor Co., 844 F. Supp. 819, 827-28 (D. Me. 1994) (in contract clause case, determining that Maine had significant and legitimate interests in rectifying "[t]he disparity in bargaining power between automobile manufacturers and their dealers" and in protecting dealers from abusive and oppressive manufacturer practices), affirmed in part and reversed in part on other grounds, 44 F.3d 1050 (1st Cir. 1995); Mon-Shore Management, Inc. v. Family Media, Inc., 584 F. Supp. 186, 191 (S.D.N.Y. 1984) (rejecting dormant Commerce Clause claim and concluding that New York had "a valid interest in protecting prospective franchisees from unscrupulous franchisors" and that the "protection of investors" is a legitimate state objective); General Motors v. Motor Vehicle Review Bd., 862 N.E.2d 209, 229 (Ill. 2007) (in the context of an equal protection claim, concluding that Illinois

statute is rationally related to the "legitimate government purposes of redressing the disparity in bargaining power between automobile manufacturers and their existing dealers and of protecting the public from the negative impact of harmful franchise practices by automobile manufacturers"); Anderson's Vehicle Sales, Inc. v. OMC-Lincoln, 287 N.W.2d 247, 250 (Mich. Ct. App. 1979) (in a contract clause case, finding "that the Legislature has the power to regulate the potential inequities inherent in the relationship between manufacturers and dealers of motor vehicles").

Relying upon Equipment Manufacturers Institute v. Janklow, 300 F.3d 842, 861 (8th Cir. 2002), the Deere petitioners and Husqvarna argue that protecting equipment dealers "from perceived abusive and oppressive acts by . . . manufacturers," New Motor Vehicle Bd. of Cal., 439 U.S. at 101, is not a significant and legitimate public purpose. In Janklow, equipment manufacturers, including Deere and AGCO, sought a declaration that a 1999 amendment to a South Dakota law governing the relationships between such manufacturers and their dealers violated the federal Contract Clause because it substantially impaired their pre-existing dealership contracts. Janklow, 300 F.3d at 847, 848. The State conceded that the purpose of the South Dakota law was to "level the playing field between manufacturers and dealers." Id. at 860. The Eighth Circuit Court of Appeals held that "leveling the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest." Id. at 861.

Janklow is distinguishable because SB 126 has a broader purpose "than a simple reallocation of existing contractual rights." Gwadosky, 430 F.3d at 43 (discussing Maine law that precludes motor vehicle manufacturers from recovering from dealers their costs for warranty repairs). SB 126, like the Maine statute at issue in Gwadosky, "aspires to protect consumers as well as dealers." Id.; see N.H.H.R. Jour. 765 (May 22, 2013). The legislature was specifically concerned that manufacturers shifted costs "onto dealers and ultimately consumers" through the use of "one-sided, non-negotiable contracts." N.H.H.R. Jour. 765 (May 22, 2013). That rationale brings SB 126 "squarely within the category of remedies to generalized social or economic problems that constitute legitimate subjects for legislation, notwithstanding the imperatives of the Contracts Clause." Gwadosky, 430 F.3d at 43; see Greenwood Trust Co. v. Com. of Mass., 971 F.2d 818, 828 (1st Cir. 1992) (describing "consumer protection" as a "subject[ ] over which the states have traditionally exercised their police powers").

In Janklow, the court also concluded that "the only real beneficiaries" under the South Dakota law were "the narrow class of dealers of agricultural machinery," and that "such special interest legislation runs afoul of the Contract Clause when it impairs pre-existing contracts." Janklow, 300 F.3d at 860. The Deere petitioners argue that, like the law at issue in Janklow, SB 126 constitutes special interest legislation.

To support this argument, they rely upon Allied Structural Steel Co. v. Spannaus, 438 U.S. 234

(1978). Their reliance upon Allied Structural Steel is misplaced. At issue in Allied Structural Steel was whether the application of Minnesota's Private Pension Benefits Protection Act to Allied Structural Steel violated the Federal Contract Clause. Allied Structural Steel, 438 U.S. at 236. Under the act, "a private employer of 100 employees or more — at least one of whom was a Minnesota resident — who provided pension benefits under a plan meeting the qualifications of § 401 of the Internal Revenue Code, was subject to a 'pension funding charge' if [the employer] either terminated the plan or closed a Minnesota office." Id. at 238. In concluding that the act lacked a significant and legitimate public purpose, the Court observed that the act "was not even purportedly enacted to deal with a broad, generalized economic or social problem." Id. at 250. Rather, it had "an extremely narrow focus," applying only to certain private employers with 100 employees or more, at least one of whom was a Minnesota resident. Id. at 248. "Indeed," as the Court observed in a later case, the act "even may have been directed at one particular employer planning to terminate its pension plan when its collective-bargaining agreement expired." Energy Reserves Group, 459 U.S. at 412 n.13; see Allied Structural Steel, 438 U.S. at 247-48, 248 n.20.

The same cannot be said of SB 126. SB 126 was expressly enacted to address "a broad, generalized economic or social problem." Allied Structural Steel, 438 U.S. at 250; see N.H.H.R. Jour. 765 (May 22, 2013); see also Gwadosky, 430 F.3d at 43. The State has a significant and legitimate interest in protecting equipment dealers from "perceived

abusive and oppressive acts by the manufacturers." New Motor Vehicle Bd. of Cal., 439 U.S. at 101. As one court explained, eliminating unfair methods of competition and unfair and deceptive practices can foster "a salubrious and more stable business climate" for all businesses, "thus aiding the state economy" and providing a "secondary benefit that inures to . . . consumers." N.A. Burkitt, Inc. v. J.I. Case Co., 597 F. Supp. 1086, 1092 (D. Me. 1984); cf. Sanitation and Recycling Industry v. City of N.Y., 107 F.3d 985, 994 (2d Cir. 1997) (concluding that "eradicating the vestiges of criminal control accompanied by bid-rigging, 'evergreen' contracts and predatory pricing in the carting industry," constitutes a "broad societal goal, not the pursuit of the interests of a narrow class").

The Deere petitioners argue that we cannot view legislative history to determine whether SB 126 has a significant and legitimate public purpose; however, their argument conflates our general principles of statutory interpretation with our inquiry under the State and Federal Contract Clauses. Although generally, when interpreting a statute, we consider legislative history only when statutory language is ambiguous, see ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011), that principle does not apply here. Here, we are not interpreting SB 126, but rather are determining whether the legislature had a significant and legitimate public purpose for enacting the statute. Indeed, the Deere petitioners have not cited any cases, and we are not aware of any, that stand for the proposition that a court is precluded from examining a statute's legislative

history when analyzing whether it offends the State or Federal Contract Clause.

Husqvarna contends that we must find that the legislature lacked a significant and legitimate purpose for enacting SB 126 because, to the extent that it found the relationship between car/truck dealers and manufacturers to be identical to that between yard and lawn equipment dealers and manufacturers, its finding is unsupportable and was made in an "evidentiary vacuum." However, it is not our role to second-guess this legislative determination. Although our review in a contract clause case involving purely private contracts is not identical to rational basis review in the equal protection or due process context, it is similar. See Bunham, Public Pension Reform and the Contract Clause: A Constitutional Protection for Rhode Island's Sacrificial Economic Lamb, 20 Roger Williams U. L. Rev. 523, 537-38 (Summer 2015) (discussing differences between rational basis review and review in a contract clause case); see also E. Chemerinsky, Constitutional Law: Principles and Policies § 8.3.3, at 652 (4th ed. 2011) (when government is not a contracting party, describing contract clause analysis as similar to "traditional rational basis review"). As with rational basis review in other contexts, when examining, for contract clause purposes, whether the legislature had a significant and legitimate public purpose for enacting a law, we will not require of the legislature "courtroom factfinding" and will uphold a legislative choice "based on rational speculation." FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993)

(discussing rational basis review in an equal protection case).

To the extent that Husqvarna argues that, for public policy reasons, equipment manufacturers, such as itself, should not be subject to the mandates of RSA chapter 357-C, this must be accomplished by legislative action and not by judicial decree.

Although Kubota asserts that the public policy underlying SB 126 is not legitimate because it was not a response to an emergency, we disagree. An emergency need not exist before a state may enact a law that impairs a private contract. Energy Reserves Group, 459 U.S. at 412 (explaining that, to be legitimate, "the public purpose need not be addressed to an emergency or temporary situation").

2. Reasonableness and Necessity

"Upon finding a legitimate public purpose, the next step . . . involves ascertaining the reasonableness and necessity of the adjustment of contract obligations effected by the regulation to determine finally whether the regulation offends the Contract Clause." Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 191 (1st Cir. 1999). However, "when the contracts at issue are private and no appreciable danger exists that the governmental entity is using its regulatory power to profiteer or otherwise serve its own pecuniary interests . . . , a court properly may defer to the legislature's judgment." Id.; see Energy Reserves Group, 459 U.S. at 412-13. As the Supreme Court explained in Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 505 (1987), although "the finding of a significant and legitimate public purpose

is not, by itself, enough to justify the impairment of contractual obligations," and although "[a] court must . . . satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption, . . . unless the State is itself a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (Quotations, brackets, and citations omitted; emphasis added.)

Here, SB 126 "plainly survives scrutiny" under the standards for evaluating impairments of purely private contracts. Keystone Bituminous Coal Assn., 480 U.S. at 506. The legislature has determined that, to prevent equipment manufacturers from engaging in abusive and oppressive acts with their dealers, it must subject them to the same level of regulation that it imposes upon automobile manufacturers. See N.H.H.R. Jour. 765 (May 22, 2013). Thus, as a result of SB 126, equipment manufacturers are specifically precluded from engaging in methods of competition and practices that the legislature has deemed unfair and deceptive. See RSA 357-C:3. To deter them from engaging in such conduct, the legislature has made a violation of any provision of RSA chapter 357-C a misdemeanor. See RSA 357-C:15. Additionally, among other regulations, equipment manufacturers are precluded from adding dealerships to the market areas of existing franchises when "it is injurious . . . to the public welfare" to do so, RSA 357-C:9, II(c). See New Motor Vehicle Bd. of Cal., 439 U.S. at 102

(describing California Automobile Franchise Act). As a result of SB 126, to enforce this prohibition, an equipment manufacturer proposing to establish a new dealership in a dealer's relevant market area, must give prior notice of its intention to the Board and to other dealers of the same "line make" in the same market area. RSA 357-C:9, I; see New Motor Vehicle Bd. of Cal., 439 U.S. at 103 (describing California Automobile Franchise Act).

The provisions of RSA chapter 357-C, as applied to equipment manufacturers through SB 126, reasonably accomplish the legislature's goal of preventing equipment manufacturers from engaging in abusive and oppressive trade practices. Because the contracts at issue are private and, thus, there is no danger that the State is using its regulatory power to serve its own pecuniary interests, we "refuse to second-guess" the legislature's determination that including equipment manufacturers within the aegis of RSA chapter 357-C was a reasonable and necessary way to address its concern. Keystone Bituminous Coal Assn., 480 U.S. at 506; see Houlton Citizens' Coalition, 175 F.3d at 191; see also Sanitation and Recycling Industry, 107 F.3d at 994 (observing that "[w]hen reviewing a law that purports to remedy a pervasive economic or social problem," the court's "analysis is carried out with a healthy degree of deference to the legislative body that enacted the measure"). To the extent that Tuttle can be read to require that we conduct a more searching inquiry with regard to the reasonableness and necessity of SB 126, we note that our inquiry in Tuttle was more exacting than our inquiry here

because, unlike SB 126, the legislation in Tuttle inured to the State's financial benefit.

For all of the foregoing reasons, therefore, we hold that the petitioners have not sustained their burden of establishing that SB 126 offends the State Contract Clause. Because the Federal Constitution affords the petitioners no greater protection than does the State Constitution in these circumstances, see Energy Reserves Group, 459 U.S. at 411-13; Gwadosky, 430 F.3d at 43; Houlton Citizens' Coalition, 175 F.3d at 191, we reach the same conclusion under the Federal Constitution as we do under the State Constitution.

C. Supremacy Clause

The Deere petitioners argue that, as applied to equipment manufacturers, portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III conflict with the Federal Arbitration Act (FAA) and, therefore, violate the Supremacy Clause of the Federal Constitution. RSA 357-C:3, III(p)(3) provides, in relevant part, that it is "an unfair method of competition and unfair and deceptive practice" for any manufacturer to "[r]equire a motor vehicle franchisee to agree to a term or condition in a franchise . . . as a condition to the offer, grant, or renewal of the franchise . . . or agreement, which . . . [r]equires that disputes" between the franchisor and the franchisee "be submitted to arbitration." RSA 357-C:3, III(p)(3) specifically allows arbitration if the franchisor and franchisee "agree to submit the dispute to arbitration . . . at the time the dispute arises." RSA 357-C:6, III provides, in relevant part, that any provision in a new dealership agreement, including an arbitration provision, that

"denies or purports to deny access to the procedures, forums, or remedies provided for by [New Hampshire] laws or regulations" shall be deemed void and unenforceable.

The Deere petitioners assert that, as applied to equipment manufacturers, these portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III conflict with the FAA because they limit the applicability of an arbitration clause. See Preston v. Ferrer, 552 U.S. 346, 359 (2008) (holding that "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative"); see also Champion Auto Sales, LLC v. Polaris Sales Inc., 943 F. Supp. 2d 346, 353 (E.D.N.Y. 2013) (deciding that New York provision similar to RSA 357-C:3, III(p)(3) conflicts with the FAA).

The Deere petitioners acknowledge that these portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III, as applied to certain other manufacturers, do not conflict with the FAA because those manufacturers are subject to a federal law that provides, in relevant part: "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2) (2012); see Champion Auto Sales, LLC, 943 F. Supp. 2d at 354. The Deere petitioners contend that this exception to the FAA applies only to manufacturers of "motor

vehicle[s]," as defined by 49 U.S.C. § 30102(a)(6) (2012), see 15 U.S.C. § 1226(a)(1) (2012), and argue that they and other equipment dealers are not "motor vehicle" manufacturers. See Champion Auto Sales, LLC, 943 F. Supp. 2d at 354 (concluding that snowmobiles, all-terrain vehicles, and low-speed vehicles were not subject to 15 U.S.C. § 1226(a)(2) because such vehicles do not constitute "motor vehicle[s]" under 49 U.S.C. § 30102(a)(6)).

The trial court agreed with the Deere petitioners that, as applied to equipment manufacturers, the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are preempted by the FAA, but concluded that they are also severable from the remaining provisions of RSA chapter 357-C. Because the trial court's preemption determination has not been appealed, the only issue before us is the severability of the challenged provisions.

In determining whether the valid provisions of a statute are severable from the invalid ones, we presume that the legislature intended that the invalid part shall not destroy the validity of the entire statute. See Associated Press v. State of N.H., 153 N.H. 120, 141 (2005). We then examine "whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure" of the statute. Id. (quotation omitted). Based upon our review of the entire statutory scheme, of which the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are but a small part, we conclude that those portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6,

III are severable from the remaining provisions of RSA chapter 357-C.

The Deere petitioners argue that the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are inseparable from the numerous provisions in RSA chapter 357-C that pertain to administrative proceedings before the Board (the Board provisions). They contend that the Board provisions "manifest a legislative understanding (or, in this case, a legislative misunderstanding) that the contracts RSA [chapter] 357-C regulates are exempt from the FAA." They argue that those provisions demonstrate that RSA chapter 357-C "is not designed to regulate contractual relationships under which pre-dispute arbitration agreements are enforceable." Accordingly, they assert, because the Board provisions are integral to RSA chapter 357-C, the entire chapter, as applied to "equipment dealership agreements that contain pre-dispute mandatory arbitration agreements," is invalid. We are not persuaded that the challenged portions of RSA 357-C:3, III(p)(3) and RSA 357-C:6, III are inextricably linked to the Board provisions in RSA chapter 357-C, and, thus, we reject this argument. To the extent that the Deere petitioners assert that the Board provisions themselves conflict with the FAA and, therefore, are void under the Supremacy Clause, we conclude that they have not developed this argument sufficiently for our review. See In re G.G., 166 N.H. 193, 197 (2014).

Husqvarna requests that we "foreclose any uncertainty as to the effect of the Superior Court's Order on Husqvarna's arbitration rights" by holding that "a dealer with an agreement containing an

arbitration clause . . . may not resort to the Board for resolution of any dispute arising under or in connection with the dealer relationship." We decline this request without prejudice to Husqvarna raising this argument in any future litigated case between it and a dealer.

D. Husqvarna's Separate Federal Constitutional Claims

We next address the two constitutional claims that Husqvarna alone asserts: (1) that the trial court erred by determining that SB 126 does not violate Husqvarna's rights under the Federal Equal Protection Clause; and (2) that the trial court erred by ruling that SB 126, as applied to Husqvarna, does not violate the dormant Commerce Clause of the Federal Constitution.

1. Equal Protection Clause

Husqvarna argues that SB 126 violates the Federal Equal Protection Clause because it amends the definition of "motor vehicle" in RSA chapter 357-C to include yard and garden equipment. Husqvarna contends that including such equipment in the statutory definition of "motor vehicle" is arbitrary and irrational, in violation of its equal protection rights. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). However, Husqvarna concedes that it does not allege that it has been treated differently from any other similarly situated manufacturer. In its brief, Husqvarna explains: "It is not treatment different

from other manufacturers of this equipment that violates Husqvarna's constitutional rights," but, rather, "the arbitrary and irrational classification of Husqvarna as a manufacturer of 'motor vehicles' that deprives Husqvarna of equal protection."

The Supreme Court "has long held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the [classification] and some legitimate governmental purpose." Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080 (2012) (quotation and ellipsis omitted). The Court has "made clear . . . that, where ordinary commercial transactions are at issue, rational basis review requires deference to reasonable underlying legislative judgments." Id. (quotation omitted). The classification at issue here, including yard and garden equipment in the statutory definition of motor vehicle, see RSA 357-C:1, I, involves neither a fundamental right nor a suspect class. See Armour, 132 S. Ct. at 2080. "Its subject matter is . . . economic, social, and commercial." Id. As Husqvarna apparently concedes by not arguing otherwise, we, therefore, apply rational basis review. See id.

Under rational basis review, "a law [is] constitutionally valid if there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render [the classification] arbitrary or irrational." Id. (quotation omitted). The

legislature is deemed to have had "a plausible reason if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. (quotation omitted). "Moreover, . . . we are not to pronounce [a] classification unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Id. (quotation and brackets omitted). Because the classification is presumed constitutional, Husqvarna has the burden "to negative every conceivable basis which might support" classifying yard and garden equipment as motor vehicles under RSA chapter 357-C. Id. at 2080-81.

For all of the reasons that we have discussed previously in relation to the petitioners' contract clause claim, we hold that Husqvarna has failed to establish that classifying yard and garden equipment as motor vehicles for the purposes of RSA chapter 357-C is not rationally related to the legislature's legitimate purpose of protecting the dealers of such equipment from perceived abusive and oppressive acts by manufacturers. See New Motor Vehicle Bd. of Cal., 439 U.S. at 101.

2. Dormant Commerce Clause

Husqvarna next argues that SB 126 violates the dormant Commerce Clause of the Federal Constitution. The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. "That grant embodies a negative aspect as well — the

'dormant Commerce Clause' — which prevents state and local governments from impeding the free flow of goods from one state to another." Gwadosky, 430 F.3d at 35 (quotation omitted). "Put another way, the dormant Commerce Clause prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." Id. (quotation omitted).

"The type of inquiry needed to determine whether a state law transgresses the [dormant] Commerce Clause varies depending upon the nature of the law at issue." Id. "A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state outstrips the limits of the enacting state's constitutional authority and, therefore, is per se invalid." Id. "A state statute that has no direct extraterritorial reach but that discriminates against interstate commerce on its face, in purpose, or in effect receives a form of strict scrutiny so rigorous that it is usually fatal." Id. "[S]uch a statute is invalid unless it advances a legitimate local purpose that cannot be served by reasonable non-discriminatory means." Id. "The state bears the burden of showing legitimate local purposes and the lack of non-discriminatory alternatives, and discriminatory state laws rarely satisfy this exacting standard." Family Winemakers of California v. Jenkins, 592 F.3d 1, 9 (1st Cir. 2010).

By contrast, a state statute that "regulates evenhandedly and has only incidental effects on interstate commerce" engenders a lower level of scrutiny. Gwadosky, 430 F.3d at 35 (quotation omitted). Such a statute "will be upheld unless the burden imposed on such commerce is clearly

excessive in relation to the putative local benefits." Id. (quotation omitted); see Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Husqvarna does not argue, nor could it argue, that SB 126 discriminates against out-of-state manufacturers on its face. Instead, Husqvarna argues that SB 126 has a discriminatory purpose and/or effect. Husqvarna reasons that SB 126 violates the dormant Commerce Clause because the State has "not articulated a legitimate public interest in economically favoring New Hampshire dealers over out-of-state manufacturers." See Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992) (explaining that the State has the burden to justify a discriminatory statute "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake").

To support its assertion that SB 126 has a discriminatory purpose, Husqvarna relies upon two isolated statements, one by a member of the Nashua Chamber of Commerce at a public hearing on SB 126 that "It's them vs. out-of-state manufacturers," and the other by the sponsor of SB 126 that "New Hampshire businesses should have the right to do business with New Hampshire businesses." We agree with the trial court that Husqvarna has failed to sustain its burden of showing a discriminatory purpose.

"Where, as here, a party presents circumstantial evidence of an allegedly discriminatory purpose in support of a dormant Commerce Clause argument, it is that party's responsibility to show the relationship

between the proffered evidence and the challenged statute." Gwadosky, 430 F.3d at 39. "While statements by a law's private-sector proponents sometimes can shed light on its purpose, the [statement] of a single lobbyist has little (if any) probative value in demonstrating the objectives of the legislative body as a whole." Id. (citation omitted). An isolated statement by the bill's sponsor during a floor debate on a failed amendment likewise has little probative value regarding the legislature's intent in enacting the bill. Cf. Appeal of Reid, 143 N.H. 246, 253 (1998) (cautioning against "imputing too much weight to comments of proponents of bills offered in legislative committee hearings" (quotation omitted)). "This is particularly so when, as in this case, far stronger statements of intent can be gleaned from official legislative sources." Gwadosky, 430 F.3d at 39.

Husqvarna next asserts that SB 126 has a discriminatory effect. For the purposes of the dormant Commerce Clause analysis, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99 (1994)(quotation omitted). The "differential treatment" must be between entities that are similarly situated. See General Motors Corp. v. Tracy, 519 U.S. 278, 29899 (1997); see also National Ass'n of Optometrists & Opt. v. Brown, 567 F.3d 521, 525, 527-28 (9th Cir. 2009).

Husqvarna contends that SB 126 has a discriminatory effect "because it insulates in-state

dealers from intrabrand competition while Husqvarna must pursue a lengthy administrative process." Husqvarna argues that because it must now seek a finding of the Board before it puts a new dealer into another dealer's territory or before it relocates a dealer, it is more burdensome for it to do business in New Hampshire than elsewhere.

We agree with the trial court that Husqvarna has failed to satisfy its burden of showing discriminatory effect. Husqvarna has not presented any evidence regarding the effects of SB 126 upon similarly situated entities. Equipment dealers and manufacturers are not similarly situated. Accordingly, Husqvarna cannot meet its burden of demonstrating that SB 126 has a discriminatory effect by comparing its effect upon New Hampshire dealers against its effect upon Husqvarna.

Nor can Husqvarna meet its burden of establishing that SB 126 has discriminatory effect by alleging, upon information and belief, that "none of [its] competitors for [yard and garden equipment] has a facility in New Hampshire where [such] equipment . . . is manufactured." That allegation, even if true, cannot establish discrimination as between in-state and out-of-state equipment manufacturers. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126, n.16 (1978) (explaining that discrimination under the dormant Commerce Clause occurs when "the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market"); see also Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 36, 38 (1st Cir. 2007) (concluding that

plaintiffs had failed to show discriminatory effect of Maine law, which allowed only "farm" wineries to sell directly to consumers, absent any evidence that out-of-state wineries suffered any disproportionate loss of business, that Maine law acts to protect Maine wineries, or that Maine consumers even purchase wine directly from Maine vineyards).

In its reply brief, Husqvarna likens this case to Yamaha Motor Corp. v. Jim's Motorcycle, 401 F.3d 560 (4th Cir. 2005), and argues that the analysis used in that case should apply here. In Yamaha, a Virginia statute gave an existing motorcycle dealer the "right to protest the establishment of a new dealership for the same line-make (brand) in its 'relevant market area,' defined as a seven to ten-, fifteen-, or twenty-mile radius around the existing dealer, depending on population density." Yamaha, 401 F.3d at 563. This statutory provision had previously been upheld against a dormant Commerce Clause challenge. See Am. Motor Sales, 592 F.2d at 220-24.

The dispute in Yamaha concerned a second statutory provision that allowed "[a]ny existing franchise dealer," regardless of its relevant market area, to file a protest whenever any "new or additional motorcycle dealer franchise" was "established in any county, city or town" in Virginia. Yamaha, 401 F.3d at 563-64 (quotations omitted). This provision, the court explained, allowed "an existing dealer at one end of Virginia" to "protest a proposed dealership some 500 miles away at the other end of the state." Id. at 573. The court determined that the second statutory provision was

not discriminatory on its face, in its purpose, or in effect. Id. at 568-69.

However, the court invalidated the second statutory provision under the so-called Pike balancing test. Id. at 569-74. Under that test, the court weighs the putative local benefits of the statute against its burden upon interstate commerce, and invalidates the statute only when the burdens clearly outweigh the benefits. See Pike, 397 U.S. at 142. "A statute need not be perfectly tailored to survive Pike balancing, but it must be reasonably tailored: the extent of the burden that will be tolerated depends on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Yamaha, 401 F.3d at 569 (quotation, ellipsis, and brackets omitted). In determining whether a statute has "a legitimate local purpose" and "putative local benefits," a court defers to the state legislature. Yamaha, 401 F.3d at 569 (quotations omitted). "Courts are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation." Id. (quotation omitted). "The Pike test requires closer examination, however, when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests." Id.

Although Husqvarna raised its Pike balancing test argument in its objection to the State's cross-motion for summary judgment, the trial court did not address it. Because the Pike balancing test is "fact-intensive," we decline to address Husqvarna's argument in the first instance. United Haulers v. Oneida–Herkimer Solid Waste, 261 F.3d 245, 264

(2d Cir. 2001); see Lebanon Farms Disposal, Inc. v. County of Lebanon, 538 F.3d 241, 251-52 (3d Cir. 2008); see also National Ass'n of Optometrists & Opt., 567 F.3d at 528. "In its present form, the record is incomplete regarding the burden on interstate commerce and, more importantly, the putative local benefits," and we lack the benefit of the trial court's findings of fact and conclusions of law on these issues. Lebanon Farms Disposal, Inc., 538 F.3d at 252. Therefore, we vacate the trial court's order granting summary judgment to the State on Husqvarna's dormant Commerce Clause claim and remand for the court to consider whether RSA chapter 357-C, as amended by SB 126, passes constitutional muster under the Pike balancing test. See National Ass'n of Optometrists & Opt., 567 F.3d at 528; see also United Haulers, 261 F.3d at 263-64; Lebanon Farms Disposal, Inc., 538 F.3d at 251-52.

III. Conclusion

In sum, we uphold SB 126 against the petitioners' claims that it violates the State and Federal Contract Clauses. The trial court's decision that the challenged portions of RSA 357-C:3, III (p)(3) and RSA 357-C:6, III are preempted has not been appealed. We agree with the trial court that the preempted provisions are severable from the remaining provisions of RSA chapter 357-C as applied to the petitioners. We reject Husqvarna's argument that SB 126 violates the Equal Protection Clause of the Federal Constitution. We also reject Husqvarna's contention that SB 126 has either a discriminatory purpose or effect within the meaning of the dormant Commerce Clause. Nonetheless, we vacate the trial court's grant of summary judgment

to the State on Husqvarna's dormant Commerce Clause claim and remand for the trial court to consider, in the first instance, whether SB 126 is unconstitutional under the Pike balancing test.

2014-0315 Affirmed;
2014-0441 Affirmed;
2014-0575 Affirmed in part;
vacated in part; and remanded.

HICKS, CONBOY, and LYNN, JJ., concurred.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Husqvarna Professional Products, Inc.

v.

The State of New Hampshire

No. 14-CV-166

Date of Entry: August 6, 2014

ORDER

The plaintiff, Husqvarna Professional Products, Inc. ("Husqvarna"), brought this action against the defendant, the State of New Hampshire (the "state"), challenging the constitutionality of Senate Bill 126 ("SB 126"), which adds farm, forestry, and industrial equipment to the RSA 357-C definition of motor vehicle. Before the court are the parties' cross-motions for summary judgment. The plaintiff asserts that the retroactive application of SB 126 unconstitutionally impairs its contracts in violation of article I, section 10 of the United States Constitution and part 1, article 23 of the New Hampshire Constitution. The plaintiff further argues SB 126 prohibits arbitration in violation of the Supremacy Clause, abridges the plaintiff's equal protection rights, violates the Dormant Commerce Clause, and violates federal and state antitrust laws. The defendant takes a contrary position. The court

heard argument on May 20, 2014. Because the state has satisfied its burden of showing that it is entitled to judgment as a matter of law on the undisputed facts, the plaintiff's motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

In ruling on cross-motions for summary judgment, the court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law." *N.H. Ass'n of Counties v. State*, 158 N.H. 284, 287-88 (2009). In order to defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath, 'sufficient ... to indicate that a genuine issue of fact exists so that the party should have the opportunity, to prove the fact at trial....'" *Phillips v. Verax*, 138 N.H. 240, 243 (1994) (citation and quotations omitted). A fact is material if it affects the outcome of the litigation under the applicable substantive law. *Palmer v. Nan King Rest., Inc.*, 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the court considers the evidence, and all inferences properly drawn from it, in the light most favorable to the nonmoving party. *Sintros v Hanlon*, 148 N.H. 478, 480 (2002). Mindful of this standard, the court sets forth the undisputed facts below.

The plaintiff manufactures forestry and lawn and garden equipment. The equipment includes chainsaws, mowers, trimmers, garden tractors, and snow throwers ("products"). The plaintiff distributes the products to New Hampshire through multiple

channels, selling them to wholesaler Steven Willand, Inc. ("Willand"), independent dealers, national retailers, and directly to some users, such as tree care and equipment rental companies. The plaintiff has more than 40 authorized independent dealers in New Hampshire, some of which have multiple store locations. The plaintiff also has supply agreements with a number of national accounts that sell products through over 90 retail stores in New Hampshire. The relationship between the plaintiff and the various dealers is governed by dealer contracts.

On June 25, 2013, Governor Hassan signed SB 126 into law. Before SB 126, RSA 347-A governed the contracts. The purpose of RSA 347-A was to protect equipment dealers. SB 126 amended the terms "motor vehicle" and "motor vehicle dealer" under RSA 357-C:1, I and VIII(a) to include "farm and utility tractors, forestry equipment, industrial equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories and repair parts." SB 126 did not "grandfather" existing contracts. Consequently, the plaintiff's contracts are no longer subject to RSA 347-A – they are now governed by RSA 357-C.

In response, the plaintiff initiated the instant action seeking declaratory relief, a preliminary injunction, and permanent injunctive relief. The plaintiff makes four claims: (1) SB 126 unconstitutionally impairs the plaintiff's contracts in violation of the state and federal constitutions; (2) SB 126 prohibits arbitration in violation of the Supremacy Clause of the United States Constitution; (3) SB 126 abridges the plaintiff's equal protection

rights under the United States Constitution; and (4) SB 126 violates the Dormant Commerce Clause of the United States Constitution. Additionally, in its objection to the defendant's summary judgment motion, the plaintiff asserts an antitrust violation. The defendant objects. The state argues that SB 126 does not unconstitutionally impair the plaintiff's contracts, does not violate the plaintiff's equal protection rights, and does not violate the Dormant Commerce Clause. The state also asserts that the plaintiff's antitrust argument was not properly raised. [1] The court will address the parties' arguments in turn.

The plaintiff first asserts that SB 126 unconstitutionally impairs its existing contracts, contrary to the state and federal constitutions. The analytical framework for assessing a constitutional challenge to legislative action is well established. "Whether or not a statute is constitutional is a question of law...." *Akins v. Sec'y of State*, 154 N.H. 67, 70 (2006). "The party challenging a statute's constitutionality bears the burden of proof." *State v. Pierce*, 152 N.H. 790, 791 (2005). Accordingly, "the constitutionality of an act passed by the coordinate branch of the government is to be presumed." *Opinion of the Justices*, 118 N.H. 582, 584 (1978) (quotation omitted). "A statute will not be construed to be unconstitutional where it is susceptible to a

[1] The state does acknowledge this court's recent ruling that the SB 126 provisions prohibiting arbitration are void under the Supremacy Clause and must be severed from the other provisions of RSA 357-C. *See Deere & Co. et al. v. State of New Hampshire*, Merrimack County Superior Ct. No. 13-CV-554 (Order of April 15, 2014).

construction rendering it constitutional." *City of Claremont v. Truell*, 126 N.H. 30, 39 (1985).

"In this case … there is no question of statutory interpretation. The effects of the legislation are obvious and acknowledged. If those effects infringe on constitutionally protected rights, [the court] cannot avoid [its] obligation to say so." *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.*, 159 N.H. 627, 640 (2010), citing *Alliance of American Insurers v. Chu*, 571 N.E.2d 672, 678 (N.Y. 1991).

Part 1, article 23 of the New Hampshire Constitution states: "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." While this section does not reference existing contracts, its "proscription duplicates the protections found in the contract clause of the United States Constitution." *State v. Fournier*, 158 N.H. 214, 221 (2009). Thus, "article I, section 10 [of the federal constitution] and part I, article 23 [of the state constitution] … offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract...." *Tuttle*, 159 N.H. at 641.

> Contract Clause analysis in New Hampshire requires a threshold inquiry as to whether the legislation operates as a substantial impairment of a contractual relationship. This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the

> impairment is substantial. If the legislation substantially impairs the contract, a balancing of the police power and the rights protected by the contract clauses must be performed, and … [the] law ... may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose.

Id. (citations and quotations omitted).

Here, there is no dispute that the plaintiff has contractual relationships with its dealers or that SB 126 is intended to apply retroactively. Additionally, the defendant asserts that SB 126 does not impact the plaintiff's ability to sell directly to customers in the trade area of the dealer, does not affect the sales of products by national accounts, and does not prohibit the plaintiff's agreement with Willand or impose any new obligations on the Willand agreement. Def.'s Mem. Supp. Summ. J. at 6-7. The court agrees that SB 126 does not affect the plaintiff's right to sell to customers in a dealer's trade area, including selling to direct accounts, except to the extent that the plaintiff seeks to compete with a dealer through ownership of a dealership or establishment of a factory store. The court also agrees that SB 126 does not apply to the sale of products by national accounts; nor does it affect the plaintiff's agreement with Willand.

The remaining issue is whether the plaintiff's independent contracts are substantially impaired. "Although the United States Supreme Court has provided little specific guidance as to what constitutes a 'substantial' contract impairment, total

destruction of contractual expectations is not necessary for a finding of substantial impairment." *Tuttle*, 159 N.H. at 649 (citation omitted).

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Opinion of the Justices (Furlough), 135 N.H. 625, 633 (1992), quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel, 438 U.S. at 245.

To evaluate whether a law substantially impairs a contract, the court examines "(1) the nature of the contract and the affected contractual terms; (2) the degree to which the parties reasonably relied upon

those terms at the time they formed the contract; and (3) the practical effect the challenged law would have upon parties." *Tuttle*, 159 N.H. at 668 (Dalianis and Duggan, JJ., dissenting), citing *Lower Village Hydroelectric Assocs. v. City of Claremont*, 147 N.H. 73, 77 (2001). "In determining whether contract impairment is substantial, some courts look to whether the subject matter of the contract has been the focus of heavy state regulation." *Id*. at 650. "If so, further regulation might be foreseeable and, thus, any change to the contract caused by such regulation would not necessarily constitute a substantial impairment." *Id*. "However, standing alone, 'a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause.'" *Id*., citing and quoting *Chrysler Corp. v. Kolosso Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998), cert. denied, 525 U.S, 1177 (1999).

Applying these standards, the court concludes that SB 126 does not substantially impair the plaintiff's existing contracts. In its brief, the plaintiff identifies eleven substantial SB 126 impairments. Six of these impairments are essentially the same as those alleged in *Deere & Co.*:

> 1. RSA 357-C would prevent the plaintiff from exercising its contractual right to add a dealer to another dealer's market area.
>
> 2. RSA 357-C:7 would prevent the plaintiff from exercising its right to terminate a dealer contract for the dealer's failure to perform its obligations unless the Motor Vehicle

> Industry Board finds that there is good cause for termination.
>
> 3. RSA 357-C:3, III (q) would prevent the plaintiff from exercising its contractual right to limit a dealer to handling less than the full product line under a brand. For example, offering a dealer handheld products only when there are also wheeled products sold under the brand.
>
> 4. RSA 357-C:3, III (a) would prevent the plaintiff from exercising its contractual right to decline to accept an order for any reason and would limit the grounds for refusal to acts of God and other circumstances beyond the plaintiff's control.
>
> 5. RSA 375-C:5 would prevent the plaintiff from exercising its contractual right to determine the rate of dealer reimbursement for parts and labor for warranty service.
>
> 6. RSA 357-C:3, III (p)(3) would prevent the plaintiff from exercising its contractual right to binding arbitration of dealer contract disputes.

In *Deere & Co.*, the court interpreted the language of SB 126 in an almost identical factual scenario as the instant case. The court determined that SB 126 did not violate the plaintiffs' constitutional rights. While acknowledging that including "the plaintiffs within the purview of RSA 357-C has created added requirements by which the plaintiffs must act," the

court established that "such additions represent refinements in the law." *Id.* The court also determined that SB 126 "serves a legitimate and significant public purpose." *Id.* Review of the plaintiff's contracts in this case does not disturb the *Deere & Co.* analysis. As a result, the plaintiff's six allegations of substantial impairment referenced above do not support a claim of unconstitutionality.

In the instant case, the plaintiff asserts five additional alleged impairments:

> 1. RSA 357-C would prevent the plaintiff from exercising its contractual right to sell directly to end-users in a dealer's market area.
>
> 2. RSA 357-C would subject the sale of products by national accounts to regulation under RSA 357-C.
>
> 3, RSA 357-C would substantially impair contracts in all of the plaintiff's distribution channels, including those with Willand.
>
> 4. RSA 357-C:6, III would prevent the plaintiff from exercising its right to amend dealer contracts except for inclusion of language in the amendment expressly accepting retroactive application of RSA 357-C.
>
> 5. RSA 357-C would substantially impair many other provisions in its contracts, such as the ability to audit a dealer's warranty claims; it would impose risk of loss upon the plaintiff for

> carrier-related damage; it would impose requirements to obtain approval from the Motor Vehicle Industry Board; and it would require the plaintiff to give 180 days' notice if the termination of a contract was due to the discontinuance of the sale of a product line or change in distribution system.

The plaintiff has not sustained its burden of showing that these five additional alleged impairments are substantial. SB 126 does not prevent the plaintiff from selling to direct accounts nor does it regulate the sale of products by national accounts. Thus, the plaintiff's claim with respect to first three of these five alleged impairments lacks merit. Further, application of SB 126 does not affect the plaintiff's contract with Willand. Thus, there can be no substantial impairment.

This leaves the final two alleged impairments. Because the plaintiff was previously subject to regulation under RSA 347-A, the assignment of equipment to RSA 357-C does not represent an unregulated industry unexpectedly facing regulation. The plaintiff's contracts were subject to a statutory scheme that regulated the behavior of the manufacturers and dealers, and added requirements are "refinements in the law." *See Deere & Co.*, No. 13-CV-554. Moreover, RSA 357-C:6, III does not prevent the plaintiff from amending dealer contracts as it contends it does. The statute merely acknowledges that RSA 357-C is the law. The plaintiff's remaining alleged impairments are likewise foreseeable and do not merit a deviation from the court's holding in *Deere & Co.* Given these

considerations, the court concludes that SB 126 does not substantially impair the plaintiff's existing contracts.

The plaintiff next argues that SB 126 violates the Federal Arbitration Act ("FAA") by prohibiting arbitration in violation of the Supremacy Clause of the United States Constitution. Both parties recognize the effect of the decision in *Deere & Co.*, in which the court held that provisions in SB 126 prohibiting arbitration are void under the Supremacy Clause and must be severed from the other provisions of RSA 357-C. As a result, "those provisions that conflict with the FAA are considered invalid, leaving the rest of the statutory scheme intact." *Id.*

The plaintiff's next argument is that SB 126 violates its equal protection rights by classifying the plaintiff as a manufacturer of "motor vehicles," thereby subjecting it to a burdensome regulatory scheme. In response, the defendant asserts that the plaintiff is not treated differently than similarly situated forestry and yard and garden equipment manufacturers. The defendant further argues that the legislature had a rational basis for regulating the plaintiffs contracts in the same manner as automobile and other equipment manufacturers.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne*

Living Ctr., 473 U.S. 432, 439 (1985) (citation omitted).

> In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993). The party challenging the rationality of the legislative classification bears the burden of proof. *Id*. at 315.

Here, the plaintiff fails to allege that it is treated differently than other manufacturers in its class. By statutory definition, all forestry and yard and garden equipment manufacturers, such as the plaintiff, that manufacture motorized, ground-supported equipment are subject to RSA 357-C. Moreover, the court is persuaded by the defendant's argument that the legislature had a rational basis for regulating the plaintiff's dealership agreements in the same fashion as automobile and other equipment manufacturers. In enacting SB 126, the legislature determined that "[t]he relationship between equipment dealers and manufacturers is identical to that of car/truck dealers." Def.'s Exh. E at 2. In particular, SB 126 was aimed at governing the "one-sided, non-negotiable contracts and an autocratic relationship." *Id*. Thus, the goal of enacting SB 126 was to protect dealers and consumers from manufacturers using superior leverage. While there are obvious

differences between yard and garden equipment and automobiles, the legislature's decision that RSA 357-C should regulate various industries was based on the actual business relationship between the manufacturer and dealer, not the product that is sold. Thus, the legislature had a rational basis for its decision. *See City of Cleburne*, 473 U.S. at 440 ("When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.") (citations omitted). As a result, SB 126 does not violate the plaintiff's equal protection rights.

The plaintiff next argues that SB 126 violates the Dormant Commerce Clause of the United States Constitution by discriminating against manufacturers selling to end users in New Hampshire and insulating dealers from competition. In response, the defendant asserts that SB 126 does not have a discriminatory purpose or effect.

The Dormant Commerce Clause "prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir, 2005) (citation and quotations omitted). "Where the statute regulates evenhandedly 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." *Id.* (citation and quotations omitted). The party asserting a Dormant Commerce Clause claim bears the burden

of proving the challenged statute discriminates against interstate commerce in purpose or effect. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). When a plaintiff meets the burden of demonstrating discrimination against commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* (citation and quotations omitted).

Here, the plaintiff has not sustained its burden of showing a discriminatory purpose. The First Circuit addressed a similar issue in *Alliance of Auto. Mfrs*. The court determined that Maine's motor vehicle dealer act, designed "to protect retail customers and to protect Maine automobile dealers from the superior bargaining position of the national manufacturers," did not have a discriminatory purpose. *Alliance of Auto. Mfrs.*, 430 F.3d at 39. Likewise, RSA 357-C, which, as noted above, the legislature designed to protect dealers and consumers, is distinct from a law designed to place New Hampshire businesses at a competitive advantage over out of state businesses.

Furthermore, RSA 357-C is not discriminatory in effect. "A state law is discriminatory in effect when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1,10 (1st Cir. 2010). "Plaintiffs must present evidence as to why the law discriminates in practice." *Id.* at 11. "[T]he party having the burden of proof on a critical issue must

present evidence on that issue that is 'significantly probative,' not 'merely colorable.'" *Alliance of Auto. Mfrs.*, 430 F.3d at 40. Here, the plaintiff has not satisfied that requirement. The evidence introduced by the plaintiff does not demonstrate that RSA 357-C disproportionately burdens non-New Hampshire businesses. The plaintiff has failed to provide "any significantly probative evidence," which "is inadequate to make out a genuine issue of material fact." *See id.* at 41. As a result, the court cannot conclude that SB 126 violates the Dormant Commerce Clause.

Finally, the plaintiff argues that SB 126 violates federal and state antitrust laws. In response, the defendant argues that this claim is improperly raised as the plaintiff did not raise the issue in its complaint or summary judgment memorandum and asserted it for the first time in its objection to the defendant's cross motion for summary judgment. The court agrees with the defendant. "Ordinarily, a plaintiff cannot assert new claims in response to a motion for summary judgment that were not alleged in the complaint" *McCarthy v. Weathervane Seafoods*, No. 10-cv-395-JD, 2011 U.S. Dist. LEXIS 59015, at *11-12 (D.N.H. June 1, 2011) (citation omitted); *see also Evans v. Taco Bell Corp.*, No. 04-CV-103-JD, 2005 U.S. Dist. LEXIS 20997, at *37 (D.N.H. Sept. 23, 2005) ("...courts have consistently ruled that it is inappropriate to raise new claims for the first time in opposition to summary judgment.") (citation omitted). As a result, the timing of the plaintiff's antitrust argument is improper.

Based on the foregoing, the court concludes that SB 126 does not impair the plaintiff's existing

contracts in violation of part 1, article 23 of the New Hampshire Constitution. Additionally, the court concludes that article 1, section 10 of the United States Constitution provides no additional Contract Clause protection. Finally, SB 126 does not violate the plaintiff's equal protection rights or the Dormant Commerce Clause. Accordingly, the plaintiff's motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

So ORDERED.

Date: August 6, 2014 s/ Larry M. Smukler
LARRY M. SMUKLER
PRESIDING JUSTICE

APPENDIX C

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

NOTICE OF DECISION

THOMAS J. COLLIN, ESQ
THOMPSON HINE LLP
127 PUBLIC SQUARE
3900 KEY CENTER
CLEVELAND OH 44114

Case Name: **Husqvarna Professional Products, Inc. v State of New Hampshire**

Case Number: **217-2014-CV-00166**

Please be advised that on March 09, 2016 Judge Nicolosi made the following order relative to:

Assented-To Motion to Voluntarily Dismiss Husqvarna Professional Product, Inc.'s Claim for Violation of Dormant Commerce Clause

"Granted"

Proposed Order of Dismissal of Husqvarna Professional Product, Inc.'s Claim for Violation of Dormant Commerce Clause COPY ATTACHED

March 10, 2016

Tracy A. Uhrin
Clerk of Court

(485)

C: Michael A. Delaney, ESQ; Jennifer S. Roach, ESQ; Francis C. Fredericks, ESQ; Mary Ann Dempsey, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY Case No. 217-2014-CV-00166

SUPERIOR COURT

Husqvarna Professional Products, Inc.

v.

The State of New Hampshire

PROPOSED ORDER OF DISMISSAL OF HUSQVARNA PROFESSIONAL PRODUCT, INC.'S CLAIM FOR VIOLATION OF DORMANT COMMERCE CLAUSE

Husqvarna Professional Products, Inc.'s claim against the State of New Hampshire for violation of the Dormant Commerce Clause in the above-titled action is hereby dismissed.
SO ORDERED.

Dated: 3/9/2016

s/ Diane M. Nicolosi
Justice Diane M. Nicolosi

APPENDIX D

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Deere & Company, CNH America LLC,
and AGCO Corporation

v.

The State of New Hampshire

No. 216-2013-CV-554

Date of Entry: April 15, 2014

ORDER

The plaintiffs, Deere & Company (Deere), CNH America LLC (CNH), and AGCO Corporation ("AGCO"), brought this action against the defendant, the State of New Hampshire, challenging the constitutionality of Senate Bill 126 ("SB 126"), which adds farm, forestry, and industrial equipment, such as tractors, to the RSA 357-C definition of motor vehicle. Before the court are the parties' cross motions for summary judgment. The plaintiffs assert that retroactive application of SB 126 will unconstitutionally impair their existing contracts in violation of article 1, section 10 of the United States Constitution and part I, article 23 of the New Hampshire Constitution. The defendant disagrees. The court heard argument on February 18, 2014. Because the plaintiffs have not sustained their burden of showing that SB 126 unconstitutionally

impairs existing contracts and cannot be reconciled with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. ("FAA"), the plaintiffs' motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

In ruling on cross-motions for summary judgment, the court consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party and, if no genuine issue of material fact exists, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law." *N.H. Ass'n of Counties v. State*, 158 N.H. 284, 287-88 (2009). A fact is material if it affects the outcome of the litigation under the applicable substantive law. *Palmer v. Nan King Rest., Inc.*, 147 N.H. 681, 683 (2002). In considering a party's motion for summary judgment, the evidence must be considered in the light most favorable to the non moving party, together with all reasonable inferences therefrom. *Sintros v, Hamon*, 148 N.H. 478, 480 (2002). Mindful of this standard, the court sets forth the undisputed facts below.

The plaintiffs manufacture industrial, construction, forestry, agricultural, and lawn and garden equipment. The equipment includes commercial mowing products, agricultural tractors, wheel loaders, and backhoes. The plaintiffs sell their products through a number of dealerships in New Hampshire. The relationship between the plaintiffs and the dealerships are governed by dealership agreements (the agreements). For example, Deere has three different types of dealership agreements and eight total dealership agreements at issue here. CNH has four different

types of dealership agreements and ten total dealership agreements at issue. AGCO has one type of dealership agreement and three total dealership agreements at issue.

Before SB 126, RSA chapter 347-A governed the agreements. The purpose of RSA 347-A was to protect equipment dealers. Enacted in 1995, the statute established certain ground rules for the relationship between equipment manufacturers and dealers, including regulation in areas where manufacturer and dealer disputes commonly arise, such as warranty reimbursement, termination of franchise agreements, and transfers of dealership interests.

On June 25, 2013, Governor Hassan signed SB 126 into law. The measure *inter alia* amended the terms motor vehicle and motor vehicle dealer under RSA 357-C:1,I and VIII(a) to include farm and utility tractors, forestry equipment, industrial equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories and repair parts. SB 126 did not grandfather existing agreements. Thus, the plaintiffs' current and future contracts are now subject to the provisions of RSA chapter 357-C and are no longer governed by RSA 347-A.

In response, the plaintiffs initiated the instant action in the Hillsborough County Superior Court–Northern District, seeking declaratory relief, a preliminary injunction and permanent injunctive relief. On September 19, 2013, the court (*Mangones,* J.) granted the plaintiffs' request for preliminary injunctive relief to maintain the *status quo*. The

court also granted the defendant's request to transfer venue to this county. In the interim, two parties – the New Hampshire Automobile Dealers Association and Frost Farm Services, Inc. – intervened.

The plaintiffs make two substantive arguments. First, the plaintiffs assert that SB 126 unconstitutionally impairs the 21 contracts at issue, contrary to part I, article 23 of the state constitution and article 1, section 10 of the federal constitution. Second, the plaintiffs contend that SB 126 violates the Supremacy Clause of the federal constitution by voiding arbitration provisions in Deere's and AGCO's respective contracts. Not surprisingly, the defendant disagrees. It asserts first that SB 126 does not unconstitutionally impair the plaintiffs' contracts. The defendant also argues that even if certain portions of RSA 357-C violate the Supremacy Clause, such violations do not void the entire statutory scheme. The court will address the parties' arguments in turn.

The analytical framework for assessing a constitutional challenge to legislative action is well established. Whether or not a statute is constitutional is a question of law. . . . *Akins v. Sec'y of State*, 154 N.H. 67, 70 (2006). "The party challenging a statute's constitutionality bears the burden of proof." *State v. Pierce*, 152 N.H. 790, 791 (2005). Accordingly, "the constitutionality of an act passed by the coordinate branch of the government is to be presumed." *Opinion of the Justices*, 118 N.H. 582, 584 (1978) (quotation omitted). "A statute will not be construed to be unconstitutional where it is susceptible to a construction rendering it

constitutional." *City of Claremont v, Truell*, 126 N.H. 30, 39 (1985).

In this case, the court need not engage in the exercise of statutory interpretation. "The effects of the legislation are obvious and acknowledged. If those effects infringe on constitutionally protected rights, [the court] cannot avoid [its] obligation to say so." *Tuttle v. N.H. Med. Malpractice Joint Underwriting Assoc.*, 159 N.H. 627, 640 (2010), citing *Alliance of American Insurers v. Chu*, 571 N.E.2d 672, 678 (N.Y. 1991).

Under part I, article 23 of the New Hampshire Constitution, "[r]etrospective 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." While this section does not reference existing contracts, its "proscription duplicates the protections found in the contract clause of the United States Constitution." *State v. Fournier*, 158 N.H. 214, 221 (2009). Thus, "article I, section 10 [of the federal constitution] and part I, article 23 [of the state constitution] . . . offer equivalent protections where a law impairs a contract, or where a law abrogates an earlier statute that is itself a contract. . . ." *Tuttle*, 159 N.H. at 641.

The threshold inquiry in a Contract Clause analysis is whether the law has a retroactive effect on an existing contract. The party asserting a Contract Clause violation has the burden of demonstrating retroactive application of the law. *Petition of Concord Teachers*, 158 N.H. 529, 537 (2009). Here, the parties do not dispute that SB 126 has a retroactive effect. Thus, the court will direct

its analysis at the remaining elements of the plaintiffs' claim of a Contract Clause violation.

"Contract Clause analysis in New Hampshire requires a threshold inquiry as to whether the legislation operates as a substantial impairment of a contractual relationship." *Tuttle*, 159 N.H. at 641 (quotation and citation omitted). "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.* If the legislation substantially impairs the contract, "a balancing of the police power and the rights protected by the contract clauses must be performed, and . . . [the] law . . . may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose." *Opinion of the Justices (Furlough)*, 135 N.H. 625, 634 (1992).

While the parties do not dispute the existence of the plaintiffs' contracts, they do dispute whether the contracts are impaired by the enactment of SB 126 and whether that impairment is substantial. *See General Motors Corp. v. Romein*, 503 U.S. 182, 186 (1992). "Although the United States Supreme Court has provided little specific guidance as to what constitutes a 'substantial' contract impairment, total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Tuttle*, 159 N.H. at 649 (citation omitted).

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the

> protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Furlough, 135 N.H. at 633, quoting *Allied Structural Steel Co, v. Spannaus*, 438 U.S. 234, 245 (1978).

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel, 438 U.S. at 245.

To evaluate whether a law substantially impairs a contract, the court examines "(1) the nature of the contract and the affected contractual terms; (2) the degree to which the parties reasonably relied upon those terms at the time they formed the contract; and (3) the practical effect the challenged law would have upon parties." *Tuttle*, 159 N.H. at 668 (*Dalianis and Duggan,* JJ., dissenting), citing *Lower Village Hydroelectric Assocs. v. City of Claremont*, 147 N.H. 73, 77 (2001). "In determining whether contract impairment is substantial, some courts look to whether the subject matter of the contract has been the focus of heavy state regulation." *Id*. at 650.

"If so, further regulation might be foreseeable and, thus, any change to the contract caused by such regulation would not necessarily constitute a substantial impairment." *Id.* "However, standing alone, 'a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause.'" *Id.*, citing and quoting *Chrysler Corp. v. Kolosso Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998), cert. denied, 525 U.S. 1177 (1999).

Applying the foregoing standards, the court concludes that SB 126 does not substantially impair the plaintiffs' existing contracts. In their brief, the plaintiffs identify ten substantial SB 126 impairments:

1. The plaintiffs were originally permitted to define each dealer's relevant market area without advance notice. Under RSA 357-C:3, it is an unfair and deceptive practice to change the relevant market area set forth in the franchise agreement without good cause.

2. Although the plaintiffs could compete or authorize others to compete with a dealer in the dealer's dealership area, the statute now removes the plaintiff's discretion to add or relocate a dealership into an existing area without good cause and without a finding by the New Hampshire Motor Vehicle Board ("MVIB") that good cause exists.

3. RSA 357-C:3, III(h) removes the plaintiffs' discretion to set dealer minimum equity level or capital standards.
4. RSA 357-C limits the plaintiffs' discretion to decline to deliver or fill orders to situations where the plaintiffs have no control.
5. While the plaintiffs previously could terminate, cancel, or non-renew a dealership agreement upon notice for any failure to abide by the terms of the dealership agreement consistent with RSA 347-A:2, I, the plaintiffs now can only do so if good cause exists. Further, the plaintiffs must satisfy certain requirements, including: (1) notice; (2) good faith; (3) good cause; and (4) a MVIB finding that there is good cause to cancel, terminate, fail to renew, or refuse to continue any franchise relationship. RSA 357-C:7, III (a-e).
6. RSA 357-C will prohibit the plaintiffs from enforcing the arbitration agreements contained in their existing contracts.
7. The plaintiffs will lose control over the compensation they provide for warranty services by forcing them to compensate at the dealer's retail labor rates and product prices.

8. The plaintiffs will no longer be able to limit the types of equipment a particular dealer may sell.

9. At least one of the plaintiffs' contracts places express restrictions on whether a dealer may carry a competitive line of equipment. Under RSA 357-C:3, II(c), it will be an unfair and deceptive act to "coerce or attempt to coerce, any motor vehicle dealer to . . . [r]efrain from participation in the management of, investment in, or acquisition of any other line of new motor vehicle or related products."

10. SB 126 will impair one contracting party's commercial worksite products contract.

The defendant disputes the plaintiffs' claim of substantial impairment.

Not all of the impairments identified by the plaintiffs apply to each of the contracts in question. According to the plaintiffs, "SB 126 impairs [their] existing contracts in at least 10 respects." Pl.'s Mem. of Law at 12. The court disagrees. Upon review of each individual contract, it is clear that all ten factors do not affect all of the agreements. The court must therefore analyze the plaintiffs' substantial impairment argument as it pertains to each individual contract – not all the contracts listed as a whole.

A review of each individual contract does not support a conclusion of substantial impairment. The

provisions of RSA 347-A previously governed the plaintiffs' agreements. Thus, as the defendant correctly notes, "SB 126's assignment of tractors and other equipment to RSA 357-C is not equivalent to an entirely unregulated industry suddenly being faced with extensive regulation." Def.'s Mem. of Law at 6. The plaintiffs' agreements were subject to a statutory scheme that regulated the behavior of the manufacturers and dealers. While including the plaintiffs within the purview of RSA 357-C has created added requirements by which the plaintiffs must act, such additions represent refinements in the law. For example, subjecting the plaintiffs to the "good cause" requirement, while not in RSA 347-A, is consistent with the RSA 347-A general prohibition of bad faith. *See Ford Motor Co. v. Meredith Motor Co.*, No. 99-456-B, 2000 U.S. Dist. LEXIS 13099, at *24-25 (D.N.H., Aug. 24, 2000), vacated on abstention grounds, 257 F.3d 67 (1st Cir. 2001); *see also Veix v. Sixth Ward Bldg. & Loan Assoc.*, 310 U.S. 32, 38 (1940).

The plaintiffs' reliance on *Tuttle* does not avail them, as that case is factually distinct. *Tuttle* involved legislation requiring the New Hampshire Medical Malpractice Joint Underwriting Association ("JUA") to transfer surplus funds directly to the general fund, despite the fact that the JUA.'s plans entitled participating physicians to surplus funds. The court held that the measure impaired existing contract rights. *Tuttle*, 159 N.H. at 633. It is true that the insurance industry is heavily regulated; however, the *Tuttle* legislation was not regulatory legislation meant to protect insurers, insureds or the public. *Id*. at 650. In contrast, the issues raised by

SB 126 are more analogous to those addressed in *Ford*, which examined the expansion of existing regulation pertaining to previously regulated agreements. SB 126 does not change the fundamental nature of the contracts in question. Unlike the legislation in *Tuttle*, which effectively eliminated the "participating" character of the policies and thus changed the nature of the contracts, SB 126's requirement that manufacturer decisions be made with good cause does not change the very nature or "heart" of these agreements to buy and sell equipment parts. *See id.* at 651.

Given these considerations, the court concludes that SB 126 does not substantially impair the plaintiffs' existing contracts. Importantly, a contrary conclusion would not be helpful to the plaintiffs because the plaintiffs have also not sustained their burden of showing that SB 126 is not reasonable and necessary to serve an important public purpose.

"[I]t is to be accepted as commonplace that the Contract Clause does not operate to obliterate the [State's] police power. . .." *Furlough*, 135 N.H. at 634, quoting *Allied Structural Steel*, 438 U.S. at 241.

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may, thereby be affected. This power, which

> in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Allied Structural Steel, 438 U.S. at 241. "If the Contract Clause is to retain any meaning at all, however, it 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." *Id.* at 242. "Thus, a balancing of the police power and the rights protected by the contract clauses must be performed, and a bill or law which substantially impairs a contractual obligation may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose." *Furlough*, 135 N.H. at 635. Given the nature of this case, it is appropriate for the court to engage in the exercise of examining whether SB 126 is reasonable and necessary to accomplish the stated public purpose, assuming a substantial impairment of contract rights.

The police power side of the equation requires the court to examine whether the law serves an important public purpose. The defendant asserts that "SB 126 serves a proper public purpose because it broadens the reach of RSA 357-C, a statute created to regulate vehicle manufacturers, distributors … and dealers doing business in this state … premised on the 1981 general court's finding that 'the distribution and sale of vehicles

within this state vitally affects the general economy of the state and the public interest'" Def.'s Mem. of Law at 14. In addition to the stated purpose of RSA 357-C, the legislative history of SB 126 establishes the measure's public purpose. Three equipment dealers discussed issues with manufacturers at an April 16, 2013 house committee public hearing. *See* Def.'s Exh. C. One dealer testified about how unfair manufacturer practices hurt customers and small family owned businesses. *Id*. A farmer testified that fewer local dealerships hurt farmers because these farmers have to travel great distances to larger dealers they do not know. *Id*.

This testimony was thoroughly considered by the legislature. In a May 22, 2013 hearing on SB 126, Representative Jones stated:

> In the past farm equipment was sold and serviced by many smaller dealers in towns all across the state. This practice was beneficial because local dealers can be called at home, after hours, or on Sundays or holidays to provide service or parts in emergencies. Local dealers will open their stores when a farmer needs a baler part on Sunday morning and rain is forecast for Sunday afternoon. This is a true emergency for a farmer whose hay crop is at risk.
>
> According to the Northeast Equipment Dealers Association in 1999 they had 41 member dealers in New Hampshire and today they only have nine. The move by

> equipment manufacturers to fewer mega dealers is detrimental to agriculture and the economy of rural New Hampshire because a mega dealer 100 miles away will not provide the level of support of a local dealer and, even if they would, the distance is too great to be of use.

H.R. Session Hearing on SB 126 at 1:09:15 (May 22, 2013). Representative Sad responded by stating: "Last month R.N. Johnson, a family owned John Deere dealership in my town, closed its doors after 84 years of service to our large agricultural community. Do you think that this bill would have had any impact at all on that decision to close?" *Id*. Representative Jones answered that it would.

The legislative history and the stated purpose of the bill establish the legislative findings as to the public purpose of the bill. There is sufficient record support to accord an appropriate level of deference. While the plaintiffs correctly assert that leveling the playing field between manufacturers and dealers is not a significant and legitimate public interest, *see Allied Structural Steel*, 438 U.S. at 247, the purpose of SB 126 goes beyond that purpose to "ensure consumer interests are safeguarded . . .." *See* SB 126. As a result, the court must assign significant weight to the public purpose. *See Allied Structural Steel*, 438 U.S. at 247; *see also Alliance of Auto Mfrs. v. Gwadosky*, 430 F.3d 30 (1st Cir. 2005). Accordingly, the court is persuaded that the bill serves a legitimate and significant public purpose.

The police power analysis also requires the court to examine whether the law is reasonable and necessary. "In assessing the reasonableness and necessity of the Act, the threshold question is the degree of deference [the court] must afford the legislature's decision as to the means chosen to accomplish its purpose." *Tuttle*, 159 N.H. at 653. "Unless the State itself is a contracting party, 'as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Furlough*, 135 N.H. at 634-35 (quotation, brackets and ellipses omitted). "This deference serves to ensure that the constitutional prohibition against the impairment of contracts does not prevent the State from legitimate exercises of police power 'to protect the vital interests of its people.'" *Tuttle*, 159 N.H. at 653, citing *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 432-33 (1934).

"The exercise of that reserved power has repeatedly been sustained by this Court as against a literalism in the construction of the contract clause which would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *Thomas*, 292 U.S. at 432-33. "In cases where the State is itself a party to the contract, heightened review is warranted and courts generally accord minimal deference to legislative acts affecting such contracts." *Tuttle*, 159 N.H. at 654, citing *Lower Village Hydroelectric Assocs.*, 147 N.H. at 78. If, on the other hand, the state is not a party to the contracts, more deference is warranted, "but complete deference is unsupportable." *Tuttle*, 159 N.H. at 655.

In analyzing the reasonableness of legislation, courts consider whether: "(1) the law meets an emergency need; (2) the law was enacted to protected a basic societal interest, rather than a favored group; (3) the law is appropriately tailored to the targeted emergency; (4) whether the imposed conditions are reasonable; and (5) whether the law is limited to the duration of the emergency." *Tuttle*, 159 N.H. at 675 (*Dalianis and Duggan*, JJ., dissenting), citing *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 444-47 (1934). "An emergency need not exist, however, before a state may enact a law that impairs a private contract." *Id*., citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983).

Here, SB 126 survives the aforementioned scrutiny under this deferential standard. The state is not a party to the existing contracts. Moreover, nothing before the court suggests that the state has some type of indirect financial interest at stake. This is in stark contrast to the *Tuttle* situation. The legislation in question is a reasonable decision by the legislature to protect the general welfare of the public through valid economic legislation. As a result, the court is satisfied that SB 126 constitutes broad-based economic legislation that is directed to meet a societal need. *See Nieves v. Hess Oil Virgin Islands Corp*., 819 F.2d 1237, 1249 (3d Cir. 1987) ("Courts are required to defer to the legislature's judgment concerning the necessity and reasonableness of economic and social legislation.").

The other side of the balancing equation involves the rights protected by the contract clause. In this context, the court's analysis as to whether SB 126 substantially impairs the plaintiffs' contract rights is

dispositive. The court acknowledges that SB 126 may have some economic impact on the plaintiffs; however, as addressed above, their pre-SB 126 relationship with dealers was not unfettered. RSA 347-A previously governed the plaintiffs' agreements. Any SB 126 burden caused by extending the plaintiffs' dealer relationships to the regulatory requirements of RSA 357-C does not outweigh the state's police power.

In addition to their contract clause claim, the plaintiffs assert that SB 126 violates the Supremacy Clause. Under 11 of the contracts at issue in this case, the parties agreed that any disputes would be resolved by binding arbitration. The plaintiffs contend that RSA chapter 357-C prohibits predetermined agreements to arbitrate. In so doing, the plaintiffs argue that these provisions violate the FAA and are therefore void under the Supremacy Clause of the United States Constitution.

The FAA provides, in pertinent part:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract … or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Supremacy Clause provides:

> The Constitution, and the Law of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. CONST. ART. IV, CL. 2. Where state law invalidates an arbitration provision that falls under the FAA, the state law is preempted. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996).

The plaintiffs have persuaded the court that the foregoing authority that SB 126 and RSA chapter 357-C are void under the Supremacy Clause to the extent that they attempt to render void and unenforceable arbitration agreements in existing contracts. This is not dispositive, however. As the defendant asserts, "the conflicting provision is 'displaced' by the federal law in that singular instance." Def.'s Mem. of Law at 21. As a result, only those provisions that conflict with the FAA are considered invalid, leaving the rest of the statutory scheme intact. *See* RSA 357-C:16 ("If any provision of this chapter or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the chapter ….").

The plaintiffs argue that RSA 357-C MVIB regulation is pervasive to the point where the

statute cannot stand if the arbitration provisions of the contracts are enforced. The court disagrees. The arbitration provisions relate to the procedural mechanism that will be employed to resolve disputes between the plaintiffs and the dealers those provisions do not establish the substantive law that will govern the resolution of the disputes. An arbitration panel can apply RSA 357-C substantive law as it applies any other substantive law that would govern the resolution of a dispute. Thus, pursuant to RSA 357-C:16, the procedural dispute resolution mechanisms can be severed from the other provisions of the chapter.

Based on the foregoing, the court concludes that SB 126 does not impair the plaintiffs' existing contracts in violation of part I, article 23 of the New Hampshire Constitution. Additionally, the court concludes that article I, section 10 of the United States Constitution provides no additional Contract Clause protection. Finally, in view of the RSA 357-C:16 severability provision, SB 126 does not run afoul of article IV, clause 2 of the United States Constitution–the Supremacy Clause. Accordingly, the plaintiffs' motion for summary judgment is DENIED and the defendant's motion for summary judgment is GRANTED.

So ORDERED.

Date: April 15, 2014 s/ Larry M. Smukler
LARRY M. SMUKLER
PRESIDING JUSTICE

APPENDIX E

Relevant portions of N.H. Rev. Stat. Ann. ch. 357-C, as amended in 2013 by SB 126: Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers

357-C:1. Definitions.

For the purpose of this chapter only:

I. "Motor vehicle" means every self-propelled vehicle manufactured and designed primarily for use and operation on the public highways and required to be registered and titled under the laws of New Hampshire. Motor vehicle shall include equipment if sold by a motor vehicle dealer primarily engaged in the business of retail sales of equipment. Except for RSA 357-C:3, I-b, and where otherwise specifically exempted from the provisions of this chapter, "motor vehicle" shall include off highway recreational vehicles and snowmobiles. "Equipment" means farm and utility tractors, forestry equipment, industrial equipment, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts.

II. "Manufacturer" means any person who manufactures or assembles new motor vehicles or any partnership, firm, association, joint venture, corporation or trust which is controlled by the manufacturer. "Manufacturer" shall also mean a distributor, distributor branch, factory, factory branch, and franchisor.

* * *

VIII. (a) "Motor vehicle dealer" means any person engaged in the business of selling, offering to sell, soliciting or advertising the sale of new or used motor vehicles or possessing motor vehicles for the purpose of resale either on his or her own account or on behalf of another, either as his or her primary business or incidental thereto. "Motor vehicle dealer" also means a person granted the right to service motor vehicles or component parts manufactured or distributed by the manufacturer but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles. However, "motor vehicle dealer" shall not include:

(1) Receivers, trustees, administrators, executors, guardians, or other persons appointed by or acting under judgment, decree or order of any court; or

(2) Public officers while performing their duties as such officers.

(b) "New motor vehicle dealer" means a motor vehicle dealer who holds a valid sales and service agreement, franchise or contract granted by the manufacturer or distributor for the sale, service, or both, of its new motor vehicles, but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles.

(c) The term "motor vehicle dealer" shall not include a single line equipment dealer. "Single line equipment dealer" means a person, partnership, or corporation who is primarily engaged in the business of retail sales of farm and utility tractors, forestry

equipment, industrial and construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts, and who:

(1) Has purchased 75 percent or more of the dealer's total new product inventory from a single supplier; and

(2) Has a total annual average sales volume for the previous 3 years in excess of $ 100,000,000 for the relevant market area for which the dealer is responsible.

IX. "Franchise" means one or more oral or written agreements under or by which:

(a) The franchisee is granted the right to sell new motor vehicles or component parts manufactured or distributed by the franchisor or the right to service motor vehicles or component parts manufactured or distributed by the manufacturer but does not include any person who has an agreement with a manufacturer or distributer to perform service only on fleet, government, or rental vehicles;

(b) The franchisee as an independent business is a component of the franchisor's distribution or service system;

(c) The franchisee is granted the right to be substantially associated with the franchisor's trademark, trade name or commercial symbol;

(d) The franchisee's business is substantially reliant for the conduct of its business on the franchisor for a continued supply or service of motor vehicles, parts, and accessories; or

(e) Any right, duty, or obligation granted or imposed under this chapter is affected.

X. "Franchisor" means a manufacturer or distributor who grants a franchise to a motor vehicle dealer.

XI. "Franchisee" means a motor vehicle dealer to whom a franchise is granted.

* * *

357-C:3. Prohibited Conduct.

It shall be deemed an unfair method of competition and unfair and deceptive practice for any:

* * *

III. Manufacturer; distributor; distributor branch or division; factory branch or division; or any agent thereof to:

* * *

(p) Require a motor vehicle franchisee to agree to a term or condition in a franchise, or in any lease related to the operation of the franchise or agreement ancillary or collateral to a franchise, as a condition to the offer, grant, or renewal of the franchise, lease, or agreement, which:

(1) Requires the motor vehicle franchisee to waive trial by jury in actions involving the motor vehicle franchisor;

(2) Specifies the jurisdictions, venues, or tribunals in which disputes arising with respect to the franchise, lease, or agreement shall or shall not be submitted for resolution or otherwise prohibits a motor vehicle franchisee from bringing an action in a

particular forum otherwise available under the law of this state;

(3) Requires that disputes between the motor vehicle franchisor and motor vehicle franchisee be submitted to arbitration or to any other binding alternate dispute resolution procedure; provided, however, that any franchise, lease, or agreement may authorize the submission of a dispute to arbitration or to binding alternate dispute resolution if the motor vehicle franchisor and motor vehicle franchisee voluntarily agree to submit the dispute to arbitration or binding alternate dispute resolution at the time the dispute arises;

(4) Provides that in any administrative or judicial proceeding arising from any dispute with respect to the aforesaid agreements that the franchisor shall be entitled to recover its costs, reasonable attorney's fees and other expenses of litigation from the franchisee; or

(5) Grants the manufacturer an option to purchase the franchise, or real estate, or business assets of the franchisee.

* * *

357-C:5. Warranty Obligations, Transportation Damage and Indemnification.

* * *

II. If any franchisor shall require or permit franchisees to perform services or provide parts in satisfaction of a warranty issued by the franchisor:

* * *

(d)(1) All claims made by new motor vehicle dealers pursuant to this section for labor and parts shall be paid within 30 days following their approval. All such claims shall be either approved and paid or disapproved within 30 days after their receipt, and any claim not specifically disapproved in writing within such period shall be deemed approved. Notice of rejection of any claim shall be accompanied by a specific statement of the grounds on which the rejection is based.

* * *

(5) Any chargeback resulting from any audit shall not be made until a final order is issued by the New Hampshire motor vehicle industry board if a protest to the proposed chargeback is filed within 30 days of the notification of the final amount claimed by the manufacturer, distributor, branch, or division to be due after exhausting any procedure established by the manufacturer, distributor, branch, or division to contest the chargeback, other than arbitration. If the chargeback is affirmed by a final order of the board, the dealer shall be liable for interest on the amount set forth in the order at a rate of the prime rate effective on the date of the order plus one percent per annum from the date of the filing of the protest. In the absence of fraud, the board may order, based on the equities and circumstances of the parties, that the chargeback plus applicable interest be paid in installments not exceeding 12 months. If the board finds that a warranty chargeback is the result of a fraudulent warranty claim, no installment payments shall be allowed by the board.

* * *

357-C:6. Agreements Governed.

I. All written or oral agreements of any type between a manufacturer or distributor and a motor vehicle dealer shall be subject to the provisions of this chapter, and provisions of such agreements which are inconsistent with this chapter shall be void as against public policy and unenforceable in the courts or the motor vehicle industry board of this state.

II. Before any new selling agreement or amendment to an agreement involving a motor vehicle dealer and such party becomes effective, the manufacturer, distributor, distributor branch or division, factory branch or division, or agent thereof shall, 90 days prior to the effective date thereof, forward a copy of such agreement or amendment to the New Hampshire motor vehicle industry board and to the dealer.

III. Every new selling agreement or amendment made to such agreement between a motor vehicle dealer and a manufacturer or distributor shall include, and if omitted, shall be presumed to include, the following language: "If any provision herein contravenes the valid laws or regulations of the state of New Hampshire, such provision shall be deemed to be modified to conform to such laws or regulations; or if any provision herein, including arbitration provisions, denies or purports to deny access to the procedures, forums, or remedies provided for by such laws or regulations, such provision shall be void and unenforceable; and all other terms and provisions of this agreement shall remain in full force and effect."

357-C:7. Limitations on Cancellations, Terminations and Nonrenewals.

I. Notwithstanding the terms, provisions, or conditions of any agreement or franchise, and notwithstanding the terms or provision to any waiver, no manufacturer, distributor, or branch or division thereof shall cancel, terminate, fail to renew, or refuse to continue any franchise relationship with a new motor vehicle dealer unless:

(a) The manufacturer, distributor, or branch or division thereof has satisfied the notice requirement of paragraph V;

(b) The manufacturer, distributor, or branch or division thereof has acted in good faith;

(c) The manufacturer, distributor, or branch or division thereof has good cause for the cancellation, termination, nonrenewal, or noncontinuance; and

(d) (1) The New Hampshire motor vehicle industry board finds after a hearing and after ruling on any motion to reconsider that is timely filed in accordance with RSA 357-C:12, VII, that there is good cause for cancellation, termination, failure to renew, or refusal to continue any franchise relationship. The new motor vehicle dealer may file a protest with the board within 45 days after receiving the 90-day notice. A copy of the protest shall be served by the new motor vehicle dealer on the manufacturer, distributor, or branch or division thereof. When a protest is filed under this section, the franchise agreement shall remain in full force and effect and the franchisee shall retain all rights and remedies pursuant to the terms and conditions of such franchise agreement, including, but not

limited to, the right to sell or transfer such franchisee's ownership interest prior to a final determination by the board and any appeal; or

(2) The manufacturer, distributor, or branch or division thereof has received the written consent of the new motor vehicle dealer; or

(3) The appropriate period for filing a protest has expired.

II. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation, nonrenewal, or noncontinuance when:

(a) There is a failure by the new motor vehicle dealer to comply with a provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship; provided that compliance on the part of the new motor vehicle dealer is reasonably possible; and that the manufacturer, distributor, or branch or division thereof first acquired actual or constructive knowledge of such failure not more than 180 days prior to the date on which notification is given pursuant to paragraph V.

(b) If the failure by the new motor vehicle dealer, in subparagraph (a), relates to his or her performance in sales or service, then good cause, as used in subparagraph I(c), shall be defined as the failure of the new motor vehicle dealer to effectively carry out the performance provisions of the franchise if:

(1) The new motor vehicle dealer was apprised by the manufacturer, distributor, or branch or division thereof in writing of such failure, the notification stated that notice was provided of failure of performance pursuant to this law, and the new motor vehicle dealer was afforded a reasonable opportunity to exert good faith efforts to correct his or her failures;

(2) (A) Except with regard to OHRV and snowmobile dealers, such failure thereafter continued within the period which began not more than 180 days before the date notification of termination, cancellation, or nonrenewal was given pursuant to paragraph V; and

(B) With regard to OHRV and snowmobile dealers, such failure thereafter continued within the period which began not more than 365 days before the date notification of termination, cancellation, or nonrenewal was given pursuant to paragraph V; and

(3) The new motor vehicle dealer has not substantially complied with reasonable performance criteria established by the manufacturer, distributor, or branch or division thereof and communicated to the dealer. Among those factors determining performance criteria shall be the relevancy of the sales of the manufacturer, distributor, or branch or division thereof within the state and the particular market area.

(c) For the purposes of this paragraph, good cause for terminating, canceling, or failing to renew a franchise shall be limited to failure by the franchisee to substantially comply with those requirements

imposed upon the franchisee by the franchise, as set forth in subparagraphs II(a) and (b).

III. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, the following shall be construed as examples of what do not constitute good cause for the termination, cancellation, nonrenewal, or noncontinuance of a franchise:

(a) The change of ownership of the new motor vehicle dealer's dealership, excluding any change in ownership which would have the effect of the sale of the franchise without the reasonable consent of the manufacturer, distributor, or branch or division thereof;

(b) The fact that the new motor vehicle dealer refused to purchase or accept delivery of any new motor vehicle parts, accessories, or any other commodity or services not ordered by the new motor vehicle dealer;

(c) The fact that the new motor vehicle dealer owns, has an investment in, participates in the management of, or holds a license for the sale of another make or line of new motor vehicle, or that the new motor vehicle dealer has established another make or line of new motor vehicle in the same dealership facilities as those of the manufacturer, distributor, or branch or division thereof; provided that the new motor vehicle dealer maintains a reasonable line of credit for each make or line of new motor vehicle, and that the new motor vehicle dealer remains in substantial compliance with any reasonable facilities' requirements of the

manufacturer, distributor, or branch or division thereof;

(d) The fact that the new motor vehicle dealer sells or transfers ownership of the dealership or sells or transfers capital stock in the dealership to the new motor vehicle dealer's spouse, son, or daughter. The manufacturer, distributor, or branch or division thereof shall give effect to such change in ownership unless, if licensing is required by the state, the transfer of the new motor vehicle dealer's license is denied or the new owner is unable to license as the case may be; and

(e) The fact that the new motor vehicle dealer's dealership does not substantially meet the reasonable capitalization requirements of the manufacturer, distributor, branch, or division.

IV. The manufacturer, distributor, or branch or division thereof shall bear the burden of proof for showing that it has acted in good faith, that all notice requirements have been satisfied, and that there was good cause for the franchise termination, cancellation, nonrenewal or noncontinuance.

V. (a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, prior to the termination, cancellation, or nonrenewal of any franchise, the manufacturer, distributor, or branch or division thereof shall furnish notification of such action to the new motor vehicle dealer and the board in the manner described in subparagraph (b) not less than 90 days prior to the effective date of such termination, cancellation, or nonrenewal, except that the notice required of a controlled financing company

of a manufacturer, distributor, or branch or division thereof shall be that period set forth in its contract with the dealer.

(b) Notification under this paragraph shall be in writing; shall be by certified mail, or personally delivered to the new motor vehicle dealer; and shall contain:

(1) A statement of intention to terminate the franchise, cancel the franchise, or not to renew the franchise; and

(2) A statement of the reasons for the termination, cancellation, or nonrenewal; and

(3) The date on which such termination, cancellation, or nonrenewal takes effect.

(c) Not less than 180 days prior to the effective date of such termination, cancellation, or nonrenewal which occurs as a result of:

(1) Any change in ownership, operation, or control of all or any part of the business of the manufacturer, whether by sale or transfer of assets, corporate stock or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law or otherwise;

(2) The termination, suspension, or cessation of a part or all of the business operations of the manufacturer; or

(3) Discontinuance of the sale of the product line make or a change in distribution system by the manufacturer whether through a change in distributors or the manufacturer's decision to cease

conducting business through a distributor altogether.

VI. Within 90 days of the termination, cancellation, or nonrenewal of a motor vehicle franchise as provided for in this section, or the termination, cancellation, or nonrenewal of a motor vehicle franchise by the motor vehicle franchisee, the motor vehicle franchisor shall pay to the motor vehicle dealer:

(a) The dealer cost plus any charges by the manufacturer, distributor, or branch or division thereof for distribution, delivery, and taxes paid by the dealer, less all allowances paid to the dealer by the manufacturer, distributor, or representative, for new, unsold, undamaged and complete motor vehicles in the dealer's inventory that have original invoices bearing original dates within 24 months prior to the effective date of termination with less than 750 miles on the odometer, and insurance costs, and floor plan costs from the effective date of the termination to the date that the vehicles are removed from dealership or the date the floor plan finance company is paid, whichever occurs last. Vehicles with a gross vehicle weight rating over 14,000 shall be exempt from the 750 mile limitation. Motorcycles shall be subject to a 350 mile limitation. All vehicles shall have been acquired from the manufacturer or another same line make vehicle dealer in the ordinary course of business. Equipment shall be subject to a 36-month limitation. Payment for farm and utility tractors, forestry equipment, industrial, construction equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories and repair

parts shall include all items attached to the original equipment by the dealer or the manufacturer other than items that are not related to the performance of the function the equipment is designed to provide.

(b) The dealer cost of each new, unused, undamaged, and unsold part or accessory if such part or accessory is in the current parts catalog, was purchased from the manufacturer or distributor or from a subsidiary or affiliated company or authorized vendor, and is still in the original, resalable merchandising package and in unbroken lots, except that in the case of sheet metal, a comparable substitute for the original package may be used. Any part or accessory that is available to be purchased from the manufacturer on the date the notice of termination issued shall be considered to be included in the current parts catalog.

(c) The fair market value of each undamaged sign owned by the dealer which bears a trademark, trade name, or commercial symbol used or claimed by the manufacturer, distributor, or branch or division thereof if such sign was purchased from or at the request of the manufacturer, distributor, or branch or division thereof.

(d) At the dealer's option, the fair market value of all special tools and automotive service equipment owned by the dealer which were recommended in writing and designated as special tools and equipment by the manufacturer, distributor, or branch or division thereof and purchased from or at the request of the manufacturer or distributor, if the tools and equipment are in usable and good condition, normal wear and tear excepted.

(e) The cost of transporting, handling, packing, and loading of motor vehicles, parts, signs, tools, and special equipment subject to repurchase by the manufacturer, distributor, or branch or division thereof.

(f) The amount remaining to be paid on any equipment or service contracts required by or leased from the manufacturer or a subsidiary or company affiliated with the manufacturer.

(g) If the dealer leases the dealership facilities, then the manufacturer, distributor, or branch or division thereof shall be liable for 2 year's payment of the gross rent or the remainder of the term of the lease, whichever is less. If the dealership facilities are not leased, then the manufacturer, distributor, or branch or division thereof shall be liable for the equivalent of 2 years payment of gross rent. This subparagraph shall only apply when the termination, cancellation, or nonrenewed line was pursuant to RSA 357-C:7, V(c)(3) or was with good cause, other than good cause related to a conviction and imprisonment for a felony involving moral turpitude that is substantially related to the qualifications, function, or duties of a franchisee. Gross rent is the monthly rent plus the monthly cost of insurance and taxes. Such reasonable rent shall be paid only to the extent that the dealership premises are recognized in the franchise and only if they are: (i) used solely for performance in accordance with the franchise, and (ii) not substantially in excess of those facilities recommended by the manufacturer or distributor. If the facility is used for the operations of more than one franchise, the gross rent compensation shall be

adjusted based on the planning volume and facility requirements of the manufacturers, distributors, or branch or division thereof.

This paragraph shall not apply to a termination, cancellation, or nonrenewal due to a sale of the assets or stock of the motor vehicle dealership.

VII. (a) (1) In addition to the other payments set forth in this section, if a termination, cancellation, or nonrenewal is premised upon any of the occurrences set forth in subparagraph V(c), then the manufacturer shall be liable to the dealer for an amount at least equivalent to the fair market value of the motor vehicle franchise on:

(A) The date immediately preceeding the date the franchisor announces the action which results in termination, cancellation, or nonrenewal; or

(B) The day 12 months prior to the date on which the notice of termination, cancellation, or nonrenewal is issued, whichever amount is higher.

(2) Payment is due within 90 days of the effective date of the termination, cancellation, or nonrenewal.

(b) The manufacturer shall authorize the franchisee, or upon the franchisee's termination another authorized franchise dealership of the manufacturer in the area, to continue servicing and supplying parts, including service and parts pursuant to a warranty issued by the franchisor, for any goods or services marketed by the franchisee pursuant to the motor vehicle franchise for a period of not less than 5 years from the effective date of the

termination, cancellation, or nonrenewal and shall continue to reimburse the franchisee for warranty parts and service in an amount and on terms no less favorable than those in effect prior to the termination, cancellation, or nonrenewal and in accordance with paragraph V.

(c) At the dealers option, the manufacturer may avoid paying fair market value of the motor vehicle franchise to the dealer under this subparagraph if the franchisor, or another motor vehicle franchisor pursuant to an agreement with the franchisor, offers the franchisee a replacement motor vehicle franchise with terms substantially similar to that offered to other same line make dealers.

VIII. Within 90 days of a termination or nonrenewal, with good cause and in good faith, the manufacturer or distributor of any franchise, or any branch or division thereof, and notwithstanding any terms therein to the contrary, the manufacturer, distributor, or branch or division thereof shall pay to the new motor vehicle dealer the amount remaining to be paid on any leases of computer hardware or software that is used to manage and report data to the manufacturer or distributor for financial reporting requirements and the amount remaining to be paid on any manufacturer or distributor required equipment leases or service contracts, including but not limited to computer hardware and software leases.

IX. The payments required by paragraphs VI, VII, and VIII, and any other money owed the franchisee, shall be made within 90 days of the effective date of the termination. The manufacturer shall pay the

franchisee an additional 5 percent per month of the amount due for any payment not made within 90 days of the effective date of the termination.

* * *

357-C:9. Limitations on Establishing or Relocating Dealerships.

I. In the event that a manufacturer, distributor, or branch or division thereof seeks to enter into a franchise establishing an additional new motor vehicle dealership or relocating an existing new motor vehicle dealership within a relevant market area where the same line make is then represented, the manufacturer, distributor, or branch or division thereof shall first give written notice to the New Hampshire motor vehicle industry board and each new motor vehicle dealer of such line make in the relevant market area of the intention to establish an additional dealership or to relocate an existing dealership within that market area. Within 45 days of receiving such notice or within 45 days after the end of any appeal procedure provided by the manufacturer, distributor, or branch or division thereof, any such new motor vehicle dealership may file a protest with the New Hampshire motor vehicle industry board to the establishing or relocating of the new motor vehicle dealership. A copy shall be served on the manufacturer, distributor, or branch or division thereof within the 45-day period. When such protest is filed, the manufacturer, distributor, or branch or division thereof may not establish or relocate the proposed new motor vehicle dealership until the board has held a hearing, nor thereafter if the board determines that there is good cause for not

permitting such new motor vehicle dealership. For purposes of this paragraph, the reopening in a relevant market area of a new motor vehicle dealership that has not been in operation for one year or more shall be deemed the establishment of an additional new motor vehicle dealership.

II. In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line make, the board shall consider the existing circumstances, including, but not limited to:

(a) The permanency of the investment;

(b) Any effect on the retail new motor vehicle business and the consuming public in the relevant market area;

(c) Whether it is injurious or beneficial to the public welfare for an additional new motor vehicle dealership to be established;

(d) Whether the new motor vehicle dealers of the same line make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of motor vehicle parts, and qualified service personnel;

(e) Whether the establishment of an additional new motor vehicle dealership would increase competition, and therefore be in the public interest; and

(f) Growth or decline in population and new motor vehicle registration in the relevant market area.

III. At any hearing conducted by the New Hampshire motor vehicle industry board under this section, the manufacturer, distributor, or branch or division thereof seeking to establish an additional new motor vehicle dealership or relocate an existing new motor vehicle dealership shall have the burden of proof in establishing that good cause exists and that it acted in good faith.

IV. In the event that a manufacturer, distributor, or branch or division is seeking to establish a new dealership rather than relocating an existing dealership, in addition to the definition of market area in RSA 357-C:1, XXI, in no case shall a franchisee's relevant market area be less than the area within a radius of 15 miles from any boundary of the dealership.

* * *

357-C:12. Enforcement; New Hampshire Motor Vehicle Industry Board; Fund Established.

* * *

II. Except for civil actions filed in superior court pursuant to paragraph IX of this section, the board shall have the following exclusive powers:

(a) Any person may file a written protest with the board complaining of conduct governed by and violative of this chapter. The board shall hold a public hearing in accordance with the rules adopted by the board pursuant to RSA 541-A.

(b) The board shall issue written decisions and may issue orders to any person in violation of this chapter.

* * *

IX. Notwithstanding the terms, provisions, or conditions of any agreement or franchise or the terms or provisions of any waiver, any person whose business or property is injured by a violation of this chapter, or any person so injured because such person refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this chapter, may bring a civil action in the superior court to recover the actual damages sustained by such person together with the costs of the suit, including a reasonable attorney's fee.

APPENDIX F

Relevant portions of N.H. Rev. Stat. Ann. ch. 347-A, Regulation of Equipment Dealerships

347-A:1 Definitions. In this chapter:

* * *

II. "Dealer" means a person, corporation, or partnership primarily engaged in the business of retail sales of farm and utility tractors, forestry equipment, light industrial equipment, farm implements, farm machinery, yard and garden equipment, attachments, accessories, and repair parts. The term "dealer" shall not include dealers primarily engaged in the retail sale of all-terrain vehicles and motorcycles as defined by RSA 357-C:1. The term "dealer" shall also not include a single line dealer primarily engaged in the retail sale and service of industrial, forestry and construction equipment. "Single line dealer" means a person, partnership or corporation who:

(a) Has purchased 75 percent or more of the dealer's total new product inventory from a single supplier; and

(b) Who has a total annual average sales volume for the previous 3 years in excess of $ 20,000,000 for the entire territory for which the dealer is responsible.

III. "Dealer agreement" means a written or oral contract or agreement between a dealer and a wholesaler, manufacturer, or distributor by which the dealer is granted the right to sell or distribute

goods or services or to use a trade name, trademark, service mark, logotype, or advertising or other commercial symbol.

* * *

VI. "Supplier" means a wholesaler, manufacturer, or distributor of inventory who enters into a dealer agreement with a dealer.

VII. "Termination of a dealer agreement" means the cancellation, nonrenewal, or noncontinuance of the agreement.

347-A:2 Notice of Termination of Dealer Agreements.

I. Notwithstanding any agreement to the contrary, prior to the termination of a dealer agreement, a supplier shall notify the dealer of the termination not less than 120 days prior to the effective date of the termination. No supplier shall terminate, cancel, or fail to renew a dealership agreement without cause. For the purposes of this paragraph "cause" means failure by an equipment dealer to comply with requirements imposed upon the equipment dealer by the dealer agreement, provided the requirements are not substantially different from those requirements imposed upon other similarly situated dealers in this state.

II. The supplier may immediately terminate the agreement at any time upon the occurrence of any of the following events:

(a) The filing of a petition for bankruptcy or for receivership either by or against the dealer.

(b) The making by the dealer of an intentional and material misrepresentation as to the dealer's financial status.

(c) Any default by the dealer under a chattel mortgage or other security agreement between the dealer and the supplier.

(d) The commencement of voluntary or involuntary dissolution or liquidation of the dealer if the dealer is a partnership or corporation.

(e) A change in location of the dealer's principal place of business as provided in the agreement without the prior written approval of the supplier.

(f) Withdrawal of an individual proprietor, partner, major shareholder, or the involuntary termination of the manager of the dealership, or a substantial reduction in the interest of a partner or major shareholder without the prior written consent of the supplier.

* * *

347-A:8 Warranty Obligations. Whenever a supplier and a dealer enter into an agreement providing consumer warranties, the supplier shall pay any warranty claim made for warranty parts and service within 30 days after its receipt and approval. The supplier shall approve or disapprove a warranty claim within 30 days after its receipt. If a claim is not specifically disapproved in writing within 30 days after its receipt, it shall be deemed to be approved and payment shall be made by the supplier within 30 days.

APPENDIX G

MAJORITY COMMITTEE REPORT

Committee:	COMMERCE AND CONSUMER AFFAIRS
Bill Number:	SB126-FN
Title:	relative to business practices between motor vehicle manufacturers, distributors, and dealers
Date:	May 16, 2013
Consent Calendar:	NO
Recommendation:	OUGHT TO PASS WITH AMENDMENT

STATEMENT OF INTENT

This bill modifies RSA 357-C the "Dealer Bill of Rights" ("DBR") which has been on the books for 40 years. The DBR already covers off-highway recreational vehicles, snowmobiles, cars, trucks, motorcycles, and RV's. The DBR governs the relationship and business practices between manufacturers and NH dealers. This law was originally passed out of recognition that the manufacturer was [were] abusing its power in the relationship and that NH businesses and consumers were being harmed as a result. Dealers cannot, of

course, simply drop one franchise and add another. This is not a free market that dealer-owners operate in. All 50 states have nearly identical laws and all but one provision (dealer files) in SB126 are based on those laws. The current law and SB126, seeks to continue to level the playing field for NH businesses and ensure consumers interests are safeguarded as well. The committee heard extensive testimony showing the dealer-manufacturer relationship is broken: contracts and terms are non-negotiable, programs are dictated, and costs are shifted onto dealers and ultimately consumers. The committee encouraged the two parties to work to compromise on several issues. Some compromise was reached before subcommittees met and more was achieved during extensive subcommittee work. First was moving tractor & equipment dealers from their current RSA 347-A into RSA 357-C. 347-A has been on the books for 15[18] years and when passed did not result in major changes to business as usual in the state or the contracts. The relationship between equipment dealers and manufacturers is identical to that of car/truck dealers: nearly duplicate one-sided, non-negotiable contracts and an autocratic relationship. Equipment dealers also have business operations that are nearly identical in all respects to car/truck/motorcycle etc. dealers. Three times the committee or subcommittee rejected by large margins amendments to strip out equipment dealers. The last vote was 14-3. The committee was reminded during deliberations that snowmobile and off-road RV dealers were added to RSA 357-C in 2002 without ensuing problems. Second, access to Dealer files was heavily scrutinized and amended. It

now only allows annual access to routine business reports

Original: House Clerk

Cc: Committee Bill File

upon written request. If a dealer is failing it only makes sense that they receive notification, and a chance to improve performance or challenge findings, before significant problems develop or a termination notice arrives in the mail. Third, limiting mandatory facility upgrades to every 15 years was much discussed. The committee kept the 15 year limit, as approved by the Senate, as there was no proof of return on investment for 5 or 10 year upgrades. Average upgrade costs are $3.6 million; the average loan is 20 years; and depreciation write-off is as much as 39 years. The committee was concerned that consumers would pay more for cars if manufacturers continued to demand short turnaround renovations from some of their dealers. The 15 year limit will be waived if the manufacturer agrees to pay for 65% of the cost. The "buy local" sourcing of goods and services was modified to ensure that manufacturers give final approval of vendors, protect their intellectual property and are able to maintain the same overall design. Measuring the dealer in their performance is made more transparent through the bill. The bill also reaches a solution to eliminate a dealer from being penalized when a vehicle is illegally exported, which we heard from State Police is a serious problem in NH. The amendment requires both parties to work to identify exports happening in a dealer's marketing region. The committee also heard that some, but not all,

manufacturers are following the current UCC which requires manufacturers to appropriately pay for warranty parts. To ensure the current law is followed, the bill adopts a formula used in at least 15 other states. Safeguards were put in place to allow the manufacturer to ensure the right amount is paid. Finally, the committee adopted similar language to the Maine law regarding the surcharge prohibition which was held constitutional in 2004.

Vote 15-2.

Rep. Edward Butler
FOR THE MAJORITY

Original: House Clerk

Cc: Committee Bill File

APPENDIX H

HOUSE JOURNAL MAY 22, 2013 765

REGULAR CALENDAR

SB 126-FN, relative to business practices between motor vehicle manufacturers, distributors, and dealers. **MAJORITY: OUGHT TO PASS WITH AMENDMENT. MINORITY: OUGHT TO PASS WITH AMENDMENT.**

Rep. Edward A. Butler for the Majority of Commerce and Consumer Affairs: This bill modifies RSA 357-C the "Dealer Bill of Rights" ("DBR") which has been on the books for 40 years. The DBR already covers off-highway recreational vehicles, snowmobiles, cars, trucks, motorcycles, and RV's. The DBR governs the relationship and business practices between manufacturers and NH dealers. This law was originally passed out of recognition that the manufacturers were abusing their power in the relationship and that NH businesses and consumers were being harmed as a result. Dealers cannot, of course, simply drop one franchise and add another. This is not a free market that dealer-owners operate in. All 50 states have nearly identical laws and all but one provision (dealer files) in SB 126 are based on those laws. The current law and SB 126, seeks to continue to level the playing field for NH businesses and ensure consumers interests are safeguarded as well. The committee heard extensive testimony showing the dealer-manufacturer relationship is broken: contracts and terms are non-negotiable, programs

are dictated, and costs are shifted onto dealers and ultimately consumers. The committee encouraged the two parties to work to compromise on several issues. Some compromise was reached before subcommittees met and more was achieved during extensive subcommittee work. First was moving tractor & equipment dealers from their current RSA 347-A into RSA 357-C. 347-A has been on the books for 18 years and when passed did not result in major changes to business as usual in the state or their contracts. The relationship between equipment dealers and manufacturers is identical to that of car/truck dealers: nearly duplicate one-sided, non-negotiable contracts and an autocratic relationship. Equipment dealers also have business operations that are nearly identical in all respects to car/truck/motorcycle etc. dealers. Three times the committee or subcommittee rejected by large margins amendments to strip out equipment dealers. The last vote was 14-3. The committee was reminded during deliberations that snowmobile and off-road RV dealers were added to RSA 357-C in 2002 without ensuing problems. Second, access to dealer files was heavily scrutinized and amended. It now only allows annual access to routine business reports upon written request. If a dealer is failing it only makes sense that they receive notification, and a chance to improve performance or challenge findings, before significant problems develop or a termination notice arrives in the mail. Third, limiting mandatory facility upgrades to every 15 years was much discussed. The committee kept the 15 year limit, as approved by the Senate, as there was no proof of return on investment for 5 or 10 year

upgrades. Average upgrade costs are $3.6 million; the average loan is 20 years; and depreciation write-off is as much as 39 years. The committee was concerned that consumers would pay more for cars if manufacturers continued to demand short turnaround renovations from some of their dealers. The 15 year limit will be waived if the manufacturer agrees to pay for 65% of the cost. The "buy local" sourcing of goods and services was modified to ensure that manufacturers give final approval of vendors, protect their intellectual property and are able to maintain the same overall design. Measuring the dealer in their performance is made more transparent through the bill. The bill also reaches a solution to eliminate a dealer from being penalized when a vehicle is illegally exported, which we heard from State Police is a serious problem in NH. The amendment requires both parties to work to identify exports happening in a dealer's marketing region. The committee also heard that some, but not all, manufacturers are following the current UCC which requires manufacturers to appropriately pay for warranty parts. To ensure the current law is followed, the bill adopts a formula used in at least 15 other states. Safeguards were put in place to allow the manufacturer to ensure the right amount is paid. Finally, the committee adopted similar language to the Maine law regarding the surcharge prohibition which was held constitutional in 2004. Vote 15-2.

APPENDIX I

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2014-0575

(Case No. 2014-0315)

HUSQVARNA PROFESSIONAL PRODUCTS, INC.

Plaintiff-Appellant,

v.

STATE OF NEW HAMPSHIRE

BRIEF OF APPELLANT

HUSQVARNA PROFESSIONAL PRODUCTS, INC.

On Appeal from the Merrimack County Superior Court (No. 217-2014-CV-00166)

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2. The Legislature Was Concerned About Automobile Dealers and Farm Equipment Dealers, and There Was No Testimony from Dealers in Any Other Industries.

Senator Sanborn explained, in introducing SB 126 to the Senate, that it would "consolidate equipment dealers" in RSA 357-C by repealing RSA 347-A, and he explained the logic behind consolidation: "We look [at] it as the fact if it's got wheels, tires and engines and it's equipment *whether it be a car or a tractor*, the same type of provisions can exist." (Emphasis added.)[1] Attention to cars and tractors was the unifying theme in the evidence heard by the Legislature, and this focus exactly validates the State's position, quoted at page 8 above, that SB 126 is intended only to govern manufacturer-dealer relationships "that are *comparable to the auto industry*" (emphasis added).

Testimony from dealers, whether oral or written, came from automobile and farm equipment dealers, and not from any dealers of yard and garden equipment. The only dealers or dealer representatives from whom the Senate or House heard were the following:

- New Hampshire Automobile Dealers Association;

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[1] HApp. 329, Statement of Senator Sanborn, Feb. 19, 2013.

- Farm equipment dealers for Massey Ferguson, Case, Case IH and New Holland; and
- Automobile dealers for Cadillac, Chevrolet, Chrysler, Dodge, Ford,
- Honda, Hyundai, Jeep, Kia, Lincoln, Mercedes, Nissan, VW.[2]

SB 126 was drafted by the New Hampshire Automobile Dealers Association, and focus on the interests of the Association's members was the stated purpose:

> The Bill that you have before you … was written by dealers for dealers about the issues that impact their businesses.[3]
>
> * * *
>
> . . . [T]here are problems that our members approach us with. We filed this Bill to help solve those problems . . ..[4]

---

[2] HApp. 822. A listing of all witnesses who testified in support of SB 126 in the Senate and House can be found at HApp. 822-23.

[3] HApp. 356, D. Bennett, New Hampshire Automobile Dealers Ass'n, Senate Commerce Committee, Hearing, February 19, 2013.

[4] HApp. 362, Pete McNamara, President of the New Hampshire Automobile Dealers Association, Senate Commerce Committee, Hearing, February 19, 2013.

In weighing whether SB 126 served an important public purpose, the Superior Court pointed in *Deere & Company v. State of New Hampshire* to the Legislature's consideration of farm equipment manufacturers. It quoted from a statement by Representative Butler at a May 22, 2013 hearing on the adverse effect of reduction in the number of local dealerships: "Local dealers will open their stores when a farmer needs a baler part on Sunday morning and rain is forecast for Sunday afternoon. This is a true emergency for a farmer whose crop is at risk." [5] In contrast, the Superior Court in *Husqvarna* could point to nothing in the record to show whether SB 126 served an important public purpose as to yard and garden equipment dealers. *See* HApp. 7-8. It could not, because the subject of these dealers never came up in the Legislature.

F. <u>Husqvarna's Relationships with its New Hampshire Dealers Are Not Comparable to Those in the Auto Industry.</u>

Husqvarna dealers have none of the attributes identified by the Legislature as making automobile dealers vulnerable to manufacturer actions. Disparity of bargaining power caused conditions prejudicial to automobile dealers, as well as farm equipment dealers, and SB 126 was passed to "level

[5] HApp. 23, *Deere & Co. v. State of New Hampshire* , No. 216-2013-CV-554 (Superior Ct., Merrimack County, April 15, 2014), *appeal pending*, No. 2014-0315 (N.H. Supreme Ct.).

the playing field" between dealers and manufacturers. HApp. 647 (Statement of Intent). The conditions considered by the Legislature are summarized in the left-hand column in the chart below. Husqvarna dealers face none of these, as entries in the right-hand column show:

Key Attributes of Automobile Dealers as Identified by Legislature[6]	**Corresponding Attributes of Husqvarna Dealers[7]**
Significant investment required in manufacturer's brand	No significant investment in Husqvarna brand, dealer discretion what investment to make
A single supplier and no competitive lines	Multiple suppliers and competitive lines
Switching to another supplier is not an option	No limitation on switching to another supplier
Mandatory investment in expensive facility upgrades	No mandatory investment in facility upgrades

[6] The record support for this listing of key attributes of automobile dealers can be found at HApp. 816-20, under the column heading "Legislative Observations and Findings."

[7] The record support for this listing of Husqvarna dealer attributes can be found at HApp. 816-20, under the column heading "Husqvarna's Relationship with Dealers."

Relevant quotations from legislative debate and hearings are collected in the chart submitted by Husqvarna as Exhibit A to its Memorandum in Support of its Objection to the State's Cross-Motion for Summary Judgment. HApp. 816-20. Attributes of Husqvarna dealers are described below.

12

1. Dealers Have Total Discretion Over Any Investment in Husqvarna Products.

Husqvarna does not require a dealer to open new or additional facilities or otherwise make any capital investment in connection with selling and servicing Products. HApp. 213 ¶ 15. It does not require any upfront payment for the right to become an authorized dealer. *Id.* The dealer decides whether to purchase promotional and marketing materials and what is a reasonable inventory of equipment and parts. *Id.* Husqvarna requires dealers to employ personnel who are trained in the service and repair of forestry equipment or yard and garden equipment, but knowledge about service and repair of Products is readily transferable to the service and repair of similar equipment manufactured by Husqvarna's competitors. *Id.* A dealer's only brand-specific financial investment in handling a line or lines of Products is the purchase of Products for resale. *Id.*

2. Husqvarna's Dealers Carry Competing Product Lines and May Switch to Other Suppliers.

Dealers typically sell a wide range of tools, equipment and other products sourced from multiple manufacturers, and Products comprise a small segment of the average dealer's overall business. HApp. 211-12 ¶ 12. Many dealers, like Barn Store of New England, LLC, are hardware retailers that stock a mix of gardening supplies, paint and paint supplies, plumbing supplies, electrical supplies, carpentry tools and supplies and other products. *Id*. Other dealers, like Greenlands Equipment Corporation, are outdoor power equipment retailers that stock mowers, blowers, chainsaws, edgers, trimmers, snow throwers and related accessories. *Id*.

The goods offered by Husqvarna to dealers are all comparatively inexpensive in relation to automobiles or agricultural and construction equipment. HApp. 212 ¶ 13. Even the highest-priced goods -- *e.g.*, garden tractors and riding mowers -- sell for only a fraction of the price of an automobile or a unit of motorized agricultural or construction equipment. *Id*.

Many Husqvarna dealers carry brands competitive with Products. HApp. 212 ¶ 14. Husqvarna seeks to maintain a cooperative relationship with its independent dealers. HApp.

212-13 ¶ 14. A dealer is free under each of the forms of contract in use in New Hampshire to give notice of termination at any time, and Husqvarna understands that a dealer can readily turn to other manufacturers, such as Toro, Deere, Kubota, Modern Tool and Die Company (MTD), Echo or Stihl, for the supply of yard and garden equipment if it becomes dissatisfied with Husqvarna's performance or product offerings. *Id.*

Since Husqvarna's equipment will, in the usual case, account for a comparatively small part of a dealer's total sales revenue, termination by Husqvarna of a dealer agreement will have no significant impact on a dealer's business and pose no threat to its continued viability. HApp. 213 ¶ 14; 825-27 ¶ 8-11. Annual purchases from Husqvarna by the average New Hampshire dealer total less than $200,000. HApp. 213 ¶ 15.

* * *

B. <u>Impairment Was Not Foreseeable.</u>

This Court noted in *Tuttle* that contract impairment may not be substantial if "further regulation might be foreseeable" in an industry. 159 N.H. at 650. The Trial Court, following the analysis in its April 15, 2014 ruling on summary judgment motions in *Deere & Co. v. State of New Hampshire* (HApp. 14-27), held that the contract impairments resulting from SB 126 were all foreseeable. HApp. 8.

Application of the Dealership Act to Husqvarna was not foreseeable. Many states regulate yard and

garden equipment manufacturers under statutes similar to the Equipment Dealer Act, but there was no regulation *anywhere in the country* that would have alerted Husqvarna to the possibility that New Hampshire's motor vehicle dealer statute would be extended to reach yard and garden equipment dealers. New Hampshire is the *only* state with a

motor vehicle dealer statute that defines "motor vehicle" to include yard and garden equipment and the only state with a statute subjecting manufacturer-dealer relationships in this industry to regulatory oversight from an administrative board.[8]

The Equipment Dealer Act (HApp. 866-79) gave no hint that Husqvarna could at some point become subject to regulatory burdens imposed on automobile and truck manufacturers by the Dealership Act. Like many statutes regulating the relationship between manufacturers of yard and garden equipment and their dealers, this statute required cause for termination of a dealer agreement (RSA 347-A:2(I)), a fixed notice period (*id.*) and repurchase of inventory upon termination (RSA 347-A:3); limited a manufacturer's exercise of discretion in reviewing a request to transfer ownership of the dealership (RSA 347-A:6); and imposed time limits for processing a dealer's claim for reimbursement for

[8] A listing of statutes potentially applicable to dealers of forestry and yard and garden equipment appears at HApp. 165-71.

warranty service parts and labor (RSA 347-A:8). Against this legislative backdrop, Husqvarna could not have foreseen legislation that would:

> *Restrict* its ability to add a dealer to a market;
>
> *Subject* its decision to terminate a dealership or add a dealer to another dealer's market to review and potential veto by a governmental board;
>
> *Prohibit* it from offering a dealer less than the full product line for a brand;
>
> *Mandate* the reimbursement it provides dealers for warranty claims; and
>
> *Condition* amendment of a dealer agreement upon Husqvarna's acquiescence in this regulatory scheme.

Amendment of the Dealership Act to reach yard and garden equipment could not, thus, have been foreseen. Far less drastic amendments to dealer and franchisee protection statutes have been found to have been unforeseeable. *See, e.g., Equipment Manufacturers Institute v. Janklow*, 300 F.3d 842,

857-59 (8th Cir. 2002) (holding that amendments to good cause provisions of South Dakota agricultural equipment dealer statute were not foreseeable even though dealer relationships had been regulated since 1951); *McDonald's Corp.*, 822 F. Supp. at 607-08 (holding that enactment of Iowa franchise statute of general application could not have been foreseen

even though dealer protection statutes had been enacted for specific industries).

C. As Applied to Husqvarna, the Dealership Act Is Not Reasonable and Necessary to Serve an Important Public Purpose.

A retroactive law that substantially impairs an existing contract can withstand scrutiny under the Contract Clause only if the law is "reasonable and necessary to accomplish the stated public purpose." *Tuttle*, 159 N.H. at 645. Once it is established that legislation substantially impairs a contract, as the Dealership Act does here, a court must conduct a "balancing of the police power and the rights protected by the contract clauses . . ., and a bill or law which substantially impairs a contractual obligation may pass constitutional muster only if it is 'reasonable and necessary to serve an important public purpose.'" *Opinion of the Justices*, 135 N.H. at 634 (citation omitted). As applied to Husqvarna, the Dealership Act serves no such purpose. There is a complete failure of purpose on multiple grounds, none of which was addressed by the Trial Court.

1. The Legislature Did Not Consider any Facts about Yard and Garden Equipment Dealers.

The Legislature gave no consideration to the relationship between manufacturers of yard and garden equipment and their dealers. Since these dealers are a subject of SB 126, one would expect that the legislative record would contain some mention of them. It does not. The Legislature was

focused solely upon dealer relationships in which "[m]anufacturers hold all the cards," [9] and the automotive industry was the principal subject.

Husqvarna dealers have *none* of the characteristics identified by the Legislature as making automobile dealers vulnerable to manufacturer actions and in response to which it passed SB 126. *See* pages 11-13 *supra.* The *only* dealers or dealer representatives whom Senate and House committees heard testify in support of SB 126 were, as noted at pages 9-10, automobile dealers, the New Hampshire Automobile Dealers Association and farm equipment dealers.

The ostensible justification for repealing the Equipment Dealer Act and sweeping all manufacturers within its coverage into the Dealership Act is the Legislature's finding, quoted at page 3 above, that the relationship between automobile dealers and manufacturers is identical to that between equipment dealers and manufacturers. [10] This conclusion might be supportable if the word "agricultural" or "farm" were used to modify "equipment dealers." There is no basis, however, for any such finding as to a

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[9] HApp. 502, statement of Sen. Bradley at April 16, 2013 hearing of the House Commerce and Consumer Affairs Committee.

[10] HApp. 502, statement of Sen. Bradley at April 16, 2013 hearing of the House Commerce and Consumer Affairs Committee.

manufacturer of yard and garden equipment like Husqvarna. Against this evidentiary vacuum, subjecting Husqvarna to the Dealership Act is neither reasonable nor necessary to accomplish the law's stated public purpose – "to level the playing field for NH businesses and ensure consumers[']interests are safeguarded as well." HApp. 647 (Statement of Intent).

* * *

unfair method of competition and unfair and deceptive practice to require that disputes be submitted to arbitration. The Superior Court agreed that the "provisions in SB 126 prohibiting arbitration are void under the Supremacy Clause and must be severed from the other provisions of RSA 357-C." HApp. 8. The court did not, however, address Husqvarna's request for a declaration that arbitration, if provided for in the contract between Husqvarna and its dealer, is the sole dispute resolution mechanism and that dealers disputing action by Husqvarna may not bypass it and file a protest with the Board under any provisions of the Dealership Act. HApp. 794-96 (Memorandum in Support of Objection to State's Cross-Motion for Summary Judgment, at 3-5).

In order to foreclose any uncertainty as to the effect of the Superior Court's Order on Husqvarna's arbitration rights protected by the Federal Arbitration Act, Husqvarna urges this Court, if it

were to decline to hold the Dealership Act unconstitutional, to reverse the Order, grant Husqvarna's motion for summary judgment on Count II of its Complaint and hold that a dealer with an agreement containing an arbitration clause such as that in the 2007 Contract or 2010 Contract may not resort to the Board for resolution of any dispute arising under or in connection with the dealer relationship.

APPENDIX J

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY SUPERIOR COURT	Case No. 217-2014-CV-00166

Husqvarna Professional Products, Inc.

v.

The State of New Hampshire

AFFIDAVIT OF JEFFREY DEWOSKY SUBMITTED IN SUPPORT OF HUSQVARNA PROFESSIONAL PRODUCTS, INC.'S MOTION FOR SUMMARY JUDGMENT

STATE OF NORTH CAROLINA)

) SS:

COUNTY OF MECKLENBURG)

JEFFREY DEWOSKY, being first duly sworn, hereby deposes and states as follows:

1. I am employed as the Vice President, General Manager, Dealer Division, Americas for Husqvarna Group by Husqvarna Professional Products, Inc. ("Husqvarna"), and I am authorized to make this Affidavit on its behalf. Husqvarna is a Delaware corporation having its principal place of business at 9335 Harris Corners Parkway, Charlotte, North Carolina 28269.

* * *

9. Husqvarna has more than 40 authorized dealers for Products in New Hampshire, and some of them have multiple store locations. Husqvarna has written agreements with its dealers, and three standard forms are in use with dealers in New Hampshire. One form provides that either party may terminate it on 30 days' notice, and it has no specified duration. An example of this form is attached hereto as Exhibit B, which is a true and accurate copy of the Authorized Sales & Service Dealer and/or Service Dealer Agreement with Summa Humma Enterprises, LLC, effective August 1, 2000. A second form of agreement began to be used in 2007. An example of this form ("2007 Contract") is attached hereto as Exhibit C, which is a true and accurate copy of the Authorized Sales & Service Dealer and/or Service Dealer Agreement with All & Awl Repair, effective October 5, 2007. The third form of agreement was used beginning in 2010. It has a different format than the earlier agreements but the same term and termination provision as the 2007 Contract. An example of this form ("2010 Contract") is attached hereto as Exhibit D, which is a true and accurate copy of the Authorized Sales &/or Service Dealer Agreement with Belletetes, Inc., effective June 28, 2013.

10. The identity and locations of representative New Hampshire dealers and the form of contract signed by each are listed on the attached Exhibit E.

* * *

31. Husqvarna's 2007 Contracts and 2010 Contracts require disputes arising from the relationship to be submitted to arbitration and provide that arbitration is to be the sole dispute resolution mechanism for the parties. Section 13 of the 2010 Contract provides in relevant part as follows:

> Section 13. Arbitration.
>
> Any dispute arising out of or relating to this Agreement shall be submitted to arbitration under the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Judgment upon the award rendered by the arbitrator shall be binding upon the parties and may be enforced in any court having jurisdiction. . . . Arbitration shall be in lieu of all other remedies and procedures available to the parties, provided, however, that either party may seek preliminary injunctive relief prior to commencement of arbitration solely for the purpose of maintaining the status quo pending arbitration.

(2010 Contract, § 13 (Ex. D to this Affidavit).) I am informed that RSA 357-C:3(III)(p)(3) declares it an unfair method of competition and unfair and deceptive practice to require that disputes be submitted to arbitration. This statutory provision substantially impairs Husqvarna's contract rights by preventing Husqvarna and its dealers from arbitrating any disputes and rendering the arbitration clause in dealer contracts void and unenforceable, if any provision in a dealer agreement that is inconsistent with chapter 357-C is void as against public policy and unenforceable under RSA 357-C:6(I). Husqvarna placed importance upon the provision in its dealer contracts to arbitrate disputes arising under the contracts, and it relied upon it when it entered into the contracts.