No. 15-1213

IN THE
Supreme Court of the United States

DEERE & COMPANY, CNH AMERICA LLC, AND AGCO CORPORATION,
Petitioners,
v.

STATE OF NEW HAMPSHIRE, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement included in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

When it comes to the Contracts Clause, this Court has repeatedly emphasized a simple rule: a law that interferes with pre-existing contractual rights "must have a significant and legitimate *public* purpose behind [it], such as the remedying of a broad and general social or economic problem." *Energy Reserves Grp., Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983) (citations omitted; emphasis added); *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434 (1934).

There was nothing broad, general, or public about the law under challenge here. To the contrary; the New Hampshire legislation giving rise to this petition, SB 126, was a remarkably well-documented

giveaway to the automotive and equipment dealer lobbies. The court below badly mishandled its Contracts Clause analysis in other respects, too, failing to assess the degree to which SB 126 impaired petitioners' contracts and deferring blindly to the legislature. And it deepened a split among the federal courts of appeals and state courts of last resort over whether "leveling the playing field" among businesses is a constitutional basis to abrogate existing contracts. This Court's review is needed to reaffirm that only important public purposes can justify upending settled contract rights, and to clarify the steps a court must take to test the reasonableness of such measures.

Respondents labor to obscure the question. They argue that the state court divined a public purpose for the bill—despite legislators' own repeated admissions that SB 126 was intended to "level the playing field" for in-state equipment dealers. They minimize the split—even though the Sixth and Eighth Circuits clearly took divergent views on nearly identical issues. And they insist the purely legal issues here are somehow "fact-bound." Demonstrably not so.

Respondents' few contentions on the merits fare no better. They claim that courts need not assess the degree to which a challenged law impairs a contract, even though this Court has held repeatedly that courts must assess the degree of interference in order to determine the fit between a statute's means and ends. And they urge deference to state lawmakers in the face of this Court's admonition that courts must independently assess the reasonableness of contract-busting laws. The New Hampshire Supreme Court was wrong, and this Court should set it right.

ARGUMENT

I. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN APPROPRIATE VEHICLE TO ADDRESS IT.

1. When New Hampshire's legislature decided to eviscerate petitioners' longstanding contracts with their dealers, one of the bill's sponsors boasted that SB 126 would "make sure we have a level playing field" between equipment manufacturers and dealers. N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013); *see also* Pet. App. 71a-72a.[1] That quintessentially *private* boon to a few in-state businesses is nothing like the laws addressing "broad, generalized economic or social problem[s]" previously upheld against Contracts Clause challenges. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 250 (1978). A giveaway to equipment dealers with no discernable consumer benefit cannot be compared to laws aimed at deterring mining practices that risk "substantial damage to * * * the integrity of houses and buildings," *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 474-475 (1987), or providing emergency relief from foreclosure to families affected by the Great Depression, *Blaisdell*, 290 U.S. at 416.

Yet New Hampshire is not alone. Other states have also torn up private contracts to benefit influential business interests. *See, e.g.*, *Equipment Mfrs.*

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[1] Even New Hampshire's governor got in on the action, tweeting she was "signing SB 126 into law, levelling [*sic*] the playing field for NH's vehicle and equipment dealers." Gov. Maggie Hassan (@GovernorHassan), Twitter (June 25, 2013, 12:30 PM), https://goo.gl/inOQIs.

Inst. v. *Janklow*, 300 F.3d 842, 860 (8th Cir. 2002) (South Dakota); *Cloverdale Equip. Co.* v. *Manitowoc Eng'g Co.*, 149 F.3d 1182, at *4 (6th Cir. 1998) (tbl.) (Michigan). Just in the months since the decision below, Vermont enacted legislation expanding the scope of its own machinery dealership statute. *See* S.B. 224, 2015-2016 Leg. Sess (Vt. 2015).

The court below now joins a series of decisions that have failed to reach consensus over whether "leveling the playing field" between private contracting parties constitutes the kind of "significant and legitimate public purpose" required to justify substantially impairing contractual rights. *Energy Reserves Grp., Inc.*, 459 U.S. at 411. That question is important and only this Court's intervention can resolve it. *See* Nat'l Ass'n of Mfrs. Am. Br. 14-20.

2. Respondents do not seriously contest the importance of the question. Instead, they primarily argue this case is a poor vehicle to decide it. Not one of their arguments withstands scrutiny.

a. Respondents start by claiming that the question is not squarely presented. They rely heavily on the New Hampshire Supreme Court's surmise that "SB 126 has a broader purpose than a simple reallocation of existing contractual rights." Frost Br. in Opp. 20 (quoting Pet. App. 15a-16a); NH Br. in Opp. 17-18. But courts have an obligation to ensure "that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Grp.*, 459 U.S. at 412. States "must do more than mouth the vocabulary of the public weal in order to reach safe harbor." *McGrath* v. *Rhode Island Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996). Rather, there must be a "*showing in the record*" that

any "severe disruption of contractual expectations was necessary to meet an important general social problem." *Spannaus*, 438 U.S. at 247 (emphasis added).

The only "showing in the record" bearing on the legislature's purpose here—other than an oblique reference to consumers (in the context of costs to *dealers*), *see* Pet. App. 13a—is the repeated invocation of dealers' private business interests as the reason for the bill. The representatives *themselves* billed SB 126 "the Dealer Bill of Rights," aimed at protecting dealers, by "level[ing] the playing field." *See* 35 N.H. H. Rec. No. 43, at 1473 (May 22, 2013) (statement of Rep. Butler); N.H. H. Comm. on Commerce & Consumer Affairs, Public Hr'g on SB 126-FN (Apr. 16, 2013) (statement of Sen. Bradley). The special interests championing their bespoke legislation were not shy about trumpeting their achievement, either—New Hampshire's auto dealer lobby declared that it had been "instrumental" in securing passage of the bill. NHADA Mot. for Leave to File Am. Curiae Br. 1 (Merrimack Super. Ct. No. 216-2013-CV-554). Consumers, for their part, were all but absent from the legislative effort. And while NHADA, an equipment dealer lobby, and respondent Frost Farm Service, Inc. intervened below, consumer groups were nowhere to be seen. *See* Pet. App. 2a-3a. *Cf. Janklow*, 300 F.3d at 861 (noting absence of consumer advocates in hearings on an analogous statute). General social problems were not foremost in the legislators' minds (nor those of the equipment dealers' lobby), to put it mildly.

The State also offered no evidence that gutting pre-existing contracts was reasonable and necessary for the common good. Once the court below assumed

impairment (improperly, as we next discuss), the burden shifted to the State to show a proper purpose. *See Energy Reserves Grp.*, 459 U.S. at 411-412; *and see, e.g.*, *Hawkeye Commodity Promotions, Inc.* v. *Vilsack*, 486 F.3d 430, 438 (8th Cir. 2007); *Buffalo Teachers Fed'n* v. *Tobe*, 464 F.3d 362, 368 (2d Cir. 2006). The State failed to do that here. As *amici* point out, the evidence suggests that dealer-protection laws are *anti*-competitive, and more likely to harm consumers than help them. *See* Nat'l Ass'n of Mfrs. Am. Br. 14-20.

b. Respondents next attempt to wave away the split among the courts of appeals that have confronted similar Contracts Clause challenges. But they merely re-package their contention that SB 126 was intended—apparently *sub rosa*—to benefit consumers. Respondent Frost attempts to distinguish the Eighth Circuit's decision in *Janklow* because the court found the legislature's stated purpose was pretextual. Frost Br. in Opp. 21. Yet the evidence of pretext in *Janklow*, 300 F.3d at 860-861, bears a striking resemblance to the record here: an express purpose of the bill was leveling the playing field, *cf.* Pet. App. 71a; the title of the bill referred exclusively to changing the relationship between dealers and manufacturers, *cf. id.* 78a-79a, and dealers were the driving force behind the law, *see, e.g.*, NHADA Mot. for Leave to File Am. Curiae Br. 1 (Merrimack Super. Ct. No. 216-2013-CV-554) (claiming that the auto dealer lobby was "instrumental" in passing the bill).

Frost also attempts to distinguish the Sixth Circuit's decision in *Cloverdale Equipment Co.* by claiming that *Cloverdale* "did not squarely address whether 'leveling the playing field' was a significant and

legitimate public purpose." Frost Br. in Opp. 20. But the *Cloverdale* court identified the desire to "balance the bargaining power" as the legitimate purpose behind the challenged law before finding the act did not reasonably achieve that end. *Cloverdale*, 149 F.3d at *4-*5. If the court did not believe that balancing *could* be a valid purpose, it would have stopped there.

c. Finally, Frost urges that the question here is "fact-bound." Frost Br. in Opp. 23. Wrong again. The petition asks this Court to decide whether the court below relied on a legitimate public purpose to uphold SB 126, and whether it properly applied this Court's Contract Clause analysis. Nothing in the details of petitioners' individual contracts would be helpful—let alone necessary—to decide those purely legal questions. With this Court's guidance as to the proper standard, the state courts can proceed to whatever analysis of petitioners' contracts proves necessary.

II. THE DECISION BELOW MISAPPLIED THIS COURT'S CONTRACTS CLAUSE CASES.

Compounding its mistake in crediting the State's distinctly private purpose in enacting SB 126, the New Hampshire Supreme Court also cut corners in its Contracts Clause analysis. Instead of gauging the extent to which the statute impaired petitioners' contract rights, the court simply "assume[d]" that the impairment was "substantial." Pet. App. 12a-13a. Having failed to properly assess the statute's impact, the court then deferred blindly to the legislature's judgment of the "fit" between that impact and the purpose of the law. That approach all but renders the Contracts Clause a nullity and cannot be squared

with this Court's cases. And if that were not enough to justify a grant, Respondents' arguments in opposition suggest that there is profound confusion over what the precedent requires.

1. Every Contracts Clause analysis begins with two distinct questions. First, the court must ask "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Spannaus*, 438 U.S. at 244. Second, it must determine the "severity of the impairment." *Id.* at 245. That second step dictates "the height of the hurdle the state legislation must clear." *Id.* "Minimal" impairments "may end the inquiry at its first stage." *Id.* But greater impairment will "increase the level of scrutiny to which the legislation will be subjected." *Energy Reserves Grp.*, 459 U.S. at 411.

Respondents do not dispute that the court below did not try to determine the degree of the impairment. Instead, they argue that it does not matter. Respondents are mistaken.

a. Respondents' boldest claim is that courts are not required to determine the degree to which a law impairs a contract. All that matters, in their view, is whether the impairment is putatively "substantial." NH Br. in Opp. 10-11; Frost Br. in Opp. 15-17. But that is not what this Court's cases say. Time and again, this Court has emphasized the need to "determine the severity of the impairment, which in turn affects the level of scrutiny to which the legislation" will be subjected. *Keystone*, 480 U.S. at 504 n.31. *See also Energy Reserves Grp*., 459 U.S. at 411; *Spannaus*, 438 U.S. at 245. The extent of the impairment bears directly on the court's assessment of the law's reasonableness in light of its important

public purpose. *See U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1, 27 (1977).

Frost insists that the severity of the impairment is relevant "only in that it determines whether the challenged law receives *any* scrutiny." Frost Br. in Opp. 16. But why would this Court refer to determining the "*height* of the hurdle," *Spannaus*, 438 U.S. at 245 (emphasis added), if it meant merely the *presence* of a hurdle? And why would this Court speak of "*increas[ing]* the level of scrutiny," *Energy Reserves Grp.*, 459 U.S. at 411 (emphasis added), if it meant only applying *any* scrutiny? Frost surmises that different levels of scrutiny "may apply" where States alter their own contractual obligations. Frost Br. in Opp. at 16 n.4. Neither *Spannaus* nor *Energy Reserves Group* were such cases; they involved private employer pension plans and natural gas price controls, respectively, and the standard was the same.

b. Respondents' next line of defense is to contend that the state court's analysis was sufficiently "akin to the methodology in *Keystone*" to pass constitutional muster. N.H. Br. in Opp. 9-10; *see* Frost Br. in Opp. 15. That is wrong for two reasons. First, unlike this case, the deficits in the factual record in *Keystone* were potentially relevant to the Contracts Clause analysis. The law challenged in *Keystone* interfered with damage waivers the challengers obtained when they bought subsurface property rights. *See* 480 U.S. at 504; *see id.* at 474-478. To "determine the severity of the impairment," the Court explained it would be "essential" to assess both the relative importance of the waivers to the challengers' property rights, and the proportion of their property actually affected by the act. *Id.* 504 n.31

(internal quotation marks omitted). But the record lacked the necessary information. *Id.* The *Keystone* Court avoided those deficits by concluding that the law at issue "withstands scrutiny even if it is assumed that it constitutes a *total* impairment." *Id.* (emphasis added).

That is not what happened here. The New Hampshire Supreme Court assumed that the impairment was "substantial." But that is merely the first step. *See Spannaus*, 438 U.S. at 244-245. Unlike the *Keystone* Court, the court below did not apply a level of scrutiny commensurate with "total impairment," nor did it hold that SB 126 was valid *regardless* of its impact on petitioners; rather, as explained *infra* at 11-12, the court below abdicated altogether its responsibility to assess the fit between the statute's means and ends.

c. Finally, respondents claim that "the actual level of impairment before the court was indeterminate" because petitioners brought a pre-enforcement challenge to the law. NH Br. in Opp. 9; *see* Frost Br. in Opp. 24-25. Not so. The level of impairment is evident from the face of the bill. SB 126 excised—and made it a misdemeanor to exercise petitioners' rights under—numerous essential clauses of petitioners' contracts, Pet. App. 4a, including those affecting petitioners' termination rights, *id.* 60a-61a, the equipment the dealers were authorized to sell, *id.* 62a-63a, and where they were authorized to sell it, *id.* 58a.

Respondents' "indetermina[cy]" argument confuses "impairment" with economic harm. True, the court could not assess the *degree* of economic harm that SB 126 may cause in the event of a dispute with a

dealer. But nothing turns on that. The Contracts Clause forbids unjustified "impairment[s] of contractual obligations" and "disruption[s] of contractual expectations." *Spannaus*, 438 U.S. at 245, 247. Impairment can be measured by the parties' reliance interests and the importance of the affected provisions. *Id.* at 245; *see U.S. Tr. Co.*, 431 U.S. at 19-20 (legislature "eliminated an important security provision and thus impaired the obligation of the States' contract").

The record here showed that SB 126 cut the heart out of petitioners' contracts. *See* Pet. 7-10. There was no need to wait for "concrete facts of a dealer-manufacturer dispute." NH Br. in Opp. 9. The state court simply skipped a step in the analysis.

2. The New Hampshire Supreme Court's failure to consider the degree to which SB 126 impaired petitioners' contract rights rendered its subsequent review a mere formality. As this Court explained in *Keystone*, "the finding of a significant and legitimate public purpose is not, by itself, enough to justify the impairment of contractual obligations." 480 U.S. at 505. And while respondents hammer away at the deference afforded States in matters of economic and social policy, *see* N.H. Br. in Opp. 15-16; Frost Br. in Opp. 17-18, the court below abjured deference in favor of total abdication.

Before a court concludes that state impairment of a private contract passes muster, the "court must also satisfy itself" that the statute's impact "is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* (citation, alterations, and internal quotation marks omitted). The court defers to the

legislature's "judgment as to the necessity and reasonableness of a particular measure." *U.S. Tr. Co.*, 431 U.S. at 23. But only to a point: In case after case, this Court has undertaken to "satisfy itself" of the fit between a statute's contract-impairing means and its ends. *See Keystone*, 480 U.S. 504-506 (explaining how the challenged statutory penalties achieved the legislature's purpose); *Energy Reserves Grp.*, 459 U.S. at 418 (assessing reasonableness of state's natural gas price controls). Having eschewed the required assessment of the impact of the statute's means, the state court's scrutiny of the statute's reasonableness was constitutionally inadequate.

* * *

Over the last century, this Court has upheld against Contracts Clause challenges measures to stem economic crisis, manage spiraling energy costs, and prevent the literal collapse of homes and other structures. But it has never countenanced petty protectionism like this. Without this Court's review, New Hampshire's experiment will—indeed, already has—become a dangerous example. *See supra* at 4. This Court has admonished that the Contracts Clause is not a "dead letter." *Spannaus*, 438 U.S. at 241. But if this decision stands, the Contracts Clause will become just that.

CONCLUSION

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

Respectfully submitted,

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