

No. 15-1218

---

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

---

**REPLY BRIEF FOR PETITIONER**

---

Earl Bennett  
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, OH 44114  
tom.collin@thompsonhine.com  
(216) 566-5500

*Counsel for Petitioner*

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii, iii
REPLY BRIEF FOR PETITIONER .....	1
ARGUMENT .....	2
I. The New Hampshire Supreme Court Ruling Conflicts with Decisions of This Court. ....	2
A. Contract Clause. ....	2
B. Equal Protection Clause.....	6
C. Supremacy Clause. ....	10
II. This Case Raises Matters of Great Importance and Urgency.....	11
CONCLUSION.....	13

## TABLE OF AUTHORITIES

	Page(s)
<b>Federal Cases</b>	
<i>Allied Structural Steel Co. v. Spannous</i> , 438 U.S. 234 (1978).....	2
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007).....	4
<i>Preston v. Ferrer</i> , 552 U.S. 346 (2008).....	10, 11
<i>Whole Women’s Health v. Hellerstedt</i> , 579 U.S. ___, Slip Op. (Jun. 27, 2016) .....	4
<b>State Cases</b>	
<i>STIHL, Inc. v. State of New Hampshire</i> , 126 A.3d 1192 (N.H. 2015) .....	9
<b>State Statutes</b>	
RSA Chapter 347-A.....	6, 7, 8, 9
RSA Chapter 357-C.....	<i>passim</i>
S.D. CODIFIED LAWS §§37-5-1 <i>et seq.</i> .....	8
S.D. CODIFIED LAWS §§37-5-12.2 .....	8

**Other Authorities**

F. Lafontaine & F. Morton, <i>Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis</i> , 24 J. ECON. PERSPECTIVES 233 (2010).....	6
--	---

**REPLY BRIEF FOR PETITIONER**

The brief in opposition confirms the case for certiorari. The State of New Hampshire's brief addresses the petition of Husqvarna Professional Products, Inc. ("Husqvarna") and the petition of Deere & Company, CNH America LLC and AGCO Corporation (collectively, "Deere") in case No. 15-1213. We will confine attention to the State's objections to Husqvarna's petition.

The State urges that there is no conflict between the New Hampshire Supreme Court's Contract Clause analysis and rulings of this Court, but it cannot rewrite the lower court's explicit announcement that it applied rational basis review, finding that SB 126 passed muster when subjected to a "rational speculation" standard. The State further contends that the lower court's Equal Protection analysis was proper in light of prior regulation, but it cannot explain how prior regulation of yard and garden equipment dealerships makes it rational to subject them to regulation enacted for the automotive industry. The State avoids responding on the merits to Husqvarna's Supremacy Clause argument and instead raises groundless procedural objections.

## ARGUMENT

### I. The New Hampshire Supreme Court Ruling Conflicts with Decisions of This Court.

#### A. Contract Clause.

Substantial impairment. The State contends that the lower court did Husqvarna a favor by assuming that SB 126 substantially impaired contract rights, even though, according to the State, Husqvarna pointed to no “concrete facts of a dealer-manufacturer dispute.” NH Brief 9. Any harm resulting from application of RSA chapter 357-C to Husqvarna was, thus, “hypothetical.” *Id.* Setting aside the fact that the State never in the lower courts questioned the *actual* impairment of Husqvarna contract rights but only whether the impairment was substantial, the record is undisputed that SB 126, in common with the statute this Court reviewed in *Allied Structural Steel Co. v. Spannous*, 438 U.S. 234, 247 (1978), “nullifies express terms of the company’s contractual obligations and imposes a completely unexpected liability.” There is nothing hypothetical about the substantial impairment of Husqvarna contract rights. *See* Husq. Pet. 5.

Significant and legitimate public purpose. The State argues that the lower court properly evaluated whether SB 126 serves a significant and legitimate public purpose. NH Brief 12-15. It insists that the court did not rely on the rational basis standard and that reading the “opinion as a whole reveals that the court did not apply rational basis review.” NH Brief

13. The court said it was doing exactly the opposite, however, and reading the opinion shows that it meant what it said.

Husqvarna demonstrated that a crucial legislative finding -- that the relationship between automobile dealers and manufacturers was identical to that between yard and lawn equipment dealers and manufacturers -- was made in an evidentiary vacuum, and the court did not disagree. Husq. Pet. 22a. Under rational basis review, there was no need to consider Husqvarna's showing, however, because a court should not "second-guess" the Legislature in a case involving private contract rights:

*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."*

*Id.* (emphasis added; citation omitted). Rather than "second-guess" the Legislature, the court speculated that it must have had its reasons, however unspecified, for sweeping yard and garden equipment dealerships into RSA chapter 357-C.

The State maintains that it was sufficient for the court to rely on the "legislature's statement of intent in finding a significant and legitimate public purpose." NH Brief 13. It does not respond to

Husqvarna’s argument that the court had a duty to look behind the *ipse dixit* in the Statement of Intent when faced with undisputed record evidence showing that legislative “findings” were pure invention as applied to yard and garden equipment manufacturers and their dealers. Husq. Pet. 20-24.<sup>1</sup>

This Court’s Contract Clause decisions show that the record is important in judging whether there is a significant and legitimate public purpose for legislation impairing contract rights, see Husq. Pet. 21-22, and that demonstrably false legislative “findings” must be disregarded, *id.* 22-24. By adopting rational basis review, the lower court abdicated its responsibility to apply the heightened scrutiny of legislative action required for Contract Clause analysis.

*Reasonableness and necessity.* The State urges that “considerable deference” should be accorded the Legislature as to the reasonableness and necessity of legislation impairing private, as opposed to public, contracts, NH Brief 15-16, and it asserts that the lower court’s “deference to the legislature was entirely appropriate,” *id.* 16. It was not.

---

<sup>1</sup> In *Whole Women’s Health v. Hellerstedt*, this Court reiterated the principle that it “retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” 579 U.S. \_\_\_, Slip Op. at 20 (June 27, 2016) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)). This Court further reasoned that blind deference to legislative findings is inappropriate where evidence conflicts with those “findings,” *id.* at 21, and held that the district court properly weighed the evidence when it struck down a Texas statute as an undue burden on the constitutional right to seek an abortion, *id.* at 36.



The State insists that the lower court correctly concluded that the purpose of SB 126 was “to protect equipment dealers and consumers,” Husq. Pet. 16a, and it stresses the court’s inclusion of the word “consumers.” NH Brief 17. According to the State, mention of consumers settles any question about whether the legislation had a legitimate public purpose. NH Brief 17-18. It does not, because the court disregarded the Legislature’s own explanation of purpose.

In relying on the Statement of Intent to divine legislative purpose, the lower court selected text supporting its holding that there was a legitimate public purpose and ignored conflicting text. Contrary to the court’s characterization, here is what the Legislature actually said about the purpose of SB 126:

*The current law [RSA 357-C] and SB 126, seeks to continue to level the playing field for NH businesses and ensure consumers interests are safeguarded as well.*

Husq. App. 106a (emphasis added). The structure of the sentence demonstrates that consumers are an afterthought.<sup>2</sup>

---

<sup>2</sup> Since SB 126 was drafted and promoted by the New Hampshire Automobile Dealers Association, see Brief Amicus Curiae of Outdoor Power Equipment Institute in Support of Petitioner at 14 (filed May 19, 2016), it should be no surprise that it is intended to benefit dealers. The Chair of the Federal Trade Commission, Edith Ramirez, observed earlier this year that dealer protection legislation can have “detrimental

The lower court omitted from its opinion any mention of leveling the playing field for local businesses, and the omission underscores the fallacy in applying rational speculation to Contract Clause analysis. Faced with a transparent legislative intention to advance the interests of automobile dealers at the expense of vested contract rights, the court had no alternative but to speculate about what a significant and legitimate public purpose might be – because this was decidedly not such a purpose.

## **B. Equal Protection Clause.**

The State urges that prior regulation of yard and garden equipment dealerships under RSA chapter 347-A makes their regulation as motor vehicle dealerships *ipso facto* rational, defeating any Equal Protection claim. NH Brief 18-21. It borrows from Contract Clause impairment analysis to argue that foreseeability should be part of the Equal Protection analysis, asserting that SB 126 was “merely an

---

consequences for consumers if it harms competition or stifles innovation,” *id.* at 22, and the economic literature, according to Francine Lafontaine, Director of the Bureau of Economics at the FTC in 2014-15, supports the view that consumers *do not* benefit from protective dealer legislation: “[T]heory and evidence suggest that the protection that automobile dealers have obtained from local legislatures has been to the detriment not only of manufacturers, but also consumers, resulting in higher cost of retailing and higher prices for cars, inflexibility of the dealer network, and lack of innovation in car distribution.” F. Lafontaine & F. Morton, *Markets: State Franchise Laws, Dealer Terminations, and the Auto Crisis*, 24 J. ECON. PERSPECTIVES 233, 248 (2010).

additional step” in regulation of yard and garden equipment dealerships. *Id.* 19.

The State cites no authority for this “additional step” argument, because there is none. Beyond the absence of any legal support, the argument must be wrong for at least two reasons. First, there is no evidence that the Legislature gave any consideration to yard and garden equipment dealerships, and the fact that it may have done so 18 years earlier when it enacted RSA chapter 347-A, Husq. Pet. 6a, affords no justification for SB 126’s radical departure from prior regulation. Second, the lower court made no mention of, and attributed no significance to, prior regulation in its Equal Protection analysis. Husq. Pet. 30a-32a. The State advances a justification not even considered by the lower court.

In an effort to buttress its contention that classification of yard and garden equipment as motor vehicles was rational, the State appended to its brief a chart listing statutes outside New Hampshire that regulate the relationship between yard and garden equipment manufacturers and their dealers.<sup>3</sup> According to the State, the chart shows that yard and garden equipment is subject to regulation under many statutes that also reach farm equipment. NH Brief 19. It points to the chart to refute a claim that Husqvarna has never made – *i.e.*, that regulation of yard and garden equipment under the same statute

---

<sup>3</sup> The chart accompanied Husqvarna’s Memorandum in Support of Motion for Summary Judgment, filed in the trial court April 18, 2014, and is included in Husqvarna’s record on appeal in the New Hampshire Supreme Court. HApp. 165-71.

as farm equipment is arbitrary. *Id.* Husqvarna claims, instead, that classification of yard and garden equipment as motor vehicles in SB 126 is, on the record before the Legislature, arbitrary and irrational, and the chart underscores that fact. It shows that New Hampshire is the only state that has subjected yard and garden equipment to the same dealer regulation as automobiles. Husq. Pet. 120a. There is no definition of “equipment” in any of the 38 statutes that includes “motor vehicles.”<sup>4</sup>

The State argues that “overlap” between provisions in repealed RSA chapter 347-A and amended RSA chapter 357-C forecloses any claim that regulation of yard and garden equipment under the latter statute is arbitrary and irrational. NH Brief 20. It does not. This argument stands on the false premise that RSA chapter 357-C imposes the same burdens as the repealed statute did and that its amendment to include yard and garden equipment was intended to address issues facing yard and garden equipment dealers. In actuality, SB 126’s burdens are dramatically more onerous and damaging than those in the repealed statute, including oversight by a state regulatory agency, the Motor Vehicle Industry Board. Husq. Pet. 5. Yard and garden equipment dealers share none of the issues of automobile or farm implement dealers that the Legislature purported to address in RSA chapter

---

<sup>4</sup> The South Dakota statute defines “merchandise” to include “automobile,” S.D. CODIFIED LAWS § 37-5-12.2, but the statute is limited to imposition of an inventory repurchase obligation upon termination of a dealer agreement by a manufacturer. §§ 37-5-1 to 37-5-12.3.

357-C, *id.* 10-12, 115a-23a, and subjecting them to regulation enacted to address issues in an entirely different industry has no rational basis.

The irrationality of classifying yard and garden equipment as motor vehicles is cast into even sharper focus by the New Hampshire Supreme Court's 2015 ruling that SB 126 reaches only certain types of yard and garden equipment, not all of it. The court held in *STIHL, Inc. v. State of New Hampshire*, 126 A.3d 1192 (N.H. 2015), that the Legislature intended to regulate only manufacturers of yard and garden products "that are *analogous to automobiles*, in that they have engines, wheels, and transmissions," *id.* at 1199 (emphasis added). Since equipment manufactured by STIHL, Inc., a head-to-head competitor of Husqvarna, does not have wheels, the statute does not apply to it. *Id.* at 1198 ("The products manufactured by STIHL do not satisfy these criteria.") As a manufacturer of both handheld and wheeled yard and garden equipment, Husqvarna is, in contrast, subject to the statute and its burdens. Husqvarna and STIHL compete against each other for the sale of chainsaws, leaf blowers, hedge trimmers and other handheld equipment, but STIHL is free of the burdens of RSA chapter 357-C, which imposes a "significantly more intensive level of regulation" than the now-repealed RSA chapter 347-A. *Id.* at 1199. Prior to passage of SB 126, Husqvarna competed on equal footing against STIHL for the sale of handheld equipment, and consumers benefited from price competition. See Brief Amicus Curiae of Outdoor Power Equipment Institute in Support of Petitioner at 17 n.37 (filed

May 19, 2016). Now, it must compete burdened by RSA chapter 357-C.

### **C. Supremacy Clause.**

Husqvarna showed that the provisions of SB 126 giving the Motor Vehicle Industry Board jurisdiction to decide disputes between dealers and manufacturers with agreements containing arbitration clauses are unconstitutional under the Supremacy Clause and conflict with this Court's ruling in *Preston v. Ferrer*, 552 U.S. 346 (2008). Husq. Pet. 29-32. The State argues that the issue of arbitration was not sufficiently briefed in the lower court, the record is deficient, and Husqvarna should litigate the destruction of its arbitration rights piecemeal. NH Brief 22-23. Its procedural objections are groundless.

The State claims that the New Hampshire Supreme Court did not analyze Husqvarna's argument because "petitioners had not developed that argument sufficiently for review." NH Brief 22. The lower court was referring to Deere, not Husqvarna, in turning aside the argument that the "Board provisions themselves conflict with the FAA," Husq. Pet. 29a, and there is not even a hint in the court's opinion that Husqvarna's appeal was inadequately briefed or otherwise not fully framed for review.

The State contends that there is no "basis in the record below" to show that SB 126 destroys Husqvarna's arbitration rights, NH Brief 22, but the record is clear. Husqvarna submitted evidence in

the trial court of its dealership agreements and their arbitration provisions, Husq. Pet. 127a-29a, and it showed that multiple otherwise unseverable provisions in RSA chapter 357-C, as amended by SB 126, permit dealers to tender disputes to the Board for resolution without regard to arbitration clauses in their contracts. Husq. Pet. 30-31, 84a-85a, 87a-101a, 124a-25a.

Husqvarna should not be forced to raise before the Board the constitutionality of SB 126 under the Supremacy Clause each time a dealer submits a dispute to the Board in disregard of its arbitration obligations. The State makes no showing that this issue is not ripe for review, and it does not even attempt to refute Husqvarna's showing that Board adjudication of dealer disputes subject to arbitration squarely conflicts with this Court's ruling in *Preston*.

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

Husqvarna showed in its petition why this case raises matters of great importance and urgency. Husq. Pet. 33-40. The State disagrees, raising baseless and misleading objections, respectively.

On the issue of importance, the State simply points to the fact that manufacturer-dealer relationships have been subject to regulation for many years and that "there is ample case law standing for the proposition that regulating this type of business relationship serves a legitimate public purpose." NH Brief 25. The fact that case law outside New Hampshire recognizes that regulation

of manufacturer-dealer relationships can serve a legitimate public purpose says nothing, however, about the grave constitutional abridgments detailed in Husqvarna's petition.

On the issue of urgency, the State points to Husqvarna's "uneventful history under chapter 357-C" and "the fact that Husqvarna's petition before this Court does not substantiate its claims to impending harm," NH Brief 24, but the State misleads the Court. Husqvarna has been diligent in seeking to protect its constitutional rights, and there has never been any question that SB 126 nullifies key vested contractual rights.

In an action filed by Deere, the Superior Court for Hillsborough County entered an order on September 19, 2013 preliminarily enjoining the State from including farm and equipment manufacturers within the definition of motor vehicles in RSA chapter 357-C as to contracts between plaintiffs and their dealers.<sup>5</sup> Because of uncertainty as to the State's intention to treat the preliminary injunction as extending to all similarly situated equipment manufacturers, Husqvarna filed this action on March 20, 2014, seeking a ruling under New Hampshire's declaratory judgment act that SB 126 is unconstitutional as applied to Husqvarna. Husq. Pet. 6.

In the lower courts, the State never suggested that Husqvarna had been less than diligent in

---

<sup>5</sup> Deere Petition for a Writ of Certiorari 51a, 76a-77a, No. 15-1213.



seeking to protect its constitutional rights. It never disputed that SB 126 *actually* voided Husqvarna's contract rights. It never suggested that Husqvarna's claims were not ripe for adjudication under New Hampshire's declaratory judgment act. When the trial court stayed application of SB 126 to Husqvarna pending final disposition of any appeal to the New Hampshire Supreme Court,<sup>6</sup> it never sought to appeal the order.

### CONCLUSION

The petition for a writ of certiorari should be granted.

---

<sup>6</sup> The order was entered by the Superior Court on September 30, 2014.

Respectfully submitted,

Earl Bennett  
HUSQVARNA GROUP  
N.A. & L.A.  
9335 Harris Corners  
Parkway  
Suite 500  
Charlotte, NC 28269  
earl.bennett@husqvarna  
group.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, OH 44114  
tom.collin@thompsonhin  
e.com  
(216) 566-5500

*Counsel for Petitioner  
Husqvarna Professional  
Products, Inc.*

July 5, 2016