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*No. 22-003*  
STATE OF NEBRASKA  
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MAR 23 2022

DEPT. OF JUSTICE

SUBJECT:                   Constitutionality of LB 543 – The Agricultural Equipment  
Right-to-Repair Act

REQUESTED BY:           Senator Julie Slama  
Nebraska State Legislature

WRITTEN BY:              Douglas J. Peterson, Attorney General  
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### INTRODUCTION

LB 543, as amended by AM1800, proposes to create the Agricultural Equipment Right-to-Repair Act ["Act"]. The Act would require an original equipment manufacturer ["OEM"] of electronics-enabled agricultural equipment to "make available, for purposes of diagnosis, maintenance, or repair of such equipment, to any independent repair provider, or to the owner of electronics-enabled agricultural equipment manufactured by or on behalf of, or sold or otherwise supplied by, the [OEM], on fair and reasonable terms, documentation, parts, and tools, inclusive of any updates to information or embedded software." LB 543, § 3. OEMs would not be required "to divulge a trade secret to an owner or an independent service provider except as necessary to provide documentation, parts, and tools on fair and reasonable terms." LB 543, § 5(1). Arrangements between OEMs and authorized repair providers, including warranty and recall provisions, would not be altered by the Act. LB 543, § 5(2). The Act would apply "to equipment sold or in use on or after" its effective date. LB 543, § 6. Violations of the Act would be enforceable by the Attorney General under the Uniform Deceptive Trade Practices Act. LB 543, § 4.

You have requested our opinion whether the Act would conflict with the prohibition against the impairment of contracts in the Nebraska Constitution. You have not identified any specific contracts which may be impaired by the Act. We assume your concern is directed to the Act's potential impact on End User License Agreements ["EULAs"] governing the use of embedded software in electronics-enabled agricultural equipment. "An EULA is a type of 'contract[ ] between software publishers and end users, which govern[s] the end user's right to use software,' and are thus extremely important as they prescribe what consumers may and may not do with the product."<sup>1</sup> While our analysis considers an EULA utilized by a major manufacturer of agricultural equipment widely discussed in available literature, it would be inappropriate for us to opine on whether the Act may impair any specific EULA, as this would require consideration of myriad facts not before us.

### ANALYSIS

Article I, § 16 of the Nebraska Constitution provides that "[n]o...law impairing the obligation of contracts...shall be passed." "A three-part test is applied to determine whether a contract has been unconstitutionally interfered with." *Big John's Billiards, Inc. v. State*, 288 Neb. 938, 953, 852 N.W.2d 727, 740 (2014). "Pursuant to that test, a court must examine (1) whether there has been an impairment of the contract; (2) whether the governmental action, in fact, operated as a substantial impairment of the contractual relationship; and (3) whether the impairment was nonetheless a permissible, legitimate exercise of the government's sovereign powers." *Id.* "Impair" means "to make worse." *Miller v. City of Omaha*, 253 Neb. 798, 806, 573 N.W.2d 121, 127 (1998) (quoting *Caruso v. City of Omaha*, 222 Neb. 257, 260, 383 N.W.2d 41, 44 (1986)). "[I]n order for there to be an impairment, the change must take away something and not work to the party's benefit." *Id.*

The United States Constitution also prohibits state laws which impair the obligation of contracts. Article I, § 10 of the United States Constitution provides that "[n]o State...shall...pass any ...Law impairing the Obligation of Contracts." While the Contract Clause is "facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983) ["*Energy Reserves*"] (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)). "The threshold inquiry" in assessing if a state law violates the Contract Clause "is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves*, 459 U.S. at 411. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation,...such as the remedying of a broad and general social or economic problem." *Id.* at 411-412. "Once a legitimate public purpose has been identified, the next inquiry is

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<sup>1</sup> Mirr, Nicholas A., *Defending the Right to Repair: An Argument for Federal Legislation Guaranteeing the Right to Repair*, 105 Iowa L. Rev. 2393, 2397 (2020) ["Mirr"] (quoting Michael L. Rustad, *Software Licensing: Principles and Practical Strategies* 35 (2010)).

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.’” *Id.* at 412 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977) [“*United States Trust*”). “Unless the State itself is a contracting party,...[a]s 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*, 459 U.S. at 412-413 (quoting *United States Trust*, 431 U.S. at 22-23).

Given the overlap between the standards applied to judging Contract Clause claims under both the Nebraska and U.S. Constitutions, we will combine our analysis of these factors in discussing whether the Act impairs the obligation of existing contracts.

#### **A. Does the Act Substantially Impair Existing Contracts?**

In considering whether a state law operates to substantially impair a contractual relationship, a court will “consider[ ] the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights.” *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). “Total destruction of contractual expectations is not necessary for a finding of substantial impairment.” *Energy Reserves*, 459 U.S. at 411. “[T]he governing rule is akin to a question of reasonable foreseeability: ‘if the party to the contract who is complaining could have seen it coming, it cannot claim that its expectations were disappointed.’” *Association of Equipment Manufacturers v. Burgum*, 932 F.3d 727, 730 (8<sup>th</sup> Cir. 2019) [“*Association of Equipment Manufacturers*”] (quoting *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 385 (8<sup>th</sup> Cir. 1994)). “[W]hether the industry the complaining party has entered has been regulated in the past” is also considered “[i]n determining the extent of the impairment.” *Energy Reserves*, 459 U.S. at 411.

Because assessing the validity of a Contract Clause claim “begin[s] by identifying the precise contractual right that has been impaired...,” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 504 (1987), assessing the substantial impairment element is impossible absent reference to the terms of a specific contract. As noted previously, we are not able to draw conclusions based on any specific EULA or other contractual relationship which may be impacted by the Act. To the extent such an agreement includes prohibitions or limitations on access to or use of embedded software by an owner of electronics-enabled agricultural equipment for purposes of diagnosis, maintenance, or repair, or access to or use of such software by any independent repair provider, the Act would appear to alter those contractual terms. Such a change could be a substantial impairment of the parties’ contractual relationship which would undermine the OEM’s ability to safeguard its contractual rights.

On the other hand, the Act requires that owners or independent repair providers be given access to “documentation, parts, and tools, inclusive of any updates to information or embedded software” only “for purposes of diagnosis, maintenance, or repair” of electronics-enabled agricultural equipment. LB 543, § 3. The definition of

“repair” specifically excludes “performing any activities that result in the machine being modified outside of the original equipment manufacturers specifications.” LB 543, § 2(12). Further, “repair does not include the ability to: (a) Reset security-related electronic modules; (b) Reprogram any electronic processing units or engine control units and parameters; (c) Change any equipment or engine settings that negatively affect emissions or safety compliance; and (d) Download or access the source code of any proprietary embedded software or code....” *Id.* The Act also provides an OEM is not required “to divulge a trade secret to an owner or independent service provider except as necessary to provide documentation, parts, and tools on fair and reasonable terms.” LB 543, § 5.

A commonly referenced EULA utilized by a large agricultural equipment manufacturer has been said to “prevent[ ] consumers from accessing the software embedded in the equipment and prohibits any repairs other than those made by authorized repair providers.”<sup>2</sup> This EULA identifies the licensor’s right to protect its proprietary licensed materials under copyright and trade secret law, and restricts the licensee from attempting to “modify” licensed material, or to “reverse engineer” or “attempt to create the source code from the object code for the Software.”<sup>3</sup> The Act’s limitation to access only for purposes of diagnosis, maintenance, and repair, and preservation of trade secret rights, appear to be consistent with these contractual terms protecting trade secrets and prohibiting modification or recreation of source codes. These considerations could be construed to lessen any impairment of such agreements created by the Act.

Another factor which may favor finding lack of substantial impairment is the foreseeability of legislation such as the Act impacting EULAs for electronics-enabled agricultural equipment. “In 2012, Massachusetts became the first state to take action preserving right to repair” by enacting a bill which covered only automotive repairs.<sup>4</sup> “In 2014, the Automotive Aftermarket Industry Association, the Coalition for Auto Repair Equality, the Alliance of Automobile Manufacturers, and the Association of Global Automakers entered into a memorandum of understanding concerning the automotive Right to Repair movement. This memorandum of understanding effectively made the Massachusetts automotive right to repair legislation apply nationwide....”<sup>5</sup> Since 2015, numerous states have introduced legislation to enact right-to-repair laws in various

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<sup>2</sup> Chan Grinvald, Leah, and Tur-Sinai, Ofer, *Smart Cars, Telematics and Repair*, 54 U. Mich. J. L. Reform 283, 321 (2021) [“Chan Grinvald and Tur-Sinai”] (citing Jason Bloomberg, *John Deere’s Digital Transformation Runs Afoul of Right-to-Repair Movement*, *Forbes* (Apr. 30, 2017)), <https://www.forbes.com/sites/jasonbloomberg/2017/04/30/john-deeres-digital-transformation-runs-afoul-of-right-to-repair-movement/?sh=72ba41fe5ab9>

<sup>3</sup> [https://www.deere.com/assets/pdfs/common/privacy-and-data/docs/agreement\\_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf](https://www.deere.com/assets/pdfs/common/privacy-and-data/docs/agreement_pdfs/english/2016-10-28-Embedded-Software-EULA.pdf)

<sup>4</sup> *Mirr*, *supra* note 1 at 2399.

<sup>5</sup> *Id.*



forms.<sup>6</sup> “During the legislative sessions following the 2016 elections, almost half of the country’s state legislatures considered right-to-repair laws.”<sup>7</sup> Right-to-Repair bills have taken several forms, including legislation addressing repair of: (1) Farm equipment (Wyoming); (2) Farm equipment and consumer electronics, but not motor vehicles (California); and (3) “Digital electronic products” (Iowa).<sup>8</sup> In 2017, right-to-repair legislation was introduced in Nebraska to adopt the Fair Repair Act which would have applied to all equipment other than motor vehicles. 2017 Neb. Laws LB 67.

The Act under review would affect existing agreements as it applies to agricultural equipment “in use” after its effective date. LB 543, § 6. As right-to-repair legislation dates back to 2012, and has been introduced and considered in many states since 2015, OEMs of electronics-enabled agricultural equipment should have recognized that their EULAs or similar agreements could be impacted by such legislation. While legislative action was certainly foreseeable, it is less evident that OEMs could reasonably expect that right-to-repair laws would be applied retroactively to alter existing agreements. The widespread consideration of right-to-repair legislation in several states may play a role in evaluating the question of substantial impairment, but it is unclear whether OEMs “can[ ] reasonably be said to have had a fair and appreciable warning of an impending intervention into their agreements.” *Association of Equipment Manufacturers*, 932 F.3d at 730 (quoting *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 385 (8<sup>th</sup> Cir. 1994)).

Testimony at the committee hearing on LB 543 from representatives of agricultural equipment manufacturers and dealers in opposition to the bill may also be relevant to the impairment issue. Several of these testifiers represented that the legislation was unnecessary because the information and tools required to allow repairs by equipment owners or independent repair providers is already readily available. Grant Suhre, manager of customer support for John Deere in the U.S. and Canada, stated “we support customers’ ability to repair their machines...[a]nd we certainly provide all the tools that are required.” Committee Records on LB 543, 107<sup>th</sup> Neb. Leg., 2<sup>nd</sup> Sess. 51 (Feb. 25, 2021) [“Committee Records”]. He further stated “we don’t believe we need legislation to enable customers to repair their machines. We’ve already enabled that.” *Id.* at 52. Kevin Clark, CEO of AKRS Equipment Solutions, a large agricultural equipment dealer with twenty-six John Deere stores in Nebraska, noting that customers have online availability through a subscription service to diagnostic tools, software codes, and parts, stated: “[I]f it’s a matter of right to repair, that already exists.” *Id.* at 59. Scott Raber of Titan Machinery, a Case IH, New Holland, and Case Construction dealer representing dealerships across Nebraska, testified a “service tool is available from Case IH or New Holland...for consumers to purchase, whether that be a farmer or an independent repair shop.” *Id.* at 62. Mark Hennessey, President and CEO of the Iowa Nebraska Equipment

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<sup>6</sup> Moore, Daniel, *You Gotta Fight for Your Right to Repair: The Digital Millennium Copyright Act’s Effect on Right-to-Repair Legislation*, 6 Texas A&M L. Rev. 509, 515 (2019).

<sup>7</sup> *Id.*

<sup>8</sup> *Mirr*, *supra* note 1 at 2401-402.

Dealers Association, referring to this earlier testimony regarding the availability of information needed for producers and independent repair providers to repair equipment, stated:

[Y]ou heard about the products that are currently available in the market today, producers can buy diagnostic tools, equipment software subscriptions, much the same as an independent repair or a dealer themselves procure. This is available for them to be able to do themselves if they so wish. The question becomes, why aren't they doing it? Well, they can if they desire. It really boils down to an awareness issue. Are they aware that these tools exist? Why are we needing to have legislation for something that's currently on the market today?...We don't believe we need to have legislation to accomplish the ability to right to repair because the products are available on the market today. *Id.* at 65-66.

The testimony on behalf of manufacturers and dealers representing that the information and tools needed for owners or independent repair providers to repair agricultural equipment is already widely available seems incongruous to any claim that providing access to that information impairs current contracts. Those entities' primary objection to the Act was not to users' ability to repair equipment but to their ability to modify equipment. Committee Records at 51 ("The challenge comes when we talk about right to repair versus right to modify.") (Statement of Grant Suhre); 58 ("[W]hile we support the ability of customers to repair their own equipment, we do not support the ability for them to be able to modify the equipment...") (Statement of Kevin Clark)). The Act's definition of "repair" is consistent with this concern, as it excludes "any activities that result in the machine being modified outside of the original equipment manufacturer specifications." LB 543, § 2(12). Ready access to necessary information and tools required to perform repairs, and the Act's prohibition of modification of equipment, appears to lessen any claim of impairment of existing contracts.<sup>9</sup>

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<sup>9</sup> In 2018, the Association of Equipment Manufacturers, a trade and lobbying group representing John Deere and other manufacturers, and the Equipment Dealers Association, committed that manufacturers would make repair tools, software, and diagnostics available beginning January 1, 2021. Jason Koebler and Matthew Gault, *John Deere Promised Farmers It Would Make Tractors Easy to Repair. It Lied*, Vice Motherboard (Feb. 18, 2021), <https://www.vice.com/en/article/v7m8mx/john-deere-promised-farmers-it-would-make-tractors-easy-to-repair-it-lied>. Proponents of LB 543 noted this commitment and claimed it had not been fulfilled. Committee Records at 30-31 ("Three years ago, OEMs said that by January 2021 farmers would have access to everything they need for equipment repairs. OEM[s] staved off right to repair legislation around the country by promising to deliver access. And here we are three years later and the farmers are still struggling to get the tools promised in the agreement.") (Statement of Sen. Brandt); *id.* at 40 ("In late 2018, John Deere and other manufacturers did promise to provide these tools by January 1, 2021, and they have not held up their end of this bargain.") (Statement of Jacob Bish). While opponents of the bill testified that such information and tools were in fact available, this further demonstrates that OEMs may be hard pressed to challenge the Act's requirement that they provide access to software solely for diagnosis, maintenance, or repair of equipment impairs any contractual rights.

In sum, it is not clear that the Act would substantially impair existing contracts. If agreements between OEMs and equipment owners include prohibitions or limitations on access to or use of embedded software for purposes of diagnosis, maintenance, or repair, or access to or use of such software by any independent repair provider, the Act would alter those contractual terms. Such a change could operate as a substantial impairment of the parties' contractual relationship which would undermine an OEM's ability to safeguard its contractual rights. The question of impairment, however, may be impacted by consideration of other factors, including the reasonable foreseeability of legislation impacting those agreements, and the access to information and tools required to provide repairs to electronics-enabled agricultural equipment currently made available by manufacturers and dealers. These factors may support finding that any impairment of current agreements is not substantial.

### **B. Does the Act Have a Significant and Legitimate Public Purpose?**

"If there is no substantial impairment on contractual relationships, the law does not violate the Contract Clause." *Equipment Manufacturers Inst. v. Janklow*, 300 F.3d 842, 850 (8<sup>th</sup> Cir. 2002) [*Equipment Manufacturers Inst.*]. Thus, a court "may stop after step one" if a "statute does not substantially impair pre-existing contractual arrangements." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). As it is unclear if the Act would substantially impair existing contractual obligations, we will proceed to address the second step of the Contract Clause analysis, i.e., whether the Act has a significant and legitimate public purpose.

To demonstrate a significant and legitimate public purpose, "[t]he State must show that the regulation protects a 'broad societal interest rather than a narrow class.'" *Equipment Manufacturers Inst.*, 300 F.3d at 859 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978)). "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*, 459 U.S. at 412. "[T]he public purpose need not be addressed to an emergency or temporary situation." *Id.*

Two Eighth Circuit decisions involving Contract Clause challenges to South Dakota's and North Dakota's statutes regulating relationships between agricultural equipment manufacturers and dealers inform the public purpose analysis. The first case, decided in 2002, held the South Dakota statutes substantially impaired existing contracts between manufacturers and dealers, and rejected the claim that the regulation served a significant and legitimate public purpose. *Equipment Manufacturers Inst.*, 300 F.3d at 859-862. The state argued the act "benefit[ed] a broad social interest: serving the farmer and rural communities in South Dakota." *Id.* at 860. The court noted "[s]uch an interest is unquestionably significant and legitimate," and it "would be compelled to uphold the Act if [it] credited the State's rationale for the Act." *Id.* The statutes, however, included "no statement of legislative intent or any other legislative history from which to directly ascertain the purpose of the Act." *Id.* In fact, "[t]he State's evidence contradict[ed] this asserted broad societal interest...in several respects." *Id.* It was conceded that the statutory purpose was "to level the playing field between manufacturers and dealers,"

which “is expressly prohibited as a significant and legitimate public purpose.” *Id.* at 860-861. The “sparse legislative history” also showed that “only implement dealers and manufacturers attended committee hearings on the Act,” and there was “no evidence of farmers’ participation.” *Id.* at 861. Because “the only real beneficiaries under the Act [were] the narrow class of dealers of agricultural machinery,” the court found “such special interest legislation [ran] afoul of the Contract Clause when it impair[ed] pre-existing contracts.” *Id.*

In 2019, the Eighth Circuit found that a similar North Dakota statutory scheme violated the Contract Clause. Initially, the court concluded that manufacturers could not have reasonably foreseen the statutory alteration of their contract rights. *Association of Equipment Manufacturers*, 932 F.3d at 730-31. Noting it had “previously held that a similar retroactive law governing agreements between farm equipment dealers and manufacturers in South Dakota violated the Contract Clause,” the court proceeded to consider North Dakota’s claim that the statute “further[ed] a significant public interest in serving farmers and rural communities.” *Id.* at 731. Because “[t]he state legislature declined to...include[ ] well-supported findings or purposes within their...laws...any significant and legitimate public purpose” had to “be discerned from the design and operation of the legislation itself.” *Id.* at 733. “[T]he Contract Clause prohibits special-interest redistributive laws, even if the legislation might have a conceivable or incidental public purpose.” *Id.* at 732. The court found the statutes had “a narrow focus: restricting the contractual rights of farm equipment manufacturers,” and “primarily benefit[ed] a particular economic actor in the farm economy—farm equipment dealers.” *Id.* at 733. The court reasoned that “[e]ven if the law indirectly might benefit farmers and rural communities, the Contract Clause demands more than incidental public benefits.” *Id.*

LB 543 contains no legislative findings or statement of purpose. The bill’s introducer described the bill as “narrowly tailored, commonsense legislation meant to address repairs that farmers can do themselves and will save our farmers time and money and break the monopoly that manufacturers have over repairs.” Committee Records at 32 (Statement of Sen. Brandt). He further noted that the significant reliance on software to operate agricultural equipment “allow[ed] manufacturers to take increasing control of the repair process by restricting access to authorized dealers.” *Id.* at 30. Further, “[w]hen breakdowns happen during the narrow window of planting or harvest, they have a detrimental effect on the ag operation. Dealership mechanics can be swamped with work, and it can sometimes take days to make it out to the farm for what in many situations is a simple repair that could be performed by the customer, while precious time is lost.” *Id.* The adverse impact of time lost waiting for dealer repairs was also noted by testifying producers. *Id.* at 37 (“We work in an unforgiving industry where weather rules our lives. A crop that’s ready to harvest today may not be there tomorrow. Farmers and ranchers need the ability to have local mechanics help them with their equipment repairs.”) (Statement of Tom Schwarz); at 49 (“[D]owntime is money lost during planting and harvesting operations.”) (Statement of Vern Jantzen). While it would be preferable for the Act to contain findings and a declaration of purpose, this history is some evidence to establish the significant and legitimate legislative purposes served by the Act.



The Act is also broader than the narrow, special interest legislation struck down in *Equipment Manufacturers Inst. and Association of Equipment Manufacturers*. Beyond the Act's impact on agreements between OEMs and owners of electronics-enabled agricultural equipment, as well as dealers currently performing repairs and prospective independent repair providers, it also serves broader significant and legitimate public purposes. Agriculture is of vital importance to Nebraska's economy. Ensuring the ability of agricultural producers to repair their equipment in a timely manner facilitates the broader purpose of strengthening our farms and businesses in rural communities. It would also address concerns regarding monopolistic practices in the market for repair of agricultural machinery.<sup>10</sup> At least one commentator has noted that limiting right-to-repair legislation to agricultural equipment is "appropriate considering the large size and difficulty of transporting farming equipment to repair facilities, the expertise farmers possess with regards to the equipment they operate daily, and the reliance farmers have on their equipment to earn a living."<sup>11</sup> On balance, it appears the Act serves a significant and legitimate public purpose.

### **C. Is the Act a Reasonable and Appropriate Measure to Serve a Legitimate Public Purpose?**

The final step in the Contract Clause analysis is "[o]nce a legitimate public purpose has been identified,...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.'" *Energy Reserves*, 459 U.S. at 412 (quoting *United States Trust*, 431 U.S. at 22). Because the state is not a contracting party, deference is due the legislative judgment of the reasonableness and necessity of the Act.

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<sup>10</sup> "[C]ertain contractual restrictions that seek to inhibit competition in markets for diagnostic tools and repairs could run afoul of federal antitrust law as agreements in unlawful restraint of trade." Chan Grinvald and Tur-Sinai, *supra* note 2 at 321-22. "The collective purpose of [right-to-repair] legislation is to prevent a monopoly by compelling manufacturers to make parts, diagnostic software, and repair tools freely available to individuals and independent repair shops." Daniel Cadia, *Fix Me: Copyright, Antitrust, and the Restriction on Independent Repairs*, 52 U.C. Davis L. Rev. 1701, 1704 (2019). Two recently filed federal lawsuits claim John Deere's repair service practices violate the anti-monopoly provisions of the Sherman Act. *Forest River Farms v. Deere & Co.*, No. 1:22CV188 (N.D. Ill. 2022) ["*Forest Farms*"]; *Underwood v. Deere & Co.*, No. 4:22CV00005 (E.D. Tenn. 2022). The *Forest Farms* complaint alleges Deere has violated the Sherman Act by "monopolization of the repair service market for [its] agricultural equipment with onboard central computers known as engine control units, or 'ECUs.'" *Forest Farms* Complaint at 1 ¶ 1. The Complaint alleges that, "in newer generations of agricultural equipment, Deere has deliberately monopolized the market for repair and maintenance services of its agricultural equipment with ECUs...by making crucial software and repair tools inaccessible to farmers and independent repair shops." *Id.* While we express no view on the merits of these allegations, legislation intended to curb anticompetitive and monopoly practices plainly furthers a significant and legitimate public purpose.

<sup>11</sup> MacAneney, Marissa, *If It is Broken, You Should Not Fix It: The Threat Fair Repair Legislation Poses to the Manufacturer and the Consumer*, 92 St. John's L. Rev. 2, 331, 353 (2018)).

A state's "economic interests...may justify the exercising of its continuing and dominant protective power notwithstanding interference with contracts.' ... Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965) (quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 437 (1934)). As noted above, the Act serves the substantial and legitimate public purposes of: (1) Ensuring agricultural producers and independent repair providers have the right to repair agricultural equipment in a timely manner, which will benefit farmers and businesses in rural communities; and (2) Promoting competition and removing monopolistic practices in the market for repair of agricultural machinery. Given the substantial deference due the Legislature to establish "the means chosen to implement these purposes," *Energy Reserves*, 459 U.S. at 418, the Act is a reasonable and appropriate measure to serve those legitimate public purposes.

### CONCLUSION

A state law does not violate the constitutional prohibition against the impairment of contracts under the Nebraska and United States Constitutions unless the impairment is substantial. Even if a law substantially impairs contractual rights, it is permissible if it has a significant and legitimate public purpose and is a reasonable and appropriate measure to serve that purpose. The Act requires that OEMs of electronics-enabled agricultural equipment make available to owners and independent repair providers, on fair and reasonable terms, access to information and tools, including embedded software, for purposes of diagnosis, maintenance, and repair of such equipment. This requirement may well impact existing EULAs or other contractual arrangements. The Act, however, defines "repair" to exclude modifications, including changes affecting equipment or engine settings, and prohibits accessing any proprietary software code. These limitations on access and use of repair information would lessen any impairment of such agreements. Other factors, including the foreseeability of the enactment of right-to-repair legislation impacting those agreements, and representations made on behalf of manufacturers and dealers that such information is already readily available, further reduce any claim of impairment to existing contracts. Accordingly, we cannot definitively say the Act substantially impairs existing contractual obligations. Even if substantial impairment exists, the Act serves significant and legitimate public purposes, including: (1) ensuring the ability of agricultural producers to repair their equipment in a timely manner, which facilitates the broader purpose of strengthening farms and businesses in rural communities; and (2) reducing monopolistic practices in the market for repair of agricultural machinery. Finally, the Act is a reasonable and appropriate means to serve these purposes. We therefore conclude that the Act likely does not violate the Contract Clause.

Very truly yours,

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Approved by:



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