IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALLIANCE FOR AUTOMOTIVE INNOVATION Plaintiff, vs. MAURA HEALEY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS in her official capacity, Defendant.	C.A. No. 1:20-cv-12090-DPW

PLAINTIFF ALLIANCE FOR AUTOMOTIVE INNOVATION'S BRIEF REGARDING MAINE BALLOT INITIATIVE AND FURTHER DISCOVERY

The same entities responsible for the Massachusetts ballot initiative that became the Data Access Law are pushing a similar "right-to-repair" ballot initiative in Maine. The two laws would share many of the same problematic features—including such things as requiring the dangerous standardization of authorization to access sensitive vehicle data, cutting original equipment manufacturers ("OEMs") out of the process of securing their vehicles, and otherwise introducing significant cybersecurity threats. But there are several curious differences between the two. These changes raise a reasonable inference that the sponsors of the Data Access Law consciously took a different, though still highly problematic, approach in crafting their latest state-ballot initiative. Auto Innovators seeks to uncover the rationale behind those changes through discovery of one of the entities pushing both efforts—the Auto Care Association ("ACA"), an entity that has already participated extensively in the trial of this case. *See* Exs. A and B (proposed deposition and document subpoenas).

The limited evidence on which Auto Innovators seeks discovery easily satisfies the "very low bar for relevance" under the federal rules. *Gonpo v. Sonam's Stonewalls & Art, LLC*, 41 F.

4th 1, 14 (1st Cir. 2022) (citation omitted). If "evidence has *any* tendency to make a material fact more or less likely, it is relevant." *Id.* (emphasis in original; internal quotation marks and citation omitted). Put another way, evidence is relevant so long as it "move[s] the inquiry forward to some degree" (*Bielunas v. F/V Misty Dawn, Inc.*, 621 F.3d 72, 76 (1st Cir. 2010) (citation omitted)) on a "fact . . . of consequence," Fed. R. Evid. 401(b).

Here, the evidence at issue goes to the principal matter before the Court: whether OEMs can comply with the Data Access Law's requirements while satisfying their federal safety and emissions obligations. Moreover, the means by which Auto Innovators seeks to develop that evidence—through limited subpoenas carefully cabined to elicit testimony and documents about these ongoing "right to repair" efforts from a third party already closely bound up in this litigation—is easily justified. After all, parties may seek "plainly relevant" evidence from a third party where that evidence cannot be obtained from the opposing party itself, so long as the discovering party takes "reasonable steps to avoid imposing [an] undue burden." *Forth v. Walgreen Co.*, 2020 WL 4569501, at *3 (D.R.I. Aug. 7, 2020) (discussing Fed. R. Civ. P. 45(d)(1)).

A. The Maine Initiative Contains Four Key Differences from the Data Access Law.

Although itself inconsistent with OEMs' federal obligations, the proposed Maine ballot initiative contains several key differences in the requirements it imposes on OEMs. *Compare* Declaration of Amy Brink ("Brink Decl.") Exs. A, B *with* Mass. General Laws, c. 93K. Each change focuses on language that has been front and center in this case.

First, the Maine Right to Repair Coalition's draft ballot initiative omits the problematic phrase "otherwise related to" from the definition of "mechanical data." Brink Decl. Ex. A (§ 1). It defines "mechanical data" as "any vehicle-specific data, including telematics system data,

generated, stored in or transmitted by a motor vehicle used in the diagnosis, repair or maintenance of a motor vehicle." *Id.* By contrast, the Data Access Law defines "mechanical data" as "any vehicle-specific data, including telematics system data, generated, stored in or transmitted by a motor vehicle used for *or otherwise related to* the diagnosis, repair or maintenance of the vehicle." Data Access Law § 1 (emphasis added).

The obligations imposed on OEMs by the broad "otherwise related to" language included in the Data Access Law but not the Maine ballot initiative is very much a "fact . . . of consequence" (Fed. R. Evid. 401(b)) in this case. The parties dispute both the breadth of that language and the ability of manufacturers to meet the requirement imposed by it. *See, e.g.*, Pl.'s Brief Regarding Textual Interpretation of the Data Access Law (ECF No. 293) at 10-11 (discussing how the "otherwise related to" language imposes an impossibly broad obligation on manufacturers to grant access to virtually all data generated by vehicles); Parties' Joint Submission Regarding Textual Interpretations of Data Access Law (ECF No. 290) ("Joint Submission") at 13-14 (discussing the parties' differing takes on the significance of the term). The omission of that language from the Maine ballot initiative suggests not only that the language is significant but also that the drafters of the Data Access Law now recognize it is problematic—directly counter to positions the Attorney General has taken in this case. *See, e.g.*, Pl.'s Brief Regarding Textual Interpretation of the Data Access Law (ECF No. 293) at 15-16 (averring that this language does essentially no work and that "otherwise related to" should be construed as effectively meaningless).

Second, the draft Maine ballot initiative directs the Maine Attorney General to "designate an independent entity" to administer the authorization system for access to vehicle on-board diagnostic systems. Brink Decl. Ex. A (§ 2). By contrast, the Data Access Law is conspicuously (and dangerously) silent on that issue: Section 2 of the Data Access Law requires the

"standardized" "authorization system for access to vehicle networks and their on-board diagnostic systems" to be "administered by an entity unaffiliated with a manufacturer," but does not provide any mechanism to establish that "unaffiliated," third-party entity. Data Access Law § 2.

This issue goes to the heart of OEMs' ability to comply with Section 2 of the Data Access Law. The third-party entity is a prerequisite for OEMs' implementation of authorization systems that comply with that section, because OEMs would have to tailor their systems around that entity's technology. The independent entity does not exist. As even the Attorney General acknowledges, it cannot be affiliated in any way—formally, informally, or contractually—with OEMs. *See* Joint Submission at 7. As a result, OEMs cannot create and fund this third-party entity without violating the Data Access Law's prohibition on their direct involvement. Pl.'s Brief Regarding Textual Interpretation of the Data Access Law (ECF No. 293) at 15-16. By adding a requirement to the proposed Maine ballot initiative requiring the state Attorney General to designate that independent entity, the proponents of the Data Access Law tacitly recognize the unaffiliated-entity problem in this case. Indeed, this issue provides a basis for the Court to invalidate the Data Access Law on preemption grounds without having to reach some of the more fact-intensive issues in the case. There is simply no dispute that: (1) there currently exists no way for automakers to provide the standardized access Section 2 requires without their involvement, (2) no third-party entity exists that can fill this role, (3) the automakers cannot fund or create such an entity without violating Section 2's "unaffiliated" language, (4) the Data Access Law does not provide a mechanism for the creation of such a third-party entity, and (5) neither ACA nor any other industry stakeholders unaffiliated with the automakers have stepped in to fill this void.

Third, the draft Maine ballot initiative identifies specific (theoretical) standards that the Attorney-General-designated independent entity should adopt to ensure appropriate security.

Brink Decl. Ex. A (§ 2) (directing the "independent entity" to "[i]dentify and adopt relevant standards required for implementation of the Maine law (anticipated to include ISO 21177, 21185, 21184 and 5616 (including compliance with regional aspect of ISO 5616))"). The Data Access Law, by contrast, omits any mention of standards that might provide even a theoretical mechanism for the required third-party authorization (Data Access Law § 2)—as Auto Innovators pointed out throughout the trial (*e.g.*, ECF No. 233, ¶ 114). This change in language suggests that the law's proponents now recognize that standards are required before compliance can even be contemplated.

Fourth, the draft Maine ballot initiative omits the phrase "open access" from its requirements for a Section 3 platform for accessing mechanical data. Brink Decl. Ex. A (§ 3). It requires manufacturers to provide "an inter-operable, standardized and *owner-authorized* access platform across all of the manufacturer's makes and models." *Id.* By contrast, the Data Access Law requires manufacturers to provide "an inter-operable, standardized and *open access* platform across all of the manufacturer's makes and models." Data Access Law § 3 (emphasis added).

Yet again, the term curiously modified in the new state initiative just so happens to be a term at the center of the dispute over OEMs' ability to comply with the Data Access Law. *See, e.g.*, Joint Submission at 12 (discussing the parties' dispute over the term, with the Attorney General averring that the requirement to provide "open access" to vehicle systems somehow allows OEMs nonetheless to implement "security controls to ensure the safety and privacy of the consumer"); Pl.'s Brief Regarding Textual Interpretation of the Data Access Law (ECF No. 293) at 11-12 (discussing how the plain meaning of the undefined term "open access" evinces broad access). Indeed, the United States focused much of its attention on that problematic term. *See, e.g.*, U.S. Statement of Interest (ECF No. 202) at 7-9 (discussing problems with Section 3 of the Data

Access Law's "open access" requirements); *id.* at 8 ("[T]he Data [Access] Law effectively requires open remote access, potentially accessible by anyone, to all of a motor vehicle's telematics systems."); *id.* at 9 ("The open access effectively required by the Data [Access] Law . . . has the potential to cause serious safety problems for motor vehicle owners and to frustrate the ability of motor vehicle manufacturers to follow their obligations to ensure vehicle safety."). As with the other changes, the decision to remove "open access" from the proposed Maine ballot initiative suggests that proponents recognize problems with that requirement, contrary to the position the Attorney General has taken in the present litigation.

B. The ACA Has Directly Relevant Information.

There is every reason to believe that the changes made to the Data Access Law's language to craft the Maine ballot initiative were not mere happenstance. There also is every reason to believe that ACA would have relevant information on the rationale for those changes.

ACA drafted and campaigned for the petition that is now the Data Access Law. June 15 Tr. 13:6-12, 18:9-21:6 (Lowe) (testifying about ACA's role in drafting the ballot initiative and seeking its passage). Unsurprisingly, given its central role, ACA participated at trial by providing one of the Attorney General's witnesses. In doing so, ACA's witness testified regarding some of the very same Data Access Law requirements from which the proposed Maine ballot initiative deviates. Take, for instance, the independent-entity requirement in Section 2 of both initiatives. The ACA's Massachusetts ballot initiative did not provide a mechanism for creating that entity. Instead, ACA's Aaron Lowe testified at trial that ACA was working with the Equipment Tool Institute ("ETI") to "develop" an entity that could serve as the unaffiliated entity contemplated by Section 2. June 15 Tr. 38:25-39:5 (Lowe). But Mr. Potter, ETI's Chief Technology Officer, testified that ETI was not in a position to fulfill that role. *Id.* at 92:3-21, 97:8-11 (Potter). Among other things, ETI and its three employees (one of whom is an event planner) lacked the capability

to have anything to do with the security of the platform that the Data Access Law contemplates. *Id.* at 98:10-18 (Potter). Although ACA resisted the idea that there was any issue with the Data Access Law's unaffiliated-entity requirement, the change to putting the onus of creating it on the Maine Attorney General speaks volumes.

Somewhere along the way of this litigation, the aftermarket parts supply industry shifted its attention to the Maine ballot-initiative effort, which was spearheaded by the same Right to Repair coalition as in Massachusetts. Brink Decl. ¶ 4. Unsurprisingly, ACA is front and center in that new effort. *Id.* It now seeks to put the new Maine initiative before voters in the November 2023 election. *Id.* ¶ 4, Ex. C. The limited evidence uncovered by Auto Innovators so far shows that ACA stands at the crossroads of the new Maine initiative effort and the Massachusetts initiative that became the Data Access Law, with ACA's SVP of Government Affairs and General Counsel recently quoted as saying that "Right to Repair is our primary issue . . . we have the law in Massachusetts, we're trying to get a ballot initiative in Maine, and there's the federal bill that we'll reintroduce to the new Congress." *Id.* Ex. C ("We anticipate we're going to have as much consumer support in Maine as we did in Massachusetts and we're looking at other states."). ACA's SVP also clears away any doubt that the mutual goal of both the Massachusetts and Maine efforts is to gain leverage over automakers: "[W]e want to continue our momentum and put pressure on the OEMs, because they have no incentive to come to the table, right now." *Id.*

Accordingly, Auto Innovators expects that ACA will have relevant information regarding the Maine ballot initiative, including the reasons for the differences between the statutory language proposed in that initiative and the Data Access Law. Likewise, given ACA's decision to shift its efforts to Maine, Auto Innovators expects that ACA will have relevant information bearing on the impossibility of compliance with the Massachusetts statute—including any efforts (or lack thereof)

to establish the "entity unaffiliated with a manufacturer" and "standardized" authorization system that the Data Access Law requires, as well as efforts to develop the purported means of compliance with the Data Access law that the Attorney General has proposed in this action. Auto Innovators' proposed discovery would cover these limited topics.

C. The Evidence Auto Innovators Seeks Was Unavailable at Trial, and Limited Discovery Will Not Delay Resolution of This Case.

Finally, that this evidence came to light only after trial should not preclude Auto Innovators from reasonably developing it or the Court from considering it. A decision whether to reopen the evidence for a limited purpose after trial is left to the Court's sound discretion. *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32 (1971); *Rivera-Flores v. P.R. Tel. Co.*, 64 F.3d 742, 746 (1st Cir. 1995). That decision "turns on flexible and case-specific criteria," *Anderson v. Brennan*, 911 F.3d 1, 13 (1st Cir. 2018), including whether "(1) the evidence sought to be introduced is especially important and probative; (2) the moving party's explanation for failing to introduce the evidence earlier is bona fide; and (3) reopening will cause no undue prejudice to the nonmoving party."). *Rivera-Flores*, 64 F.3d at 746. All three factors counsel in favor of allowing Auto Innovators to discover this new, relevant evidence.

First, as discussed above, the evidence uncovered so far—the proposed Maine ballot initiative, with its several changes to terms directly at contention in this case, and statements suggesting that ACA is as integral to those efforts as it was to those in Massachusetts—is important and probative. It goes to whether, and the extent to which, even the Data Access Law's chief proponents recognize some problems with the scope of some of the requirements in that law.

Second, Auto Innovators has a simple, bona fide explanation for not introducing this evidence at trial: It did not exist. Maine's Right to Repair coalition launched the ballot-initiative effort only this year and Auto Innovators only learned of it a few months ago—long after trial in

this case. Brink Decl. ¶ 5. By definition, Auto Innovators could not have anticipated evidence about the Maine ballot initiative during trial. *See, e.g.*, *Davignon v. Hodgson*, 524 F.3d 91, 114 (1st Cir. 2008) (noting that "reasonably genuine surprise" about the existence or significance of evidence is a bona fide explanation for failure to introduce it during trial); *cf. Rivera-Flores*, 64 F.3d at 747 (explaining that "it may amount to an abuse of discretion for a trial court to decline to reopen in circumstances where the movant has demonstrated 'reasonably genuine surprise'").

Third, the Attorney General would not suffer any prejudice from any slight delay occasioned by the limited discovery Auto Innovators proposes here. For one, much of the new evidence comes in the form of the proposed Maine ballot initiative itself. *See, e.g.*, *Rivera-Flores*, 64 F.3d at 749 (holding that there is no undue prejudice for the nonmovant where the "introduction of . . . readily obtainable documentary evidence could . . . entail[] but minimal delay"). Furthermore, the discovery that Auto Innovators intends to conduct—a limited document production and single deposition of someone from ACA, an entity that participated in this trial and that is closely tied both to the Massachusetts and Maine efforts—is narrowly drawn to ensure that any additional evidence uncovered is accomplished expeditiously. *Id.* at 749 (holding that there is no undue prejudice where additional discovery would not require "extended testimony"); *see also, e.g.*, *Rowen Petroleum Properties, LLC v. Hollywood Tanning Sys., Inc.*, 2013 WL 12303311, at *2 (D.N.J. Sept. 30, 2013) (holding that there is no undue prejudice where "additional discovery or testimony taken will be limited in scope").

This Court already reopened the evidence once in this case to take account of new evidence proffered by the Attorney General about the actions of some OEMs with regard to their telematics systems. *See* Def.'s Mot. to Reopen Trial Evidence (ECF No. 245); Nov. 1, 2021 Order (ECF No. 253) (granting Attorney General's motion). Auto Innovators should be afforded the same

opportunity to reasonably develop recently uncovered evidence tending to show that the Data Access Law's proponents recognize that several of the law's requirements are problematic.

CONCLUSION

For the foregoing reasons, Auto Innovators respectfully requests that the Court permit limited discovery from the Auto Care Association of information reasonably related to compliance with the Data Access Law by authorizing the proposed subpoenas attached as Exhibits A and B.

Dated: November 22, 2022

Respectfully submitted,

ALLIANCE FOR AUTOMOTIVE INNOVATION

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those indicated as non-registered participants on November 22, 2022.

/s/ Laurence A. Schoen
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