No. 99-474

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

BRIEF OF THE INDUSTRY COALITION ON TECHNOLOGY TRANSFER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Filed February 14, 2000

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE INDUSTRY COALITION ON TECHNOLOGY TRANSFER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT[1]

The Constitution as well as the inherent character of national sovereignty authorize the federal government to

[1] Pursuant to Supreme Court Rule 37.3, *amicus* has received consent to file this brief from counsel for the petitioners and the respondent. The original letters of consent have been filed with the Clerk of this Court. No part of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of the brief.

regulate political and commercial relations with foreign nations. In the exercise of this authority, Congress enacted in 1996 a statute that imposed certain sanctions against the Union of Myanmar, formerly known as Burma [2] (the "Federal Burma Law"). Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-121, 3009-166 to 3009-167 (1996). The Federal Burma Law restricts certain new investment in Burma by "United States persons" while expressly *not* restricting most commerce between the United States and Burma in goods, technology, and services.

In the face of the federal government's authority in the fields of foreign affairs and foreign commerce, and in direct contradiction to the Federal Burma Law, Massachusetts has enacted a statute (the "Massachusetts Burma Law") penalizing American companies trading with Burma that wish to sell goods or services to Massachusetts. Appendix to Petition for Writ of Certiorari (Pet. App.) 88-94. The United States Court of Appeals for the First Circuit invalidated the Massachusetts Burma Law on the grounds that it unconstitutionally interferes with the federal government's role in foreign affairs, is preempted by the Federal Burma Law, and violates the dormant commerce power. As *amicus curiae*, the Industry Coalition on Technology Transfer (ICOTT) urges this Court to affirm the judgment of the court of appeals.

INTEREST OF THE *AMICUS CURIAE*

The Industry Coalition on Technology Transfer (ICOTT) was founded in 1983. ICOTT comprises five leading trade associations whose thousands of member companies (the ICOTT Companies) sell sophisticated American goods, technology, and services to customers around the globe. The members of ICOTT are the American Electronics Association (AEA), the American Association of Exporters and Importers (AAEI), the Electronic Industries Alliance (EIA), Semiconductor Equipment and Materials International (SEMI), and the Semiconductor Industry Association (SIA).

[2] For reasons of simplicity and consistency with other documents in this case, we refer to Myanmar throughout this brief by its former name.

The American Electronics Association is the nation's largest high-technology trade group, representing more than three thousand United States-based technology companies. Membership spans the industry product and service spectrum, from semiconductors and software to computers, Internet, and telecommunications systems and services. With eighteen regional United States councils and offices in Brussels, Tokyo, and Beijing, AEA offers a unique global policy grassroots capability and a wide portfolio of valuable business services and products for the high-technology industry. For fifty-six years, AEA has been a major voice of the United States technology community.

The American Association of Exporters and Importers (AAEI) is a national organization based in New York City. The membership of AAEI comprises more than 1100 United States companies that export, import, distribute and manufacture a broad spectrum of high technology and other products, as well as financial and other services. AAEI members conduct operations in all fifty states, export all over the world, employ millions of United States workers, and account for a large majority of United States non-military commercial trade. For more than seventy-five years the promotion of trade between the United States and other nations has been the primary mission of AAEI.

The Electronic Industries Alliance (AEI) is a federation of associations and sectors operating in the most competitive and innovative industry in existence. Comprising more than 2100 members, EIA represents eighty percent of the $550 billion United States electronics industry. EIA's member and sector associations represent telecommunications, consumer electronics, components, government electronics, semiconductor standards, as well as other vital areas of the United States electronics industry.

Semiconductor Equipment and Materials International (SEMI) is an international trade association serving more than 2300 companies participating in the $65 billion semiconductor and flat panel display equipment and materials markets. SEMI is based in Mountain View, California and maintains offices in Austin, Beijing, Boston, Brussels, Hsinchu, Moscow, Seoul, Singapore, Tokyo, and Washington, D.C.

The Semiconductor Industry Association (SIA) is the leading trade association representing the U.S. computer chip industry. SIA member companies account for ninety percent of U.S.-based semiconductor production. The mission of SIA is to provide leadership for United States chip manufacturers on critical issues such as trade, technology, environmental protection, and worker safety.

We live in an increasingly interdependent world. In 1980, United States exports and imports of goods and services amounted to $563 billion. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1999, at 790 (Table No. 1307). By 1998 this figure had more than tripled—to over $2 trillion, *id.*—and it doubtless will continue to increase. The ICOTT Companies' interest in this case flows from their right, as economic units doing business

throughout the United States and under its Constitution, to have their dealings with foreign countries governed by a single foreign policy—that of the federal government.

Permitting conduct on the part of states and localities like that challenged here would play hob with the ability of the ICOTT Companies to compete efficiently in the global marketplace. Indeed, it already has done so. Several leading United States-based multinational corporations that belong to ICOTT member associations have advised that they have been directly inhibited by the Massachusetts Burma Law from engaging in trade that expressly is permitted by the Federal Burma Law. One is a Fortune 50 enterprise that is active worldwide and sells a wide range of high technology products and services to state and local governments throughout the United States. This company has advised ICOTT that it has ceased all trade with Burma so that it can execute the no-trade-with-Burma certifications that are required under the Massachusetts Burma Law, and under similar statutes of other states and localities, as a precondition of doing business with those governments.

To a greater degree than some more traditional areas of economic endeavor, the high technology field is hotly competitive across national boundaries. Subjecting United States high technology companies to a host of state and local laws imposing a plethora of foreign policy and foreign commerce restrictions greatly hampers their ability to compete in the global marketplace.

The ICOTT Companies are concerned about the Massachusetts Burma Law and the sixteen or so similar state and local laws addressing relations with Burma. Of far greater concern, though, is the explosion of state and local legislation—addressing not only Burma but each new instance where a foreign government's policies are

distasteful to some Americans—that inevitably would follow a decision upholding the Massachusetts Burma Law.

For various reasons, including the competitiveness and perceived beneficial influence of American companies, the Federal Burma Law expressly permits trade between the United States and Burma. This reflects "a considered federal government decision not to impose much more rigorous economic sanctions and thereby to maintain some level of economic engagement with Burma in order to further our foreign policy objectives there." Alan P. Larson, Assistant Secretary for Economic and Business Affairs, U.S. Dep't of State, *State and Local Sanctions: Remarks to the Council of State Governments*, at 3-4 (Dec. 8, 1998); *see* 142 Cong. Rec. S8751 (daily ed. July 25, 1996) (Sen. Bond) ("U.S. firms are the ones on the ground who can help spread American values"); Roger Thurow, *South Africans Who Fought for Sanctions Now Scrap for Investors*, WALL ST. J., Feb. 11, 2000, at 1.

If the concept of federal control of foreign affairs and foreign commerce means anything, it is that state and local governments cannot unilaterally rewrite the foreign policy of the United States to suit themselves, lest we have not one but a host of different and potentially conflicting foreign policies. Preventing such confusion was an important reason for the adoption of the Constitution.

SUMMARY OF ARGUMENT

Even before the Constitution was adopted, exclusive responsibility for the making of foreign policy and the conduct of foreign affairs was vested in the national government. The United States must be able to speak with one voice in matters of foreign policy and foreign commerce, without interference from or distraction by the

actions of states or localities. Our Constitution leaves no room for other voices. The Massachusetts Burma Law impermissibly invades the foreign policy sphere that is reserved exclusively to the federal government.

Moreover, for deliberate foreign policy reasons, the Federal Burma Law was carefully drafted to permit trade in goods, services, and technology between the United States and Burma. The Massachusetts Burma Law penalizes companies that engage in such trade and thus stands as an obstacle to the Federal Burma Law. It accordingly is preempted.

Finally, the Massachusetts Burma Law violates the dormant commerce power. Massachusetts is acting as a regulator rather than a market participant because its statute regulates activity outside the Commonwealth and outside the market in which it is participating. The Massachusetts Burma Law discriminates against those engaging in foreign commerce. Even absent the fact that trade with Burma expressly is permitted by the Federal Burma Law, the discrimination wrought by the Massachusetts Burma Law violates the dormant commerce power.

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW IMPERMISSIBLY INVADES THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY OVER FOREIGN AFFAIRS.

A. The Foreign Affairs Power of the Federal Government Excludes State and Local Activities Such as That Represented by the Massachusetts Burma Law.

Our nation's foreign policy and foreign affairs are "matters which the Constitution entrusts solely to the Federal Government," *Zschernig v. Miller*, 389 U.S. 429,

436 (1968), and the federal government's authority in this area is "not shared by the states [but] vested in the national government, exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942). A state statute that engages the state in foreign affairs (e.g., by judging the policies of foreign governments) is an impermissible intrusion into the federal sphere because of its "great potential for disruption or embarrassment," *Zschernig*, 389 U.S. at 435, its "persistent and subtle" effect upon our international relations, *id.* at 440, and its "impair[ment]" of "the effective exercise of the Nation's foreign policy." *Id.*; *see New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E.2d 963 (N.Y. 1977) (holding that states "may not launch inquiries into the righteousness of foreign law"); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (suggesting that the line of impermissible intrusion into the federal sphere is crossed where a state law targets, or is motivated by disapproval of, particular foreign nations).

In the instant case Massachusetts and the federal government happen to agree that the existing government of Burma is undemocratic and that, in the words of the court of appeals, "human rights conditions in Burma are deplorable." Pet. App. 5. But if individual states and localities can have their own foreign policies, there is significant risk that such policies will conflict with the foreign policy of the United States.

In a significant current example, the federal government has taken no position in the longtime dispute over Kashmir between India and Pakistan—two strategically vital countries that have difficult relations with one another but good relations with the United States. Indeed, in the half century since British India was partitioned, the United States carefully has avoided any hint of

favoritism while urging the parties to seek a peaceful solution of their conflicting claims. The federal government also deals regularly with these two important nations on such other sensitive issues as their recent nuclear weapons tests, trade with third countries that the United States seeks to isolate, and trade with United States enterprises. Imagine that the New York legislature decided that Pakistan is in the right and prohibited New York state agencies from purchasing from companies that do business in India. Meanwhile, the California legislature, viewing the matter differently, decided that India is in the right and forbade California agencies to buy from companies that do business in Pakistan. The possibilities for embarrassment and confusion in our national policy toward these nations are obvious and substantial. One readily can imagine the occurrence of similar schisms between the federal government and one or more states, or between different states, with respect to Chechnya's current efforts to break away from Russia—as to which the United States, while expressing concern, has taken no action favoring either side—or the campaign of Quebec separatists to free their province from Canada.

Massachusetts expressly intended to use its law to change the policy of Burma. Pet. App. 9 ("foreign policy" measure seeking "free democratic elections in Burma"). Permitting such intervention by states and localities interferes with the ability of the United States to speak with one voice on issues of foreign policy. The court of appeals reviewed the constitutional provisions relating to foreign affairs in reaching its conclusion that the Massachusetts Burma Law improperly infringes upon federal authority. Pet. App. 14-18. But even before the adoption of the Constitution—and from the moment the colonies dissolved their connection with Great Britain—the foreign affairs power was vested in the *united* states

rather than in the individual states. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936). Hence "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution," as such powers are "necessary concomitants of nationality." *Id.* at 318.

This concept also "forms an obvious and essential branch of the federal administration" under the Constitution, for "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST No. 42, at 264 (James Madison) (New Amer. Library 1961). Madison expressly included foreign commerce among the areas that were to be—and had to be—regulated solely by the federal government. *Id.* Thus the Massachusetts Burma Law represents an unconstitutional invasion of the federal government's power to conduct foreign affairs.

B. The Massachusetts Burma Law Is Preempted by the Federal Burma Law.

In addition to being invalid because it infringes upon the federal government's foreign affairs powers and responsibilities, the Massachusetts Burma Law is preempted by the Federal Burma Law. The latter statute represents the federal government's measured response to the policies and conduct of the Burmese government. The Federal Burma Law imposed several sanctions immediately while holding in reserve a prohibition upon "new investment" in Burma and expressly excluding from that prohibition sales and purchases of goods, services, and technology. What is a manufacturer to do when the federal government thus encourages (or at least permits) it to trade with a foreign nation but individual states announce that such actions will disqualify the company from selling to such states? And what message does Massachusetts's de

facto ban upon trade with Burma, where the federal government has decided *not* to ban such trade, convey to the government whose conduct the United States seeks to influence?

This Court has noted "the delicate problems of foreign relations," *United States v. Pink*, 315 U.S. 203, 229 (1942), and the fact that a state policy must yield when it "would collide with and subtract from the Federal policy," *id.* at 231. The Massachusetts Burma Law's prohibition on trade with Burma collides with and subtracts from the express federal policy of *permitting* such trade. "If state action could defeat or alter our foreign policy, serious consequences might ensue." *Id.* at 232. For that reason "[n]o state can rewrite our foreign policy to conform to its own domestic policies." *Id.* at 233. That Congress deliberately decided to steer a middle ground (i.e., by restricting investment but not trade) is a significant factor in finding that the state is precluded from establishing its own, different scheme regulating the same area. *Hines v. Davidowitz*, 312 U.S. 52 (1941). When concurrent federal and state legislation exist "in a field that affects international relations," any "concurrent state power that may exist is restricted to the *narrowest of limits.*" *Id.* at 68 (emphasis added). Moreover, where federal legislation "touches on a field," such as foreign relations, "in which the federal interest is . . . dominant[,] . . . the federal system will be assumed to preclude state laws on the same subject." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *see Hines*, 312 U.S. at 67 (holding that a state law is preempted when "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

The text of the Federal Burma Law makes plain that Congress engaged in a thoughtful effort to strike a deli-

cate balance between leaving Burma's conduct untouched and isolating Burma from the United States. That was a classic—and appropriate—exercise of the foreign affairs power that the Constitution vests exclusively in our national government.

The Massachusetts Burma Law upsets the balance struck by Congress by discouraging and punishing the same activity (trade in goods, technology, and services) that Congress expressly decided to permit. The Massachusetts enactment stands very much as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *See Hines*, 312 U.S. at 67. For this reason, among others, the Massachusetts Burma Law is preempted by the Federal Burma Law.

Massachusetts claims that this merely is an example of a state law's imposing liability over and above that imposed by federal law. Pet. Brief at 23-24. But that is impermissible where the state seeks to conduct its own foreign policy by deciding that the balance carefully struck by the federal government is unsatisfactory.

II. THE MASSACHUSETTS BURMA LAW VIOLATES THE DORMANT COMMERCE POWER.

A. Massachusetts Is Not Acting as a Market Participant and Hence Is Subject to the Dormant Commerce Power.

The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, plays a dual role in the federal system. In addition to authorizing affirmative congressional action in respect of interstate and foreign commerce, it constrains the states from taking action that threatens the values the clause was intended to serve. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949). James Madison considered

this "negative" or "dormant" aspect of the clause more important than its positive grant of power to Congress. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).

Massachusetts seeks to avoid its violation of the dormant commerce power by contending that it merely is acting as a "market participant" and implying that state purchasing ipso facto is within the market participant exception to the dormant commerce power. Pet. Brief at 25-36.[3] The Massachusetts Burma Law does precisely what this Court has held to constitute regulation rather than market participation, namely imposing, in the guise of market participation, a restriction that extends beyond the market in which the state is participating and seeks to control behavior (namely that of the Burmese government) that bears no relation to the state's market participation. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

In 1986 this Court held that a Wisconsin statute prohibiting state agencies from purchasing from companies that had violated the National Labor Relations Act (NLRA) was a regulatory—and not proprietary—action and therefore preempted by the NLRA. *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986). That is precisely what the Massachusetts Burma Law does, making it a regulatory act rather than the act of a market participant.

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[3] Massachusetts concedes, as it must, that this Court has yet to extend the market participant doctrine to the *foreign* commerce context, Pet. Brief at 26 (citing *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980)), and fails to mention that the Court has declined to extend the market participant exception to such other restrictions on state authority as the Privileges and Immunities Clause, *United Bldg. & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984).

B. The Massachusetts Burma Law Discriminates Against Foreign Commerce and Hence Cannot Stand.

Even where the federal government has taken no action in a particular area, there is a "virtual *per se* rule of invalidity" where a state discriminates against interstate or foreign commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).[4] By this measure as well as those discussed above, the Massachusetts Burma Law is unconstitutional. A vendor who sells his wares only in Massachusetts is not penalized, while a vendor who would sell to Massachusetts as well as in Burma suffers a state-mandated ten percent addition to its bids for sales to Massachusetts state agencies. *See Healy v. Beer Institute*, 491 U.S. 324, 340-41 (1989) (noting that state laws that discriminate against interstate commerce consistently have been held to violate the dormant commerce power).

Nor is the Massachusetts Burma Law saved by the fact that the restraint upon doing business with Burma is indirect. This Court pointed out only recently that just as a state may not tax imported goods without taxing goods made in the state, it may not tax real estate used to store imported goods without taxing real estate used to store goods made in the state. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997). Similarly, Massachusetts may not directly forbid its private citizens, or its prospective private sector vendors, from trading with Burma. Massachusetts accordingly

[4] It is a "virtual" per se rule of invalidity because facially discriminatory state regulation can survive Commerce Clause analysis in the rare instance where it passes "strict scrutiny" requiring proof that no less discriminatory alternatives exist. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Massachusetts has made no such showing here.

may not do so indirectly by penalizing those who engage in such conduct. That the Massachusetts Burma Law nominally addresses only sales to Massachusetts state agencies is irrelevant because its practical effect is to control commerce elsewhere—namely, between Burma and potential vendors to Massachusetts. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-83 (1986).

Finally, the expression of United States policy reflected in the Federal Burma Law is sufficient to trigger the "one voice" criterion of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). The federal government has a clear, measured, carefully parsed, and formally articulated policy of prohibiting certain activities (foreign aid and new investment) in respect of Burma while permitting others—specifically, trade—to proceed unhindered. The Massachusetts Burma Law punishes precisely the activity the federal government has decided to permit.

Thus the Massachusetts Burma Law is not within the market participant exception to the dormant commerce power and the law violates that restraint upon the states.

CONCLUSION

For the reasons set forth above, in the decisions below, in the respondent's brief, and in the briefs of other *amici* filed in support of the respondent, the judgment of the court of appeals, Pet. App. 74, should be affirmed.

Respectfully submitted,

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