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 *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT AND FOR AFFIRMANCE

Filed February 14, 2000

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The position of these amici is that the Constitution precludes States and localities from enacting enforceable legislation that attempts to coerce a foreign government to reform itself, whether or not the National government has taken specific action on the same subject.

For three reasons the Court should declare a "per se" rule invalidating direct involvement by State and local governments in making foreign policy through imposing such sanctions. First, in light of the longstanding and well-established principle that the Constitution gave the National government the sole power to act for the United States on foreign-policy matters, such a rule would preserve the ability of the National government to decide in a given case that taking no action, or limited action, may be the best foreign-policy response, whereas a conventional preemption analysis under Article VI of the Constitution – identifying a federal statute or some other specific action by the National government and attempting to determine if it was intended to "occupy the field" or if the State or local action under challenge is inconsistent with it – would not accomplish this salutary purpose. Second, a per se rule would minimize controversy by giving clear notice to States and localities, and to federal judges in the event of litigation, that this kind of State and local legislation is impermissible. Third, it would reduce the pressure on the Congress to keep abreast of every State and local action in the foreign-policy area and to act to override each such action believed to be contrary to the national interest.

INTEREST OF THESE AMICI[1]

These amici are among those who find the current regime in the Union of Myanmar abhorrent and deserving our full condemnation. They share with their sisters and brothers who

[1] The parties have consented to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, these amici state that no counsel for a party authored this brief in whole or in part and that no person or entity other than these amici and their counsel made any monetary contribution to the preparation or submission of this brief.

support Petitioners the view that strong measures are needed to bring about change for the better within Myanmar (which we will hereafter refer to as "Burma" for convenience). Where they differ is in believing that under our Constitution the Nation should speak with "one voice" on foreign-policy matters and that that one voice belongs to the one National government, not to fifty State governments let alone thousands of municipal governments. These amici also believe that the political branches of the National government, in addressing specific foreign-policy matters, must have at their disposal the entire range of possible actions – from engaging in "quiet diplomacy" by taking no action to imposing comprehensive sanctions, or even declaring war – and that no State or local government is entitled to select a different strategy (or even the same strategy by enacting its own measures) to address a particular foreign-policy matter. To allow such diverse approaches would hold a serious potential for embarrassing or even disrupting the efforts of the National government and for provoking adverse reactions by foreign governments that could affect the entire Nation.

These amici also believe that the Court should not impose upon the Congress the burden of keeping track of foreign-policy measures adopted by States and localities and of acting to "preempt" such activities by legislation specifically directed toward that end. Such a rule could mean that the Congress might have to enact legislation that targets a single State, or even a single city, and that declares that the State or city is being "too tough" on some foreign dictator or regime. This would place an intolerable burden on the Members of Congress.[2]

[2] These amici do not address the issues of whether the Foreign Commerce Clause invalidates the Massachusetts Burma Law or whether the Tenth Amendment or the "market participation" doctrine have any bearing on this case.

SUMMARY OF ARGUMENT

When Massachusetts enacted its 1996 procurement statute[3] (the "Massachusetts Burma Law"), which burdens companies that do business in Burma, it trespassed into a realm of exclusively federal authority. Passing this law was an unabashed exercise in foreign-policy making, a power which the Federalist Papers and the decisions of this Court clearly indicate is vested exclusively in the political branches of the National government by the Constitution.

Since the time the current regime took control in Burma in 1988, the Congress and the Executive Branch have weighed the various foreign-policy options before them and selected a carefully crafted, incremental approach to putting pressure on the Burmese government. In formulating the appropriate response to the problems in Burma, an important concern to the National government has been garnering multilateral support for actions before taking measures like imposing sanctions that may not only be ineffective without broad support but which may anger our trading partners if the sanctions lack the potential for such support. Neither before nor after passage of the Massachusetts Burma Law have the National political branches implemented sanctions as far reaching as the procurement ban contemplated by the Massachusetts law.

While the conflict between the Massachusetts approach and the National approach highlights the problems posed when States and localities engage in foreign-policy making, in deciding the case now before it this Court need not determine the contours of this Nation's foreign policy vis-à-vis Burma and then hold the resulting image up against the Massachusetts law, attempting to see where the State law differs from or interferes with the National policy. Instead, this Court can simply choose to declare the type of foreign-policy making in which Massachusetts has engaged, the application of sanctions against foreign governments, to be a per se violation of the Constitution as an infringement of the exclusively

[3] Act of June 25, 1996, Chapter 130, § 1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, ch. 7 §§ 22G-22M.

federal power over foreign affairs. Such a per se rule would protect the prerogative of the Congress and the Executive Branch to select a specific course of action in response to a given foreign-policy issue, even if that course is non-action. Furthermore, resorting to a preemption analysis in this context would unnecessarily require judges in future cases to make difficult and fact-intensive judgments about foreign policy as well as the intent and content of National, State, and local laws.

As one of the actors imbued with the power to craft this Nation's foreign policy, the Congress should not be required to expressly preempt sanctions imposed by States and localities. Whether or not the Congress acts in response to a particular foreign-policy issue and whether or not in so doing it adopts express preemption legislation, such intrusions by States and localities are forbidden by the Constitution. An express preemption requirement would not only place an intolerable burden on the Congress to monitor and respond to actions taken by thousands of State and municipal actors, but would also prove politically improvident. By declaring a per se rule invalidating the Massachusetts Burma Law, this Court would be respecting the structure and original intent of the Constitution and would announce a rule of law that would establish a clear line for political actors as well as judges to follow.

ARGUMENT

It is important to be clear about exactly what kind of State or local legislation is at issue here. (1) It is enforceable, and thus it does not include resolutions that simply express a legislature's opinion about a subject. (2) It imposes significant disadvantages on a particular foreign country, either directly or by prohibiting firms or individuals from doing business in or with that country, or burdening them if they do so.[4] Such legislation is foreign-policy

[4] Selective investment measures by which a State decides not to invest State pension plan monies or the like in funds or entities engaged in certain types of business or involved in a particular country are not at issue in this case. *See Board of Trustees of the Employees' Retirement* (...continued)

legislation, *i.e.*, it seeks to change the government or the policies of the government of a foreign country by depriving that country of economic opportunities. We refer to this type of legislation as "sanctions" legislation.[5]

The Massachusetts Burma Law is just such legislation. It severely restricts companies that do business in Burma from selling goods or services to the State. If a company wishes to do business with Massachusetts and is not within one of the exceptions in the State law, the company must forego doing business in Burma – as several companies have in fact done

System of Baltimore v. Mayor of Baltimore City, 562 A.2d 720 (Md. 1989). The case now before the Court involves procurement, not investment. In *Wisconsin Dept of Indus., Labor and Human Relations v. Gould,* 475 U.S. 282 (1986), this Court held that, while private purchasers may boycott certain providers because of activities they find objectionable, States are not necessarily entitled to do so.

[5] This definition does not involve an inquiry into subjective intent. It need not rest, for example, on examination of legislative purpose not expressed on the face of a bill. In the case of the Massachusetts Burma Law, aside from the glaring indications from its sponsors and supporters that it was intended as a foreign-policy measure, the very character and structure of the law indicate that it is such. The Massachusetts law severely limits the ability of entities that conduct business in Burma to serve as contractors for the State. Similar contractor disqualification provisions have been employed by the National government as foreign-policy measures in various sanctions programs. *See, e.g.*, Iran and Libya Sanctions Act of 1996, 50 U.S.C.A. § 1701 note (1999) (disqualifying contractors that invest in the petroleum sector in Iran or Libya or provide certain items to these countries); 22 U.S.C. § 2797b (1994) (disqualifying contractors that contribute to missile proliferation); 50 U.S.C. App. § 2410c (1994) and 22 U.S.C. § 2798 (1994) (disqualifying contractors that contribute to chemical or biological weapons proliferation); 22 U.S.C.A. § 6301 note (1999) (disqualifying contractors that contribute to nuclear weapons proliferation); Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, 106 Stat. 2571, amended by Pub. L. No. 104-106, 110 Stat. 494, 50 U.S.C.A. § 1701 note (1999) (disqualifying contractors that contribute to weapons proliferation or development in Iran or Iraq); Exec. Order No. 13094, 63 Fed. Reg. 40803 (1998) (disqualifying contractors that contribute to the proliferation of weapons of mass destruction).

specifically in response to the Massachusetts law. This law is intended to force the Burmese regime to modify its behavior in response to such withdrawals. It has nothing to do with making more efficient use of the State's funds or any other manifestation of the police power traditionally enjoyed by the States. Instead, it is an exercise in foreign policy, pure and simple.[6]

These amici urge the Court to declare this kind of State or local legislation per se unconstitutional on the ground that formulating and implementing the foreign policy of the United States is an exclusive power of the political branches of the National government, regardless of if or how that power has been exercised.

[6] Then-Governor William Weld, who signed the procurement bill into law, reportedly characterized the measures contained in the Burma law as "Massachusetts foreign policy. . . ." Frank Phillips, *State, U.S. Officials Discuss Burma Sanctions Bill*, Boston Globe (Apr. 16, 1997), at E6. The sponsor of the bill, State Representative Byron Rushing, introduced the bill to fellow Massachusetts legislators with the following comment: "The Commonwealth has a history of assisting fledgling, democratic movements throughout the world. Burma calls on our support now. . . . Continued pressure from Massachusetts is necessary to vigorously combat well-documented repression and intolerance in Burma." Letter from Rep. Byron Rushing to Rep. Christopher Hodgkins and Senator Warren Tolman, Comm. on State Admin. (Feb. 28, 1995) (quoted in Daniel M. Price and John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 Harv. Int'l. L. J. 443, 462 (1998)). As Governor Weld was preparing to sign the bill into law, Representative Rushing announced that the signature would "'[bring] state government into the international movement to support democracy in Burma.'" Frank Phillips, *Weld Expected to Sign Bill to Avoid Firms with Burma Ties*, Boston Globe (June 21, 1996), at 30. When Apple Computers pulled out of Burma and cited the Massachusetts law as the reason, Governor Weld highlighted the statute's intent to change behavior outside of the State by noting: "'that's exactly what it's meant to do. '" Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, Boston Globe (Oct. 4, 1996), at B6.

I. THE CONSTITUTION GIVES THE NATIONAL GOVERNMENT EXCLUSIVE AUTHORITY TO SET AND CONDUCT FOREIGN POLICY.

Petitioners and the congressional amici who have filed in their support assert that the National government's exclusive authority over the foreign relations of the United States is limited to those specific foreign-relations topics identified in the Constitution. We disagree, and we adopt the argument of Respondent on this point. Excerpts from the Federalist Papers, various decisions of this Court and other sources emphasize the longstanding nature of the principle that federal exclusivity in the field of foreign affairs is not limited as Petitioners assert.

The Framers of the Constitution clearly indicated that the National government was intended to have exclusive power over foreign affairs, broadly defined. James Madison encapsulated this viewpoint in declaring, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Federalist No. 42. Indeed, one of the driving forces behind the Constitution was the desire to remedy the infirmities of the Articles of Confederation, among which was "the power of any indiscreet member to embroil the Confederacy with foreign nations." *Id.* By centralizing the power to conduct all foreign policy in the National government, the Constitution was designed to protect the Nation as a whole against this danger posed by the conduct of foreign policy by individual States. As Alexander Hamilton explained, "the peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." Federalist No. 80 (explaining the reason for federal jurisdiction over certain judicial matters).

This Court has emphatically supported and echoed the words of the Framers. "[I]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation. . . ." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840) (plurality).[7] In its decisions, this Court has

[7] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (noting that the Constitution expresses "concern for uniformity in (...continued)

A. The History of Steps Taken By the National Government With Regard To the Problems in Burma Illustrates the Wide Variety of Foreign-Policy Responses That Can Be Employed To Address a Specific Foreign-Policy Issue.

The facts regarding U.S. policy toward Burma illustrate that applying a per se rule rather than a conventional preemption analysis would protect the prerogative of the National government to decide when and to what extent to employ a specific foreign-policy response: silence or non-action, graduated actions, coordination with allies, and the like.

In September of 1988 the Burmese army staged a coup and took control of the government. They created a council – the State Law and Order Restoration Council ("SLORC") – to govern the country. Severe repression of the people of Burma followed. Thousands of people were arrested for attending demonstrations protesting the oppressive policies of the SLORC. In June of 1989 the SLORC arrested Aung San Suu Kyi, a young woman who had become a leader in the protest movement. Two years later she would win the Nobel Peace Prize, but she could not accept it in person because she was confined to her home, which was surrounded by barbed wire and troops.

The United States began pressing the SLORC to mend its ways almost immediately after it was created. Beginning in 1988, the United States has maintained an embargo on the export of arms to Burma. *See, e.g., U.S. Policy Toward Burma*, U.S. Dept. of State, Bureau for East Asian and Pacific Affairs Press Release *in* U.S. Dept. of State Dispatch (Apr. 13, 1992). The following February President Bush determined that Burma, by virtue of its lack of cooperation and ineffective action in regard to narcotics control, did not meet the standards for certification of major narcotics source and transit countries under certain legislative initiatives;[9]

[9] *See* Exec. Order No. 89-11, Certifications for Narcotics Source and Transit Countries, 54 Fed. Reg. 9413 (Feb. 28, 1989). In making this determination, the President acted under the authority granted to him by the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (...continued)

this resulted in denial of bilateral assistance and opposition to multilateral development assistance to Burma.[10] Later that year the Congress called upon all nations to withhold foreign assistance from Burma. *See* S. Con. Res. 61, 101st Cong. (1989).

Federal trade sanctions on Burma began to be considered in 1989 and 1990 with the introduction of legislation prohibiting the importation of Burmese products such as teak and fish, *see* H.R. 2578, 101st Cong. (1989); S. 822, 101st Cong (1990), but these measures were not enacted. In April 1989, President Bush took action in the trade realm by suspending Burma's benefits under the Generalized System of Preferences because of the SLORC's failure to recognize international standards for workers' rights. Memorandum on Amendments to the Generalized System of Preferences, 25 Weekly Comp. Pres. Doc. 547 (Apr. 13, 1989).

The following year the Congress gave its initial approval to the concept of sanctions directed at Burma – long before Massachusetts did. It authorized imposition of sanctions if the President made certain specific determinations. It also, however, directed the President to "confer with other industrialized democracies in order to reach cooperative agreements to impose sanctions against Burma." Customs and Trade Act of 1990, Pub. L. No. 101-382 § 138 (codified as amended in scattered sections of 19 U.S.C.).

(codified as amended at 22 U.S.C. §2291(h)(2)(A)(i)) (repealed by Pub. L. 102-583 § 6(b)(2), 106 Stat. 4392 (1992)). President Bush made this same determination in regard to Burma in 1990, 1991, and 1992. *See* Pres. Determ. No. 90-12, 55 Fed. Reg. 10597 (Feb. 28, 1990); Pres. Determ. No. 91-22, 56 Fed. Reg. 10773 (Mar. 1, 1991); Pres. Determ. No. 92-18, 57 Fed. Reg. 8571 (Feb. 28, 1992). President Clinton continued Burma's non-certification under his Administration. *See* Pres. Determ. No. 93-18, 58 Fed. Reg. 19033, (Mar. 31, 1993); Pres. Determ. No. 94-22, 59 Fed. Reg. 17231 (Apr. 1, 1994); Pres. Determ. No. 95-15, 60 Fed. Reg. 12859 (Feb. 28, 1995); Pres. Determ. No. 96-13, 61 Fed. Reg. 9891 (Mar. 1, 1996).

[10] *See* 22 U.S.C. §2291(h)(2)(A)(i)).

Since 1990, the Congress and the President have been addressing the refugee problems caused by the oppressive policies of the SLORC.[11] And the awarding of the 1991 Nobel Peace Prize to Aung San Suu Kyi and her continued detention provided additional occasions for the Congress and the President to put pressure on the SLORC regime.[12]

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[11] *See, e.g.*, Foreign Relations Authorization Act for 1990 and 1991, Pub. L. No. 101-246, §§ 702-703 (codified at 22 U.S.C. § 2651 note (1994)) (providing for humanitarian assistance to displaced Burmese and requiring reports from the Executive regarding U.S. immigration and refugee policies toward those who have fled Burma); Dire Emergency Supplemental Appropriations Act of 1990, Pub. L. No. 101-302, 104 Stat. 213 (1990) (providing for assistance to displaced Burmese). In July 1991, President Bush designated refugees from Burma as qualifying for assistance under the Migration and Refugee Assistance Act of 1962, 22 U.S.C. § 2601(b)(2) (1994), because he determined that "such assistance will contribute to the foreign policy interests of the United States." Memorandum on Assistance for Refugees from Tibet and Burma, 27 Weekly Comp. Pres. Doc. 510 (Apr. 25, 1991); *see also* Memorandum Authorizing Assistance to Cambodia and Burma, 28 Weekly Comp. Pres. Doc. 516 (Mar. 20, 1992); Memorandum on Refugee Assistance to Burma, 28 Weekly Comp. Pres. Doc. 1297 (July 21, 1992).

[12] *See* S. Res. 195, 102nd Cong. (1991) (congratulating Aung San Suu Kyi on receiving the Nobel Peace Prize and calling upon the Administration to take action against Burma); S. Res. 112, 103rd Cong. (1993) (seeking the release of Aung San Suu Kyi and encouraging adoption of U.N. sanctions); H.R. Res. 471, 103rd Cong. (1994) (urging the President, among other things, to seek the release of Aung San Suu Kyi, consider further sanctions, and encourage the international community to halt nonhumanitarian assistance to Burma); H.R. Res. 274, 104th Cong. (1995) (among other things, calling on the Burmese government to release political prisoners and engage in dialogue with Aung San Suu Kyi).

The Bush White House issued a statement "urg[ing] the Burmese military regime to transfer power to the duly elected civilian government and release all political prisoners. . . ." Statement by Press Secretary Fitzwater on the 1991 Nobel Peace Prize Winner Aung San Suu Kyi, 27 Weekly Comp. Pres. Doc. 1445 (Oct. 14, 1991). President Clinton also issued statements in support of Aung San Suu Kyi and urging the Burmese regime to release her and other political prisoners. *See, e.g.*, Statement by the White House Press Secretary, White House Office of (...continued)

While the initial responses by the United States to the deplorable acts of political suppression and human rights abuses carried out by the Burmese regime were to take the unilateral measures described above, with time "[i]t became clear . . . that unilateral actions were not sufficient to increase [*sic*] the military-led SLORC to institute reforms. Thus [the Administration] decided to mobilize multilateral efforts to increase pressures on the military regime" in Burma (as the Congress had urged in the Customs and Trade Act of 1990, *supra*). *U.S. Policy and the Situations in Burma and Thailand: Hearing of the Asian Affairs Subcomm. of the House Foreign Affairs Comm.*, 102nd Cong. (May 20, 1992) (statement of Richard Solomon, Assistant Secretary of State) (hereinafter "Solomon Statement"). In reflecting this new focus, the State Department, when it outlined the Administration's policy toward Burma in the spring of 1992, emphasized the manner in which U.S. initiatives fit into a multilateral approach to confronting the problems in Burma. *See U.S. Policy Toward Burma, supra.* For example, in noting that the United States cut off non-humanitarian aid to Burma, the State Department pointed out that "[w]e actively urge others to do the same and have established a consensus among the EC . . . countries, the Nordics, Australia, New Zealand, and others to withhold bilateral aid." *Id.* Similarly, in carrying out its ban on arms shipment to Burma, the Administration "worked to establish an international arms embargo on Burma" and put pressure on the European Community (now the European Union) to join in this effort. *Id.* More overtly, the United States used its sway in international affairs by "work[ing] with other interested countries to develop multilateral initiatives in the UN General Assembly and the UN Human Rights Commission" aimed at Burma. *Id.* Yet another way in which the Administration sought a multilateral solution to the Burmese

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the Press Secretary Press Release (Feb. 15, 1994) (outlining text of letter sent by President Clinton to Aung San Suu Kyi); Statement by the President on the Fifth Anniversary of the House Arrest of Aung San Suu Kyi, White House Office of the Press Secretary Press Release (July 19, 1994).

problem was by engaging in discussions about Burma with its ASEAN neighbors. *See* Solomon Statement, *supra*.

Within this delicately balanced multilateral approach consisting of Executive as well as congressional initiatives, the imposition of broad economic and trade sanctions was viewed as neither viable nor wise. Assistant Secretary Solomon testified before the House of Representatives to this effect:

> "[S]ome have argued that in addition to the steps we've already taken, further economic sanctions . . . would be helpful in bringing about reform in Burma. While I appreciate the desire to take all possible steps which might influence the SLORC, I have doubts about the effectiveness of this approach. To be meaningful, trade sanctions would have to be multilateral and comprehensive, including Burma's major trading partners. . . . [W]e have not found any international support for the imposition of trade sanctions. . . . Indeed, trade, in addition to fostering the welfare of ordinary Burmese, may be one of the ways to break down the walls of isolation which have so long separated Burma from the world." *Id.*

This policy of incrementalism, implementing measures only once they have garnered multilateral support or shown promise for doing so, has also been a hallmark of the Clinton Administration's Burma policy. In 1995, a State Department official indicated that within this context, "[a]lthough the issue of possible trade and investment embargoes is raised from time to time, we see little prospects of winning the multilateral support that would be needed to bring effective pressure on the Burmese regime." Deputy Assistant Secretary of State Thomas Hubbard, *Prospects for Progress in Burma*, Remarks at a meeting with corporate executives sponsored by the Asia Society (Mar. 8, 1995) (transcript available at the U.S. Dept. of State Geographic Bureau Electronic Research Collection).[13]

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[13] Lack of multilateral support then was one factor weighing against imposing trade or investment sanctions on Burma at that time. Another factor was the potentially destabilizing effect harsh measures against (...continued)

In September of 1995, the Administration expressed its satisfaction with the then-current mix of initiatives aimed at Burma as having struck the appropriate balance for accomplishing the foreign-policy goals of the National government. One State Department official expressed this point in noting that "[i]n order to encourage a political dialogue to begin, the Administration will maintain existing U.S. measures in place in Burma for the time being." *Developments in Burma: Hearings Before the Asia and the Pacific Subcomm., House Comm. on Int'l Relations*, 104th Cong. (Sep. 7, 1995) (statement of Kent Wiedemann, Deputy Assistant Secretary of State). He further indicated that the imposition of sanctions would be ill-timed and too harsh, especially since the regime had recently released Aung San Suu Kyi from prison:

> "[W]e believe it would be counterproductive to impose sanctions now. . . . [W]e must now allow time for a dialogue of national reconciliation to begin before seeking to raise the pressure, which could have consequences opposite to those we seek." *Id.*

He went on to address the point that multilateral support is of great importance in crafting the Nation's Burma policy, especially in regard to the possible imposition of trade and commercial sanctions:

> "We have discussed multilateral sanctions with interested countries, and there is no support for them against Burma, particularly in the wake of Aung San Suu Kyi's release. Furthermore, we are concerned that some sanctions provisions, which call for actions against third countries, might violate our obligations under the WTO. We would not want to be required to take punitive actions against

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Burma might have. Several Asian countries were concerned that "Western efforts to isolate Burma [would] leave an open field for Chinese trade and influence." Solomon Statement, *supra*. Such concerns necessarily exerted a tempering influence on U.S. policy vis-à-vis Burma.

countries on whom we need to rely to make common cause in other ways on Burma." *Id.* [14]

These concerns about the appropriateness of further sanctions directed at Burma were also reflected in congressional reluctance to enact such measures for several years after 1990.[15] Then, in 1996, the Congress considered and passed legislation that now contains what are considered the federal Burma sanctions. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 § 570, 120 Stat. 3009 (1996). The provisions of this act reflect a tailored approach to the Burmese problem. It provides for certain mandatory measures against Burma, including a ban on most bilateral assistance to Burma, opposition to multilateral assistance, and denial of entry visas to Burmese government officials.[16] Additionally, the Congress authorized the President to

[14] Instead of sanctions, the Administration took alternative steps to bring to bear multilateral pressure on Burma. In June 1996, the same month that Massachusetts enacted its procurement sanction, President Clinton appointed Ambassador William Brown and Stanley Roth as Special Envoys on Burma, their first task being to "visit several ASEAN states and Japan . . . to seek a coordinated response to ongoing developments in Burma." Special Envoys on Burma, Statement of the White House Press Secretary, White House Office of the Press Secretary Press Release (June 7, 1996).

[15] *See, e.g.*, Burma Freedom and Democracy Act of 1995, S. 1511, 104th Cong, (1995) (contemplating a possible range of mandatory and discretionary sanctions on Burma); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1996, H.R. 1868 §§ 801-803, 104th Cong. (1995) (enacted as Pub. L. No. 104-107, 110 Stat. 704 (1996) without proposed section banning new investment in Burma, government assistance to Burma, and importation of Burmese products); Burma Freedom and Democracy Act of 1995, H.R. 2892, 104th Cong. (1996) (containing proposed mandatory sanctions as well as a long list of discretionary sanctions).

[16] President Clinton went further by restricting the entrance into the United States of Burmese nationals involved in impeding Burma's democratic development. Presidential Proclamation, 32 Weekly Comp. Pres. Doc. 1957 (Oct. 3, 1996). In so doing, the President exercised his authority under the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(f) and 1185 (1994).

ban new investment (but not other trade relations) in Burma if he were to determine that the Burmese regime harmed, rearrested, or exiled Aung San Suu Kyi or "committed large-scale repression of or violence against the Democratic opposition." Additionally, this law specifically instructed the President to "seek to develop. . . a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma. . . ."

The President exercised this authority to impose discretionary sanctions upon Burma when, in April 1997, he announced his decision to ban new investment in Burma. *Investment Sanctions in Burma*, Statement by the President, White House Office of the Press Secretary Press Release (Apr. 22, 1997). The President issued an executive order to this effect the following month. *See* Exec. Order No. 13047, 62 Fed. Reg. 28301 (May 20, 1997).[17] Imposed one year after the Massachusetts law was enacted, this Executive Order specifically exempted from its coverage, as the 1997 statute required, contracts to purchase goods or services as long as such activities did not entail prohibited investment in or development of resources in Burma. *See id.* § 3.

Thus, even after the Massachusetts Burma Law was enacted, neither of the federal political branches sought to impose sanctions on private parties as far reaching as those imposed by the State.

Since 1997, the President has submitted semiannual reports to the Congress regarding implementation of the federal Burma sanctions. In these documents, the President has emphasized the importance of a multilateral focus in addressing the problems in Burma. In June 1997, the year after the Massachusetts Burma Law was passed and immediately before the European Union and Japan

[17] The President cited not only the recent congressional Burma sanctions provisions as authority for this Executive Order, but also the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.* (Supp. II 1996) and the National Emergencies Act, 50 U.S.C. § 1601 *et seq.* (1994). *Id.* Pursuant to this Executive Order, the Office of Foreign Assets Control of the Department of Treasury issued the Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (1998).

lodged complaints against that law in the WTO, the Administration stated the following in its implementation report:

> "In recent months we have forged a vigorous multilateral strategy to seek improvements in our key areas of concern. We consult about Burma regularly and at senior levels with leaders of ASEAN nations, Japan, the European Union, and other countries having major trading interests in Burma. These efforts have helped build and maintain strong international pressure on the SLORC." *Conditions in Burma and U.S. Policy Toward Burma*, U.S. State Dept. Report Submitted to Congress (June 13, 1997).[18]

The report goes on to list measures taken against Burma by the Administration and then to place these measures against a broader international background:

> "We likewise have encouraged ASEAN, Japan, the EU and other nations to take similar steps. . . . Many nations join us in our arms embargo, including European countries, Canada, Australia and Japan. The EU and Japan limit their assistance to Burma to humanitarian aid. . . . In November, at our urging, the EU and associated European states joined us in imposing a ban on visas for high-level SLORC officials and their families. In addition, the European Commission has recommended that the European Union withdraw GSP [Generalized System of Preference] trade benefits from Burma's agricultural and industrial products . . . which would bring European trade policy in line with the U.S. ban on GSP." *Id.*

It is thus clear that the National government takes quite seriously the principle of incrementalism. Under Secretary of State Stuart Eizenstat emphasized this point in arguing that sanctions should be imposed only after careful consideration and as a last resort:

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[18] Report available through U.S. State Dept. on-line electronic database of press releases <http.www.state.gov/www/regions/eap/970613_us-burma-report.html> (last updated Feb. 1, 2000).

> "Our first line of action against other countries should be to aggressively pursue all diplomatic options that are available to us. Such measures can range from the symbolic . . . to denying visas to target figures, entering into security arrangements with neighboring countries, and, as an ultimate resort, military intervention and everything in between. . . . *Economic sanctions involving restrictions on the private sector, when they are unilateral, should be considered only after these alternative prior measures have been aggressively pursued and have failed or have been judged inadequate or inappropriate.*" *How Sanctions Can Affect U.S. Policy Interests: Hearings Before House Int'l Relations Comm.*, 105th Cong. (June 3, 1998) (statement of Stuart Eizenstat, Under Secretary of State for Econ., Bus., and Agric. Affairs) (emphasis supplied).

Another senior State Department official did not hesitate to condemn the Massachusetts Burma Law, which flew in the face of the established approach to Burma, as a hindrance to the conduct of U.S. foreign policy and a disruption to the approach to Burma taken by the National government:

> "Congress and the President carefully tailored the precise measures the federal government would impose in seeking to influence change in Burma. Those measures included diplomatic and economic actions, including a Presidential executive order banning new investment in Burma by U.S. persons. *These measures reflect 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.*" Assistant Secretary of State Alan P. Larson, *State and Local Sanctions*, Remarks to the Council of State Governments (Dec. 8, 1998) (emphasis supplied).[19]

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[19] Transcript available on the Organization for International Investment web site <http:\\ofii.com/resources/legis> (last updated Feb. 3, 2000).

The Assistant Secretary went on to declare that the Massachusetts procurement statute "has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal." *Id.*[20]

B. A Per Se Rule Would Protect the National Government's Ability To Choose Among All of the Available Options In Response To a Specific Foreign-Policy Issue.

In most of the cases in which the Court has held State or local foreign-relations legislation unconstitutional, the existence of a federal statute directed to the same issue led the Court to apply a "preemption analysis" under Article VI. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), a three-judge District Court had declared Pennsylvania's Alien Registration Act unconstitutional on two grounds, one being that the Act "encroached upon legislative powers constitutionally vested in the federal government." 312 U.S. at 60. By the time the case reached this Court, however, the Congress had enacted legislation similar to the Pennsylvania law, and the Court decided that it must "pass upon the state Act in light of the Congressional Act." *Id.* The Court characterized the federal Act as "a complete scheme of regulation [which] the states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement . . . or enforce additional or auxiliary regulations." *Id.* at 66-67. After carefully reviewing the two enactments, the Court held that the State law undermined the federal law and therefore could not stand.

As shown in the preceding section of this brief, at various times since 1988 the political branches of the National government have given attention to the dreadful situation in Burma and have made a series of judgments about what the policy of the United States should be with regard to that situation. As the Burma case

[20] It is notable that the Massachusetts law affects foreign corporations as well as those domiciled in the United States.

illustrates, at times, non-action or limited action has been a carefully selected foreign-policy choice resulting from such judgments. Moreover, the National government has paid close attention to consensus-building in formulating policy toward Burma, and to this end it has avoided adopting measures that would be unpalatable to other countries.

If States and localities are free to adopt sanctions legislation until the Congress enacts federal legislation and either "occupies the field" or specifically preempts State or local initiatives, the foreign policy of the Nation would be in complete disarray. The power to act would repose not in Washington but in fifty State capitals and in thousands of city and county councils. Moreover, when the federal response is to take only limited action – such as imposition of an arms embargo – or to take diplomatic steps in close cooperation with allies, it would be extremely difficult for a federal judge to conclude that these steps represented the "complete scheme of regulation" that is required before a State scheme is preempted under *Hines*. *Id.* at 66.[21] If States and localities had enacted sweeping Burma sanctions legislation in 1989 or 1990, for example, the foreign policy of the United States would suddenly have become very different from the graduated approach which the Congress and the President judged appropriate. This would be an unacceptable result.

In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court struck down an Oregon probate statute as an unconstitutional intrusion into the exclusively federal field of foreign relations even though there was no federal statute (or Executive Order) covering the subject of the State law. The Court noted that laws regarding disposition of estates fell within the traditional power of the States. This particular statute, however, introduced a different element, for it required State probate courts to engage in minute examination of foreign governments' policies and laws with regard to confiscation of property. This, the Court held, represented "an intrusion by the

[21] This difficulty is especially pronounced in the case of an arms embargo, which often, as this one did, takes the form of discretionary denial of export licenses.

State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432. Although there are situations in which a State's laws might, permissibly, have "'some incidental or indirect effect in foreign countries,'" in this case State courts "launched inquiries into the type of governments that obtain in particular foreign nations" and other such aspects of the foreign relations of the United States, which is beyond their power under the Constitution. *Id.* at 434 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)). Such activities have a "great potential for disruption or embarrassment," *id.* at 435, of the United States and "may well adversely affect the power of the central government to deal with those problems." *Id.* at 441.

Justice Stewart, joined by Justice Brennan, would have gone further. Whether the State law "unduly interferes" with the conduct of foreign relations by the National government is "not the point." Instead, he wrote, "We deal here with the basic allocation of power between the State and the Nation." *Id.* at 443 (Stewart, J., concurring).

In other words, *Zschernig* stands for the proposition that, even in the absence of federal legislation or Executive action on the issue at hand, a State's "intrusion into the field of foreign affairs" is at least sometimes prohibited by the Constitution.

In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court considered a California measure which imposed criminal sanctions upon employers who knowingly employed aliens not lawfully admitted to residence in the United States *if* such employment would have had an adverse effect on workers who were lawful residents. The Court determined that the California measure merely *touched on* immigration matters and thus applied a preemption analysis in examining its validity. If, however, the State measure had constituted actual regulation of immigration, which is "unquestionably exclusively a federal power," *id.* at 355, it would have been "constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." *Id.* at 356. The Court thus expanded *Zschernig* by indicating that the Constitution itself proscribes conduct by States that trespasses into an exclusively federal realm, regardless of the

presence or absence of federal measures within that realm or any interference or disruption thereof.

In *Zschernig* it was necessary for the Court to examine the manner in which the Oregon statute at issue there was actually applied in practice, because (a) the statute was within the traditional area of State police power and (b) whether or not it intruded into the exclusive foreign-policy making realm of the National government was not evident on the face of the statute. In the case of sanctions legislation, however, no such detailed analysis is necessary because (a) imposing sanctions against foreign governments or entities who engage in otherwise lawful activity with such governments is not a traditional exercise of a State's police powers and (b) a State or locality imposing sanctions of the sort Massachusetts enacted is necessarily and obviously intruding into the exclusively federal realm of foreign-policy making, regardless of how such sanctions operate or are implemented.

It follows that State and local sanctions laws should be declared per se unconstitutional. Such a per se rule would protect the ability of the political branches of the National government to decide precisely what level of response, *if any*, to a given foreign-policy situation would best serve the Nation's interests. Otherwise the National government would be severely handicapped in its ability to follow a process of gradualism, beginning with mild measures and quiet diplomacy and escalating or scaling back as circumstances warrant, and to coordinate foreign-policy responses with our allies.

C. A Per Se Rule Would Also Relieve Federal Judges of the Need to Discern the Contours of the Nation's Foreign Policy With Regard To the Subject of the Particular State or Local Law Under Review, a Task They Are Not Well Suited To Carry Out.

As already shown, the *Hines* preemption approach requires a federal judge to discern the contours of the National law and the policy it represents and then to make a judgment about whether the State law unduly interferes with the National program. The Court

acknowledged that it was imposing a relatively standardless burden on federal judges:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference."

The Court continued:

> "But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. *Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*" 312 U.S. at 67 (emphasis supplied).[22]

This required, the Court said, examination of "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law" to determine "whether supreme federal enactments preclude enforcement of state laws on the same subject." *Id.* at 70.

Most federal judges have little or no experience with foreign-policy matters, and there is no readily available mechanism for rectifying this deficiency. Judges have available to them none of the wide array of information sources on which the National political branches rely when they formulate foreign policy. These

[22] In a footnote at this point the Court quoted from *Savage v. Jones*, 225 U.S. 501, 533 (1912), in part as follows:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed." 312 U.S. at 67 n.20.

include of course the expertise of institutional actors such as the State Department with its embassies in other countries and the office of the U.S. Trade Representative. In addition, both the Congress and the President benefit from the input of numerous military, economic, and trade advisers in the form of congressional staff, policy analysts, and scholars and industry leaders who act as consultants and testify before and provide assistance to congressional committees.[23]

But the unavailability of information is not the sole obstacle to accurate judicial determination of the precise contours of the National foreign policy. In developing specific foreign-policy responses, lawmakers normally balance a broad spectrum of interests, local, regional and national, encompassing subjects ranging from national security to market and currency stability to human rights. Such policy making also requires orchestration such that each measure taken in regard to a particular foreign nation fits into a comprehensive approach to relations with that country and the region of which it is part. Foreign policy also takes into account U.S. multilateral and bilateral commitments to a variety of instruments, accords, agreements, and treaties, as well as less formal political commitments and informal understandings with the governments of other nations. Judges, not to mention State legislators and local leaders, lack the proper perspective to perform such a task.

Moreover, judges lack political accountability in regard to foreign affairs. There is a longstanding tradition that the judiciary defers to "the political branches in matters of foreign policy." *Regan v. Wald*, 468 U.S. 222, 242 (1985). Federal courts do not

[23] Seeking advice from the then-current Administration may not be very helpful to a court. In *Zschernig* the Administration advised the court that the Oregon statute under review did not interfere with the conduct of foreign relations, 389 U.S. at 434, but the Court struck the statute down anyway. Justice Stewart, in his concurring opinion, said that whether State law "unduly interferes" with foreign relations "is not the point." Instead, he stated, the issue was "the basic allocation of power between the States and the Nation," which cannot be resolved by the "shifting winds at the State Department." *Id.* at 443 (Stewart, J., concurring).

conduct "independent foreign policy analysis," for such matters "'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Id.* (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). *See also Sabbatino*, 376 U.S. at 412.[24]

A per se rule would avoid the need for precise evaluations of foreign policy by federal judges. Such a rule would define the circumstances under which the State or local enactment could not stand, without requiring a detailed analysis of federal foreign policy and the effect of the State's law on it. The judge's task would be at an end if she determined that the State or local legislation (1) was enforceable, and (2) imposed, either directly or indirectly, significant disadvantages on a foreign country in seeking to change the government or policies of the government of that country.[25] If that determination is made – and it certainly would be in a case like this one – the State or local enactment would be unconstitutional.

D. The Congress Should Not Be Required To Adopt Express Preemption Legislation In Order To Prevent States and Localities from Interfering With the Conduct of the Nation's Foreign Policy.

Petitioners contend that State and local foreign-policy legislation is preempted only when the Congress has expressly acted to achieve that result. Thus, Petitioners say, because the Congress was aware of the Massachusetts Burma law when it enacted the federal Burma sanctions legislation, and because the Congress nonetheless did not explicitly preempt the Massachusetts law, the Congress must have intended the Massachusetts law to stand alongside the federal program. (Pet. Br. at 15-17, 19-21.)

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[24] It would be completely contrary to this longstanding principle of deference for courts to search the congressional record for evidence that the Congress intended to "approve" a State or local foreign-policy initiative, as is suggested by congressional amici who support Petitioners. (Cong. Br. Supp. Pet. at 7-11.)

[25] *See* note 5, *supra*.

These amici earnestly request that the Court not adopt such an "express preemption" requirement. As set forth above, the political branches must be free to decide that the most appropriate foreign-policy response in a given case is to take no formal action. Acceptance of Petitioners' view, however, would mean (1) that the Congress would need to make itself aware of the purported foreign-policy making of thousands of State and municipal governments and (2) that once the Congress learned of such programs and wished them displaced, the following would need to happen: A bill would need to be introduced, committee hearings would need to be held, debate would need to occur in both Houses, and the bill would need to command majorities in both Houses and be signed by the President. Yet if it is the judgment of the political branches that "quiet diplomacy" was the appropriate approach to the problem at hand, such a public legislative process would roundly defeat that goal. Moreover, there would be intolerable political pressure on the Congress not to direct legislation at specific States and localities and not to announce through legislation that their "tough" approach would not be appropriate.

Congressional failure to include preemption language in the federal 1996 Burma sanctions legislation can under no circumstances be deemed to be "approval" of the Massachusetts Burma Law, as Petitioners and their congressional supporters urge. (Pet. Br. at 14-16, 19-21; Cong. Br. Supp. Pet. at 9.) In arguing that the National government implicitly condoned the Massachusetts law, Petitioners rely heavily on the case of *Barclays Bank PLC v. Franchise Tax Board of Calif.*, 512 U.S. 298 (1994). There the Court upheld California's formula for determining how much of a multinational corporation's income was taxable by California. The Court's decision in *Barclays*, however, rests on an interpretation of the Commerce Clause, not on the foreign-policy authority of the National government. We adopt the position of Respondent in regard to the relevance of *Barclays* to the case now before the Court and add only the following observation:

Reliance on *Barclays* is also misplaced because *Barclays* is a tax case. Courts and commentators have often viewed tax cases as existing within a distinct legal subset because of the complexity and special character of the field. The analysis in *Barclays* shows that review of tax statutes raises concerns not present in other

Commerce Clause inquiries and indeed necessitates a unique legal framework. Specifically, the Court in *Barclays* indicated that a "state tax on . . . commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax: (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State." *Barclays*, 512 U.S. at 310-11 (citation omitted). In the case of tax measures affecting foreign commerce, the Court noted that two additional factors must be considered: the risk of multiple taxation and interference with the ability of the National government to "speak with one voice" in foreign affairs. *Id.* at 311; *see Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979). These factors comprise a test quite different from that applied to State regulation of foreign commerce through non-tax measures.

It was contended that the California tax at issue in *Barclays* was unconstitutional because, *inter alia*, it prevented the National government from "speaking with one voice." The Court rejected this argument, holding that States are free to tax businesses that operate within their borders, for the Commerce Clause "does not shield interstate (or foreign) commerce from 'its fair share of the state tax burden.'" 512 U.S. at 310 (quoting *Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978)). In this area of taxation of multinational businesses, the Court held, it is the Congress, not the courts (or the Executive), that must decide whether it is necessary for the Nation to speak with "one voice," and the Congress had not spoken to the precise issue involved in the case. By not speaking, the Congress essentially determined that national uniformity was not required in regard to the tax accounting method to be applied in taxing multinational businesses. The Court could find no reason in the Constitution to impose a burden of speaking on its sister branch of government.

Here, too, the Congress should not be required to act. The consequence of congressional non-action in regard to foreign policy, however, is quite different from the tax realm. In the tax realm and perhaps in other areas of commerce as well, it is up to the Congress to decide *whether or not* to speak with one voice. In the case of foreign policy, however, the Constitution *requires* that

the National government speak with one voice. Whether the Congress or the Executive exercise this prerogative vociferously through strong measures such as sanctions, quietly through limited diplomatic approaches, or simply by silence, the result is the same. Whether the Congress "speaks" through action or through silence does not affect the constitutional underpinning that States may not engage in foreign-policy making. Unlike the need to impose taxes, States have no inherent need to enact foreign-policy legislation, and thus to deny them that power does not leave them adrift. The citizens of the States are, after all, represented in the National government, where their representatives are free to determine *collectively* the foreign-policy response that would be most suitable in regard to Burma and other matters of foreign affairs. They should not, however, be permitted to "go it alone."

CONCLUSION

For the reasons set forth herein, the Court should adopt the per se rule on unconstitutionality for State and local sanctions legislation and under it declare the Massachusetts Burma Law unconstitutional. The decision below should be affirmed.

Respectfully submitted,

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