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 FOR GERALD R. FORD, LEE H. HAMILTON, CARLA A. HILLS, AND CERTAIN OTHER FORMER U.S. GOVERNMENT OFFICIALS AS AMICI CURIAE SUPPORTING RESPONDENT

Filed February 14, 2000

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v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

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

BRIEF FOR GERALD R. FORD, LEE H. HAMILTON, CARLA A. HILLS, AND CERTAIN OTHER FORMER U.S. GOVERNMENT OFFICIALS AS AMICI CURIAE SUPPORTING RESPONDENT

The former senior U.S. government officials listed and described in the Appendix ("Former U.S. Government Officials") respectfully submit this brief as amici curiae supporting the respondent, the National Foreign Trade Council.[1] Because they believe that state action like the Massachusetts Burma Law interferes with the conduct of effective foreign policy by the United States, the Former U.S. Government Officials urge the Court to affirm the First Circuit in this case.

[1] The parties consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. Counsel for a party did not write any part of this brief. No one other than the Former U.S. Government Officials and their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE AMICI CURIAE

As indicated in the brief biographies in the Appendix to this brief, the Former U.S. Government Officials held high level foreign policy positions in earlier Administrations or Congresses. Those positions include President, Secretary of State, Secretary of Defense, Secretary of the Treasury, Secretary of Commerce, U.S. Trade Representative, National Security Adviser, and Member of Congress with significant foreign relations responsibilities. In those capacities, the Former U.S. Government Officials had the duty to help formulate and implement the foreign, national security, and international trade policies of the United States and represent the United States in its relations with foreign countries and international organizations.

Each of the Former U.S. Government Officials has a significant interest in the way the Court resolves this case. They understand the complexity of conducting effective international relations and the practical realities of and constraints on that task. Based on their experience, they believe that permitting state or local governments to affect U.S. foreign relations by taking actions such as the Massachusetts Burma Law would considerably complicate and harm the ability of federal officials to conduct effective foreign policy. Because they no longer hold official positions with the U.S. government, they have greater latitude to express these views to the Court free from domestic political considerations. Accordingly, for the benefit of current and future U.S. foreign policy, national security, and international trade officials and the conduct of U.S. foreign policy, the Former U.S. Government Officials want to ensure that the Court resolves the issues in this case

with an understanding of the practical considerations underlying their views.[2]

SUMMARY OF ARGUMENT

The Court should affirm the court below because state and local trade sanctions significantly impede the ability of the federal government to conduct the foreign policy of the United States. They cause conflicts and tensions with foreign countries, provoking responses from those countries that, as a matter of international law and as a practical matter, require the attention of the President and federal foreign policy officials. The need for national officials to attend to the disruption caused by state and local action interferes with higher priorities on the U.S. foreign policy agenda.

State and local trade sanctions confuse foreign countries about the foreign policy of the United States by diluting the uniformity and clarity of the nation's position. Confusion about the U.S. policy hampers the ability of national officials to build coalitions with other nations and to bargain with foreign countries effectively, especially in international trade negotiations.

Finally, state and local trade sanctions harm national foreign policy because state officials lack sufficient information to make informed foreign policy judgments. The federal government has access to considerable information about foreign countries and the interests of the entire United States. State and local decisionmakers do not have access to this full range of information, do not have a national perspective, and therefore take actions inconsistent with the carefully balanced national policy.

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[2] The views expressed by the Former U.S. Government Officials are their own and are not necessarily those of firms, clients, or others related to them.

ARGUMENT

STATE AND LOCAL TRADE SANCTIONS SIGNIFICANTLY IMPEDE THE ABILITY OF THE FEDERAL GOVERNMENT TO CONDUCT THE FOREIGN POLICY OF THE UNITED STATES.

The experiences of the Former U.S. Government Officials in senior foreign policy, national security, and international trade positions of the federal government firmly convince them that allowing state and municipal governments in the United States to adopt trade sanctions aimed at foreign countries ("state and local trade sanctions") would materially interfere with the ability of the national government to conduct effective international negotiations and relations. This view is based on a variety of practical considerations learned during their tenures as U.S. government officials, and the purpose of this submission is to describe those practical considerations for the Court. The purpose of this brief is not to restate the legal arguments, which the parties and other amici curiae will ably present.

Before discussing the practical ways in which state and local action interferes with U.S. international relations, the Former U.S. Government Officials need to make several introductory points to ensure a complete understanding of their position:

First, the Former U.S. Government Officials deplore the human rights record of the current regime in Burma (Myanmar). This case is not about the behavior of that government, however; it is about the proper allocation of authority between the national and state governments for the regulation of international trade and the conduct of the foreign policy of the United States.

Second, the greatest, but by no means the only, concern of the Former U.S. Government Officials is a state or local official act that has the purpose of affecting or has a persistent or substantial effect on the interests or policies of a foreign sovereign. The Massachusetts Burma Law and other state and local trade sanctions are such acts.[3] Their purpose is to create a local foreign policy. As the Petitioners' brief admits, the objective of the Massachusetts Burma Law is to cause economic damage to a foreign government and use that pressure to change the policies and practices of the government. This is the category of state and local actions the Court should address in this case.

The Former U.S. Government Officials do not believe that this case requires a rule that reaches further. They appreciate that, in today's interdependent world, almost any state action, even one of general applicability, can have an incidental or unintended effect on U.S. foreign policy or on the sovereign interests of a foreign country. International relations cover an extremely wide range of activities, from war and peace, to rules of international trade, to treatment of diplomats and the citizens of other countries. Although the occasional state action not intended to affect a foreign country can roil U.S. foreign relations,[4] identifying a workable legal standard to prevent all of those situations would be difficult and is unnecessary here.

Third, the practical concerns the Former U.S. Government Officials have about the risk of interference in U.S. foreign policy from state and local actions arise even when those actions have the same general goal as a federal policy or federal sanctions. To the extent the approach of

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[3] Thus, Zschernig v. Miller, 389 U.S. 429, 440 (1968), which invalidated an Oregon probate law that "affect[ed] international relations in a persistent and subtle way," governs this case.

[4] See, e.g., Breard v. Greene, 523 U.S. 371 (1998).

states or municipalities differs from a federal approach, even if only as a matter of tactics or emphasis, the problems described below do or can occur. Similarly, the concerns arise even when the Constitution or a federal statute does not explicitly prohibit or preempt the state action.

We now turn to our description of the practical ways in which state and local trade sanctions disrupt the ability of the federal government to conduct an effective foreign policy.

A. State and Local Trade Sanctions Cause Conflicts with Foreign Nations That U.S. Officials Must Address to the Detriment of Higher Foreign Policy Priorities.

State and local trade sanctions and other foreign policy actions cause conflict and tensions with foreign countries. The President and federal foreign policy officials must address these issues to the detriment of higher priorities on the foreign policy agenda.

Sanctions offend the targeted foreign country and, when the trading restrictions apply to the companies of friendly foreign countries, as the Massachusetts Burma Law does, irritate our trading partners. When targeted countries are offended or trading partners are irritated, they direct responses to the national government.

Federal officials must deal with foreign reactions to state and local foreign policy measures because, both as a legal and a practical matter, the federal government and federal officials are accountable to foreign governments for the behavior of state governments. Under international law, a nation with subunits of states or provinces is responsible to other nations for the conduct of the subunits.[5] "The

[5] Restatement (Third) of the Foreign Relations Law of the United States § 207 (1987) ("Third Restatement"); Ian Brownlie, Principles of Public International Law 449 (4th ed. 1990).

United States has consistently accepted international responsibility for actions or omissions of its constituent States and has insisted upon similar responsibility on the part of the national governments of other federal states."[6]

As a practical matter, federal officials also are the ones who must deal with the foreign reactions because the responses of foreign governments nearly always affect the nation as a whole or the relations between senior federal officials and their foreign counterparts. Foreign responses range from diplomatic protests that complicate existing negotiations on other issues, to formal charges that a state's action violated international law or agreements, to retaliatory measures that affect the entire United States and not just the offending state.[7] In extreme cases, the state action could lead to hostilities between the United States and a foreign power.

Efforts to address these responses significantly interfere with the existing U.S. foreign policy agenda. State foreign policy actions exact a high price from the nation in distractions, compromises, and lost opportunities:

> Too often we find ourselves answering criticism about certain state and local actions rather than focussing on the poor behavior of the object of those actions. . . . Measures by states that transgress our international

[6] Third Restatement § 207, Reporters' Note 3 (citing authorities).

[7] See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 450 (1979) (retaliation of foreign nations "of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer"); Chy Lung v. Freeman, 92 U.S. 275, 279 (1876) (international claims are made on the United States, not an offending state, and, in the case of war or suspension of relations, the entire United States would suffer); Peter J. Spiro, Symposium, "Foreign Relations Federalism," 70 U. Colo. L. Rev. 1223, 1252 n.130 (1999).

obligations embroil us in disputes that could easily be avoided. Discord with our allies weakens opposition to rogue regimes and trade disputes can impair cooperation that is essential to bringing about meaningful change . . . .[8]

These concerns about foreign reactions to state action are not fanciful. The Massachusetts Burma Law has provoked many foreign protests that national officials have had to manage. For example, Japan, the European Union, and the Association of South East Asian Nations lodged objections with the State Department. Japan and the European Union later filed formal complaints against the United States in the World Trade Organization arguing that the Massachusetts law breaches a WTO agreement on government procurement.[9]

At one point, European officials told senior State Department representatives that they would not cooperate on sanctions against Burma until the Massachusetts situation was resolved.[10] Thus, the Massachusetts law actually

[8] Testimony of Deputy Assistant Secretary of State David Marchick before the Maryland House of Delegates Committee on Commerce and Government Matters (Mar. 25, 1998) <http://www.usaengage-.org/legislative/marchick.html>.

[9] See United States - Measure Affecting Government Procurement, WT/DS88/3 (Sept. 9, 1998) (European Union); United States - Measure Affecting Government Procurement, WT/DS95/3 (Sept. 8, 1998) (Japan); European Comm'n, Report on United States Barriers to Trade and Investment § 4.6, at 32 (1999) (noting that the European Union had suspended the proceedings of the WTO panel pending resolution of this case); National Foreign Trade Council v. Natsios, 181 F.3d 38, 54 (1st Cir. 1999); "A State's Foreign Policy: The Mass that Roared," The Economist, Feb. 8, 1997, at 32.

[10] Robert S. Greenberger, "States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners," Wall St. J., Apr. 1, 1998, at A20.

impaired the effectiveness of U.S. policy on Burma's human rights violations.

Relying on the national legislative process to address and preempt state or local foreign policy actions that threaten to interfere with U.S. international relations is not a solution. Senior foreign policy officials in the Executive Branch and Congress do not have the time or resources to monitor state and local initiatives, anticipate those that could disrupt U.S. foreign relations, and then, in each case, upset complex national legislative priorities to enact pre-emptive federal statutes. In addition, article I, section 10, clause 3 of the Constitution indicates a preference for Congress to act in advance to authorize a state activity in the foreign affairs area rather than for congressional action that prohibits or preempts state activity that already occurred.

B. State and Local Trade Sanctions Confuse Foreign Countries About the Foreign Policy of the United States and Detract from the Ability of the United States To Achieve Its Goals and Lead in the International Community.

State and local trade sanctions and similar international policy efforts also impede U.S. foreign relations by confusing foreign countries about the position of the United States. Thus, they detract from the ability of the United States to achieve its goals and to lead in the international community.

State foreign policy actions such as trade sanctions dilute the uniformity and clarity of the nation's stance.[11]

[11] See, e.g., Greenberger, supra note 10 (quoting a European Union trade official complaint that state and local sanctions send "conflicting signals about who determines U.S. foreign policy"); Robert E. Pierre, "Md. Bill Targeting Nigeria Stirs Ire, State Dept. Opposes Sanctions Proposal," Wash. Post, Mar. 27, 1998, at B1 (U.S. officials said that "state

They raise doubts and confusion in the minds of foreign policymakers about the U.S. position, its commitment to a particular course, and the stability of its policy. They can lead to miscalculations, possibly dangerous miscalculations, by foreign governments. They also create uncertainty about whether the U.S. officials represent all or only part of the United States.

The purpose of centralizing foreign affairs powers in the national government and particularly in the Executive Branch was in part to avoid these problems of confusion and dilution. Alexander Hamilton, when explaining the need for a single executive under the proposed Constitution, cogently identified the practical difficulties that would occur if more than one person had significant authority in areas of national concern:

> Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. ... Whenever [bitter dissensions] happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide. If they should [occur in the executive of a country], they might impede or frustrate the most important measures of the government, in the most critical emergencies of the state.[12]

Specifically in the foreign affairs arena, both this Court and academic theorists have confirmed what Hamilton viewed as the "dictates of reason and good sense."[13] The

sanctions would leave the United States sending mixed messages to foreign countries").

[12] The Federalist No. 70, at 453 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961).

[13] Id.; see also The Federalist No. 42, at 302 (James Madison) (Benjamin Fletcher Wright ed. 1961).

Court has long recognized that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."[14] Scholars have studied the institutional characteristics necessary for the successful execution of foreign policy and agree that a single, unitary decision maker is most effective.[15] Expanding the role of states and localities in international relations would be antithetical to this structure and to Hamilton's vision of an effective national executive.

Experience also confirms that, in several different ways, the potential for confusion or lack of clarity in the U.S. position and message impairs the ability of federal officials to achieve their foreign policy goals. For example, it reduces the willingness of foreign nations to align with the United States: "[S]tate sanctions often can confuse the message the United States sends and impede our ability to build coalitions to focus on the targeted regime."[16] As

[14] United States v. Pink, 315 U.S. 203, 233 (1942); see also Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (the federal government "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties," and "federal power in the field affecting foreign relations [must] be left entirely free from local interference") (emphasis added); United States v. Belmont, 301 U.S. 324, 331 (1937) (in "respect of our foreign relations generally, state lines disappear"); Board of Trustees v. United States, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power") (emphasis added); Chinese Exclusion Case, 130 U.S. 581, 606 (1889); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575-76 (1840) ("It was one of the main objects of the [C]onstitution to make us, so far as regarded our foreign relations, one people, and one nation").

[15] See John Yoo, "Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act," 20 Hastings Int'l & Comp. L. Rev. 747, 769-71 (1997) (discussing Thomas Schelling, The Strategy of Conflict (1960); Graham Allison, Essence of Decision: Explaining the Cuban Missile Crisis (1971)).

[16] Marchick, supra note 8 ("state and local sanctions may impair the

mentioned above, the Massachusetts Burma Law had exactly this effect on U.S. efforts to persuade European officials to cooperate on sanctions against Burma.

Thus, the possibility of mixed messages and differing positions is especially harmful when the United States considers the use of international trade sanctions to accomplish a foreign policy goal. The clear lesson of the last fifty years is that many countries must impose the same trade restrictions to have a realistic chance of altering the behavior of a rogue regime.[17] When trade sanctions are not multilateral, the targeted foreign country can obtain supplies or markets in other countries, and the sanctions end up hurting only the restricted U.S. businesses. Policymakers are increasingly skeptical of the effectiveness of trade sanctions imposed by the United States alone much less the far more limited ones a state or local government can adopt. Only the federal government has the foreign relations capability of seeking and obtaining the agreement of other countries to multilateral sanctions. As a result, state and local sanctions are not only ineffectual but, because they confuse the U.S. position, they also hinder the efforts of national officials to build the coalitions necessary for effective embargoes.

A further way that state sanctions or any potential departure from the federal position dissipates the effectiveness of the United States is by weakening the bargaining power of the United States during negotiations, especially international trade negotiations. The possibility

President's ability to send a clear and unified message to the rest of the world").

[17] See Richard N. Haass, Economic Sanctions & American Diplomacy 200-01, 206-07 (1998); Economic Sanctions and U.S. Policy Interests: Hearing Before the House Comm. on Int'l Relations, 105th Cong. 10 (1998) (statement of Stuart Eizenstat, Undersecretary for Economics, Business and Agricultural Affairs, State Dep't); Marchick, supra note 8.

of inconsistent state and local actions creates questions about the ability of the federal representatives to commit the United States as a single market. U.S. negotiators would not receive the other side's best offer if the foreign state needed to reserve potential additional concessions for discussions with officials of U.S. states and localities. Centralizing authority over U.S. foreign policy at the national level enhances our influence and the weight of our international role.

The Former U.S. Government Officials acknowledge that achieving uniformity and consistency within the national government of the United States on matters of foreign policy is an ideal that is not always achieved. The President is not always able to ensure harmony among all senior Executive Branch officials, much less all Members of Congress. To some extent, the same problems of confusion and dilution occur within the federal government itself. Nonetheless, that problem differs in several ways from the problems state foreign policy efforts cause. First, the President exercises control over the Executive Branch, but the states do not control the actions of other states. Second, foreign countries generally understand and accept that the United States, as well as some other nations, have systems of government with different branches at the national level that play a role in determining foreign policy. Foreign officials have more difficulty understanding and accepting that subnational units are able to play an independent role in international affairs. Third, state and local action in the international field would immeasurably compound the problem because of the large number of state and local governments that might wish to take some action, and possibly differing actions, in any particular case.

C. State and Local Trade Sanctions Interfere with U.S. Foreign Policy Because They Are Adopted Without the Full Range of Information Available to the National Government.

State and local trade sanctions interfere with national foreign policy because state officials lack sufficient information to make informed judgments about the appropriate policy. Making effective judgments about relations with other countries is a complex and delicate task requiring a broad array of information on many security, political, economic, and social issues in many different countries. Justice Sutherland in *Curtiss-Wright* referred to the "vast external realm, with its important, complicated, delicate and manifold problems."[18] The federal government has a large foreign policy and intelligence-gathering apparatus, including the Departments of State, Defense, Commerce, and Energy, the Office of the U.S. Trade Representative, the National Security Agency, and the Central Intelligence Agency, to provide the information.

Settling on a foreign policy position also requires taking into account the interests of the entire United States. It requires consultation with congressional committees and leadership and the evaluation of competing interests within the United States.

State and local decisionmakers do not have access to this full range of information and necessarily make foreign policy judgments that are less than fully informed. They also lack a national perspective and naturally pursue their own local interests at the expense of other states and the nation.[19] As a result, states and localities take actions in the

[18] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

[19] David Schmahmann & James Finch, "The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)," 30 Vand. J. Transnat'l L. 175, 205 (1997) ("Local actions may be intemperate and not informed by larger, national policy issues.").

foreign policy field that are different from and inconsistent with those preferred by federal officials. Only the federal government is equipped and informed to choose policies in the interests of the nation as a whole.

CONCLUSION

For all of these reasons, the Former U.S. Government Officials believe that state and local trade sanctions and similar international ventures materially harm the conduct of U.S. foreign relations. The United States could find no surer way of dividing and diminishing its effectiveness and influence in world affairs than by authorizing each state and local government to decide for itself the terms on which it will conduct relations with foreign countries. The Former U.S. Government Officials therefore request that the Court affirm the Court of Appeals for the First Circuit and hold the Massachusetts Burma Law unconstitutional.

Respectfully submitted,

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February 2000