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.

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

BRIEF OF MEMBERS OF CONGRESS, AMICI CURIAE: SENATORS BARBARA BOXER, EDWARD KENNEDY, JOHN KERRY, PAUL WELLSTONE, AND REPRESENTATIVES NEIL ABERCROMBIE, TAMMY BALDWIN, HOWARD BERMAN, DAVID BONIOR, SHERROD BROWN, MICHAEL CAPUANO, JULIA CARSON, WILLIAM CLAY, EVA CLAYTON, JOHN CONYERS, JOSEPH CROWLEY,

(Additional Members of Congress Listed on Inside Cover)

IN SUPPORT OF PETITIONERS & FOR REVERSAL

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICI CURIAE* MEMBERS OF CONGRESS [1]

Amici curiae are members of the United States Senate and the United States House of Representatives. *Amici* are concerned that the court of appeals has usurped the authority of Congress to determine whether to preempt state law based upon foreign commerce or foreign affairs concerns. *Amici* are also concerned that the court of appeals' decision could result in preemption challenges to numerous state and local laws that Congress has neither formed nor expressed the intent to preempt. *Amici* are further concerned that the court of appeals' preemption analysis could make it difficult for both courts and Congress to predict when federal legislation will be construed to preempt state law and could interfere with Congress's ability to craft flexible responses to the myriad ways in which state laws can implicate foreign commerce in this era of globalization.

Amici members of Congress have authorized this brief to be filed in their names through individual letters on file with counsel. Counsel for the petitioner, Commonwealth of Massachusetts, and counsel for the respondent, National Foreign Trade Council, have consented to the filirg of this brief.

SUMMARY OF ARGUMENT

In this case the National Foreign Trade Council (NFTC) is asking the federal courts to do what Congress las consistently refused to do: preempt state and local selective purchasing laws. The Court should reject this

[1] As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of the brief. Funding for the preparation of this brief was provided through the institutional support of Georgetown University for the Harrison Institute for Public Law, which is a program for clinical legal education and public interest representation.

exercise in forum shopping among the branches of the federal government and reaffirm the principle that Congress, not the federal courts, has the primary authority under the Constitution to decide whether and when to preempt state law based upon foreign policy or foreign commerce concerns.

The court of appeals failed to apply the presumption against the preemption of state law. Instead, the court based its finding of preemption upon its own notions of the relative state and national interests involved rather than upon any evidence of congressional intent. The court of appeals also ignored significant evidence that Congress has repeatedly considered selective purchasing laws and refused to preempt them. Moreover, the court of appeals disregarded Congress's explicit preclusion of actions, such as this one, that are brought in connection with trade disputes over state law.

Deferring to Congress's refusal to preempt selective purchasing laws would permit this Court to avoid deciding whether the First or Tenth Amendments limit Congress's authority to preempt state market participation measures such as the Massachusetts selective purchasing law. It would also avoid placing the federal courts in the position of reviewing state contracting and investment decisions for their impact on foreign affairs or foreign commerce, which could strain the judicial branch's mandate under Article III to decide only discrete cases or controversies.

The court of appeals also extended the dormant commerce clause and dormant foreign affairs doctrines to cover market participation measures. Through both its broad reading of implied preemption doctrine and its expansion of the judicially created dormant commerce and dormant foreign affairs doctrines, the court of appeals

has redefined our system of federalism as one in which the federal courts rather than Congress serve as the primary arbiter of the division of power between the states and the federal government. *Amici* members of Congress urge this Court to reverse the decision of the court of appeals and restore to the Congress its constitutional role in maintaining the balance of federalism.

ARGUMENT

I. THE FEDERAL COURTS SHOULD DEFER TO CONGRESS'S REFUSAL TO PREEMPT STATE AND LOCAL SELECTIVE PURCHASING LAWS

A. There Is a Strong Presumption Against the Preemption of State Laws in Traditional Areas of State Authority Including State Market Participation Measures

As this Court has noted, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors*, 507 U.S. 218, 224 (1993), *quoting Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). In areas of traditional state authority this presumption against preemption may only be rebutted by a "clear statement" of Congressional intent to preempt. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

State market participation measures are an area of traditional state authority that this Court has been particularly reluctant to find preempted by federal law. *Cf. White v. Massachusetts*, 460 U.S. 204, 207 n.3 (1983) ("[r]estraint in this area is . . . counseled by considerations of state sovereignty, the role of each State 'as guardian and trustee for its people' . . . and 'the long recognized right of trader or manufacturer, engaged in

an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.") (citations omitted).[2] In *Associated Builders and Contractors, supra*, the Court rejected a claim that the National Labor Relations Act (NLRA) preempted a bid specification imposed by a Massachusetts state agency that would require its contractors involved in the cleanup of Boston Harbor to abide by a prehire collective-bargaining agreement. 507 U.S. at 220-222.[3] The Court stressed that the NLRA permits private employers in the construction industry to enter into prehire agreements (507 U.S. at 230) and concluded that the statute should not be construed to prohibit comparable conduct by states acting as employers: "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." 507 U.S. at 231-32.

Similarly, nothing in the federal Burma sanctions legislation expresses any intent to require state governments—or any private market participants—to maintain any particular type of economic ties with Burma. *See* Omnibus

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[2] The Court in *White* was discussing the basis for its refusal to extend the dormant commerce clause doctrine to cover state market participation measures. The status of market participation measures under the dormant commerce clause is relevant to the analysis of such measures under the implied preemption doctrine as well, since both inquiries require a court to decide whether—in the absence of a congressional statement of intent to preempt—to strike down a state law in order to prevent it from encroaching on an area of federal legislative authority.

[3] "Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees." 507 U.S. at 230.

Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009. Numerous private actors —including members of NFTC such as Liz Claiborne, Inc. and Levi Strauss & Co.—have decided to limit their economic ties to Burma in ways that are closely analogous to the Massachusetts selective purchasing law. *See* R. at 413-14. These private measures, like the Massachusetts selective purchasing law, are simply among the "free play of economic forces" that Congress left untouched in the federal Burma sanctions. *See Associated Builders and Contractors*, 507 U.S. at 232. It would be no more appropriate for this Court to construe the federal Burma sanctions to preempt the Massachusetts selective purchasing law than it would be to construe it to prohibit the analogous private economic measures.

B. *Hines v. Davidowitz* Did Not Create a Presumption in Favor of Preemption Under Federal Statutes Involving Foreign Affairs

The court of appeals attempted to justify its finding of preemption by citing *Hines v. Davidowitz*, 312 U.S. 52 (1941), which it construed to contain a "strong presumption that Congress intend[s] to preempt the field" when it legislates in areas affecting foreign policy. Pet. App. at 70. Nothing in *Hines*, however, suggests that the normal presumption against preemption is reversed when the relevant federal statute implicates foreign policy. Such a presumption in favor of preemption would conflict with numerous other decisions in which this Court has indicated that the presumption against preemption applies even when foreign affairs issues are implicated. *See, e.g., United States v. Pink*, 315 U.S. 203, 230 (1942). Instead, the Court in *Hines* merely considered the pervasiveness of federal statutory and treaty provisions related to aliens when considering whether a state law requiring

the registration of aliens conflicts with a federal law on the same subject. *See* 312 U.S. at 65-66.[4]

In addition, in *Hines*, the court stressed that "[t]he basic subject of the state and federal laws is identical—registration of aliens as a distinct group." 312 U.S. at 61. In contrast, the federal Burma sanctions and the Massachusetts laws apply to distinct issues. The federal Burma sanctions prohibit private investment in Burma and restrict United States aid to the Burmese government. The Massachusetts law affects only the award of Massachusetts state contracts; the law makes no attempt to assert the

[4] Admittedly, the Court's decision in *Hines* is not a model of clarity and provides little useful guidance for Congress or the courts concerning when federal legislation will be construed to preempt state law:

> This Court, in considering the validity of state laws in the light of federal laws touching the same subject, has made use of the following expressions: inconsistency; violation; curtailment; and interference. 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.

Hines, 312 U.S. at 67. This *ad hoc* approach to preemption analysis has been the target of much criticism. *See, e.g., id.* at 75 (Stone, J., dissenting) ("it is difficult to overstate the importance of safeguarding against [the] diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted"); *Cf. Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988) ("[w]hile preemption under a theory of express or implied preemption is essentially a matter of statutory construction, preemption under a frustration of federal purpose theory is more an exercise of policy choices by a court than strict statutory construction.")

state's police power to regulate economic activity. Furthermore, the Court in *Hines* was confronted with a state statute that restricted the "rights, liberties, and personal freedoms of human beings" (312 U.S. at 68), not a statute that applied exclusively to state actions as market participant. Moreover, this Court indicated in *De Canas v. Bica*, 424 U.S. 351, 361-63 (1976) that the *Hines* approach to preemption analysis is not appropriate where, as here, there is evidence that Congress has permitted the type of state law at issue. *See infra* Section I(C).

If this Court were to accept the position of the court of appeals that *Hines* requires a presumption in favor of the preemption of the Massachusetts selective purchasing law, it would effectively transform the preemption analysis in certain cases from an attempt to determine congressional intent into an application of a *Zschernig*-like self-executing limitation on state power. This result would be of particular concern to the *amici* members of Congress because it would constitute a significant reallocation to the federal courts of Congress's constitutional authority to decide if and when to preempt state law.

C. Congress Has Refused to Preempt State and Local Selective Purchasing Laws and Has Specifically Prohibited Private Actions, Such as This One, That Are Brought in Connection With Trade Rules

There is no indication that Congress intended to preempt the Massachusetts selective purchasing law. To the contrary, there is substantial evidence that Congress has implicitly consented to state and local selective purchasing measures. As *amici* members of Congress discussed in their brief in support of Massachusetts' petition for certiorari, beginning with the debate over state and local anti-Apartheid measures during the 1980s, Congress has repeatly considered state and local selective purchasing laws

and has refused to exercise its authority to preempt them. *See* Brief of Members of Congress, Amici Curiae, in Support of the Petition for Certiorari at 3-8.

During the debate over the Comprehensive Anti-Apartheid Act of 1986, Congress rejected calls for the preemption of state and local anti-Apartheid laws. The House of Representatives, after extensive debate over state and local anti-Apartheid laws, passed a resolution stating that the federal sanctions on South Africa should not be interpreted to preempt any state or local measure. H.R. Res. 548 and 549, 99 Cong., 2d Sess. (1986).[5]

Congress not only refused to preempt state and local South Africa laws, it actually voted twice to permit state and local governments to limit the award of contracts on federally funded transportation projects in compliance with their South Africa selective purchasing laws. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, Oct. 2, 1986, 100 Stat. 1089, § 606; Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting Enrollment Errors Act of 1989, Pub. L. 101-45, June 30, 1989, 103 Stat. 97 (undesignated paragraph entitled "State and Local Anti-Apartheid Policies").[6] Congress eventually revoked that permission in response to the democratic transition in

[5] The resolution came in response to "eleventh hour" assertions that the federal sanctions would preempt state and local anti-Apartheid measures. *See Statement of Senator Edward Kennedy*, 132 Cong. Rec. 23291 (1986).

[6] Congress acted in response to a decision by the Department of Transportation to withhold millions of dollars from state and local jurisdictions with anti-Apartheid selective purchasing laws on the grounds that these laws violated the requirement that contracts on federally funded projects be awarded to the lowest bidder. *See* Brief of Members of Congress Amici Curiae in Support of the Petition for Certiorari at 5-6.

South Africa, but even then it refused to preempt the state and local measures, and instead merely "urge[d]" both state and local governments and participants in private boycotts to rescind their South Africa boycotts. *See* South African Democratic Transition Support Act, Pub. L. 103-149, Nov. 23, 1993, 107 Stat. 1503, § 4(c)(1).

Congress has similarly declined to preempt the Massachusetts selective purchasing law on Burma despite several opportunities to do so. The court of appeals noted that the Massachusetts law was passed three months before the federal Burma sanctions (Pet. App. at 10), and may have served as a "catalyst" for the federal Burma sanctions (Pet. App. at 73). The federal Burma sanctions, however, make no reference to the state or local measures let alone a "clear statement" of intent to preempt. Moreover, sanctions reform legislation that has been considered by Congress in recent years—and which the NFTC played a role in drafting—does not attempt to preempt state and local measures, presumably because there is no support in Congress for preempting selective purchasing laws. *See* Brief of Members of Congress, Amici Curiae, in Support of the Petition for Certiorari at 7-8. Accordingly, it would be inappropriate for this Court to infer such preemption. *See Barclays Bank P.C. v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994).

Moreover, in Section 102 of the Uruguay Round Agreements Act (URAA), Congress specifically precluded any private causes of action from being brought in connection with disputes under the World Trade Organization (WTO). See 19 U.S.C. §§ 3512(b)(2)(A), 3512 (c)(1). *See also* Brief of Members of Congress, Amici Curiae, in Support of the Petition for Certiorari at 8-10. Nonetheless, in its Complaint the NFTC *stressed* the alle-

gations made by the European Union and Japan that the Massachusetts law violated the United States' obligations under the WTO. *See* Complaint at 8. Both the district court and the court of appeals similarly relied upon the trade complaints in striking down the Massachusetts law. *See* Pet. App. at 24-26, 81-82.

The court of appeals dismissed the significance of Section 102 of the URAA by suggesting that it only prohibits actions based *directly* upon WTO rules. *See* Pet. App. at 26. This narrow reading ignores the clear language of Section 102, which states that "it is the intent of Congress . . . *to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements.*" 19 U.S.C. § 3512(c)(2) (emphasis added). Even if this language could somehow be construed to leave any doubt regarding Congress's intent to preclude trade rules from being used in support of private challenges to state law, that doubt would be resolved by the Statement of Administrative action for the Uruguay Round Agreements Act (SAA) that was enacted into law as part of the URAA. *See* 19 U.S.C. § 3511(a). The SAA, which constitutes the "authoritative expression by the United States concerning the interpretation and application of the (URAA[in any judicial proceeding" (19 U.S.C. § 3512(d)), states unambiguously that WTO rules may not be used "directly or indirectly" in a private action, including an action based on "Congress's Commerce Clause authority." SAA, *reprinted at* 1994 U.S.C.C.A.N. 4440, at 20.

The court of appeals has thus displaced Congress's decisions regarding the preemption of state law under two different statutes. It construed the federal Burma sanctions to preempt the Massachusetts selective purchasing law where no such intent is expressed or implied, and it

ignored Congress's explicit preclusion of all private causes of action brought "in connection with" trade rules.[7]

II. THE FAILURE OF THE COURT OF APPEALS TO DEFER TO CONGRESS'S REFUSAL TO PREEMPT STATE AND LOCAL SELECTIVE PURCHASING LAWS UNDERMINES CONGRESS'S CONSTITUTIONAL ROLE IN PROTECTING STATE SOVEREIGNTY, WHICH THIS COURT RECOGNIZED IN *GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY*

The court of appeals—both through its conclusion that Congress has somehow silently preempted the Massachusetts selective purchasing law and its expansion of the dormant foreign affairs and dormant commerce clause doctrines to cover state market participation measures—has decided this case in a manner that significantly undermines Congress's ability to perform its role as guardian of our system of federalism. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, the Court noted that under the Constitution, the protection of state sovereignty is primarily committed to the federal political process, which is responsive to the interests of the states because of their role in selecting both of the political branches of the government. *Id.* at 550-51.[8] In order for Congress to serve its role as

[7] A different case would be before this Court if the Executive Branch had exercised the authority delegated to it by Congress under the URAA to challenge the Massachusetts law on the grounds of its alleged inconsistency with trade rules. *See* 19 U.S.C. § 3512(b)(2). The Executive Branch, however, has chosen not to exercise that delegated authority.

[8] *See Printz v. United States*, 521 U.S. 898, 956 (1997) (Stevens, J., dissenting):

> As we explained in *Garcia* . . . "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal

guardian of our system of federalism, however, the federal courts must refrain from interpreting federal statutes to preempt state law in the absence of clear evidence of congressional intent to do so. As Justice O'Connor observed in *Gregory v. Ashcroft*, 501 U.S. 452 (1991),

> inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Id. at 464, *quoting* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25,, p. 480 (2d ed. 1988).

Justice Souter has similarly noted that the clear statement rule is necessary to ensure that the federal political process adequately protects the states:

> The Court has repeatedly stated its assumption that insofar as the relative positions of States and Nation may be affected consistently with the Tenth Amendment, they would not be modified without deliberately expressed intent. . . . The plain-statement rule, which assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision is particularly appropriate in light of our primary reliance on "[t]he

Government was designed in large part to protect the States from overreaching by Congress." . . . Given the fact that the Members of Congress are elected by the people of the several States, with each State receiving an equivalent number of Senators in order to ensure that even the smallest States have a powerful voice in the legislature, it is quite unrealistic to assume that they will ignore the sovereignty concerns of their constituents.

> effectiveness of the federal political process in preserving the States' interests."

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 183 (1996) (Souter, J., dissenting), *quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985) (additional citations and quotation marks omitted). *See also* Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 818 (1998) ("Political process federalism, with its attendant requirement that Congress stand directly accountable for alterations of the federal-state balance, severely undermines the viability of implied preemption theories.")

By striking down the Massachusetts selective purchasing law despite the clear evidence that Congress has consistently refused to preempt state and local selective purchasing laws, the court of appeals usurped Congress's constitutional role in maintaining the balance of federalism. As Professor Tribe observed in response to claims that state and local market participation measures concerning South Africa were implicitly preempted by federal sanctions on South Africa:

> [t]o infer preemption in such circumstances would entail a delegation of extraordinary power to the courts. Such an interpretation would force courts to employ their own notions of state sovereignty in delineating the boundaries of the preemption by the federal government. This role would be at odds with the view of federalism espoused by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* . . . which envisioned a scheme that relies upon the political branches of the federal [government] to protect state sovereignty.

Laurence H. Tribe, *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986*

upon State and Local Measures, 132 Cong. Rec. 23292, 23294 (1986).

The lines between international affairs and the legitimate powers of state governments are becoming increasingly difficult to discern in this era of globalization.[9] Now more than ever it is appropriate for the federal courts to defer to Congress's constitutional role in determining where those lines should be drawn.

As Justice Breyer has recently noted,

> courts cannot easily draw the proper basic lines of authority. The proper local/national/international balance is often highly content specific. And judicial rules that would allocate power are often far too broad. Legislatures, however, can write laws that more specifically embody that balance. Specific regulatory schemes, for example, can draw lines that leave certain local authority untouched . . . . That is why the modern substantive federalist problem demands a flexible, context-specific legislative response . . . .

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S.Ct. 2219, 2239 (1999) (Breyer, J., dissenting).

[9] *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1247-48 (1999):

> In recent years there has been a marked blurring of the distinction between foreign and domestic affairs; so fast has the line eroded—hastened by the communications revolution, the greater ease of travel, and the growing priority of trade over traditional national security issues—that globalization has become almost an instant cliche. The international arena is now very much of local interest, as reflected in the dramatically heightened profile of state and local governments on the world scene. This is particularly pronounced in matters relating to trade and investment. One in six private-sector jobs in the United States is now linked to the global economy. The number of Americans working for foreign companies in the United States now stands at five million; foreign direct investment in the United States has quadrupled since 1981. Subfederal jurisdictions now see international trade and foreign investment as critical to their economic well-being. They complete ferociously for foreign investment with tax breaks and other incentives. Most states now maintain at least one trade office abroad; many have concluded trade-related agreements with foreign entities; and the foreign trade mission has become a standard responsibility for governors and large-city mayors.

Congress created precisely such a "flexible, content-specific legislative response" to the preemption of state law in Section 102 of the URAA (19 U.S.C. § 3512). Section 102 contains several provisions that are intended to ensure that the federal political process adequately considers the interests of the states before their laws are struck down based upon trade disputes. Section 102's most important procedural protections are the assurances that only the Executive Branch, and not private parties, may sue to preempt state laws in connection with trade rules (19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1)), and that the Executive Branch may only bring such a challenge after consulting with Congress (19 U.S.C. § 3512 (b)(2)(C)). *See supra* Section I(C). Striking down the Massachusetts law in disregard of these procedures would both frustrate the specific scheme created by Congress for resolving disputes like this, and impair the ability of the federal political process to protect the sovereignty interests of the states as envisioned by the Court in *Garcia*.

III. CONCLUDING THAT CONGRESS INTENDED TO PREEMPT THE MASSACHUSETTS SELECTIVE PURCHASING LAW WOULD REQUIRE THIS COURT TO REACH CONSTITUTIONAL QUESTIONS THAT NEED NOT BE DECIDED IN THIS CASE

Application of the clear statement rule in this case would also permit this Court to avoid an interpretation of the federal Burma sanctions that could raise serious

constitutional questions. *See Richardson v. United States*, 119 S.Ct. 1707, 1711 (1999) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question"), *quoting Gomez v. United States*, 490 U.S. 858, 864 (1989). *See also Department of Commerce v. United States House of Representatives*, 119 S.Ct. 765, 779 (1999) ("if there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable"), *quoting Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). *See also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").[10]

Application of the clear statement rule would require this Court to conclude that Congress has neither formed nor anywhere expressed the intent to preempt state and local selective purchasing laws, but rather has implicitly consented to such laws. *See supra* Section I(C). If the Court concludes that Congress has implicitly consented to state and local selective purchasing laws, it need *not* consider whether to strike down the Massachusetts law in order to preserve Congress's constitutional authority to regulate foreign commerce and foreign affairs. *See Barclays Bank P.C. v. Franchise Tax Bd. of California*, 512

[10] The court of appeals opinion is difficult to reconcile with this "deeply rooted" doctrine of judicial restraint. The opinion devotes fifty pages (Pet. App. at 14-63) to its determinations that the Massachusetts law violates the dormant foreign affairs and commerce clause doctrines, before concluding, almost as an afterthought, that the law is also preempted by the federal Burma sanctions (Pet. App. at 64-73).

U.S. 298 (1994).[11] Similarly, the Court need not determine whether the market participation doctrine protects selective purchasing laws from challenge under the dormant foreign commerce and dormant foreign affairs doctrines. Moreover, if this Court defers to Congress's implicit consent to selective purchasing measures it need not address the status of selective purchasing laws under the First and Tenth Amendments.

Conversely, if this Court were to hold (despite the overwhelming evidence to the contrary) that Congress intended to preempt the Massachusetts selective purchasing law, in order to give effect to that preemptive intent it would need to determine that the Massachusetts law is not protected from federal regulation under either the First or Tenth Amendments. Moreover, if the Court determined that Congress has somehow implicitly preempted state and local market participation measures related to Burma, it would require the federal courts to review a wide variety of investment and purchasing decisions that might be difficult to reconcile with the courts' proper role under Article III of the Constitution.

A. Interpreting the Federal Burma Sanctions to Preempt the Massachusetts Selective Purchasing Law Would Require This Court to Determine Whether the Authority of Congress to Regulate the States Is Limited by the First Amendment

The court of appeals rejected the assertion that the Massachusetts selective purchasing law was a form of

[11] The Court in *Barclays* rejected arguments based upon both the dormant commerce clause and *Zschernig*'s dormant foreign affairs doctrine. *See, e.g.*, Petitioner's Brief for Barclays Bank PLC, at 32, 42-43, 1993 WL 639306 (December 15, 1993) (asserting *Zschernig*). The doctrine most closely associated with dormant foreign affairs preemption—the "act of state" doctrine—is similarly subject to congressional modification. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 443 (1986).

political expression entitled to protection under the First Amendment. Pet. App. at 40-41. In the court of appeals, Massachusetts argued that "the purpose and spirit of the First Amendment are embodied in selective purchasing laws." *See* Brief for Defendants-Appellants at 42, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304), *citing NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (holding that the First Amendment protects politically motivated economic boycotts).[12] An amicus brief submitted by the City of Berkeley explored the First Amendment issue in detail. The Berkeley brief argued, *inter alia*, that the framers understood the First Amendment to protect politically motivated boycotts—such as the colonial nonimportation boycotts—and that the First Amendment was intended to function as a limit on the new federal government's ability to regulate the states as well as individuals.

[12] Several commentators have similarly suggested that state and local selective purchasing and investing laws are a form of protected activity under the First Amendment. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1 (1999); Jay A. Christofferson, *The Constitutionality of State Laws Prohibiting Contractual Relations with Burma, Upholding Federalism's Purpose*, 29 McGeorge L. Rev. 351, 361-63 (1998); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 Foreign Policy 158, 163 (1992) ("The First Amendment guarantee[s] the rights of all citizens, including governors, mayors, and their employees, to speak out on foreign policy"); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l L. 821, 829 (1989) ("at least some of these [state and local foreign policy initiatives] appear to implicate significant freedom of speech and petition values. Their real addressee is not some foreign government but our own U.S. policymakers, and their real purpose is not to intrude into the conduct of our foreign relations but to influence the making of our foreign policy . . ."); Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 Temple L. Rev. 813 (1989).

See Brief For Amicus Curiae City of Berkeley Supporting Reversal at 14-16, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304).[13]

Rather than address these arguments in detail, however, the court of appeals dismissed the First Amendment argument based primarily upon its observation that the Court in *Zschernig v. Miller*, 389 U.S. 429 (1968) had not addressed the issue. Pet. App. at 40-41. Moreover, the court of appeals held open the possibility that even a state resolution simply condemning Burma's human rights record might be struck down (*id.* at 41 n.18). Although this Court would presumably give the question of state and local government rights under the First Amendment more careful consideration if it reached the issue, it can avoid addressing the issue prematurely by deferring to Congress's decision not to preempt state and local selective purchasing laws.

B. Interpreting the Federal Burma Sanction to Preempt the Massachusetts Selective Purchasing Boycott—But Not to Prohibit Comparable Private Boycotts—Could Create a Conflict With This Court's Tenth Amendment Jurisprudence

An interpretation of the federal Burma sanctions that prohibited the Massachusetts selective purchasing law but permitted analogous private economic measures would also create a significant potential for conflict with this Court's Tenth Amendment jurisprudence. *See Printz v. United States*, 521 U.S. 898 (1997). Accordingly, such an interpretation should be avoided. *See Gregory v. Ash-*

[13] Other *amici* also addressed the status of selective purchasing laws under the First Amendment. *See also* Brief of Amicus Curiae States North Dakota *et al.* at 2 and 11, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304); Brief for Amicus Curiae Earthrights International at 15-16, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (No. 98-2304).

croft, 501 U.S. 452, 464 (1991) (application of the plain statement rule appropriate when it would avoid constitutionally problematic exercise of the commerce power).

The Court in *Printz* indicated that it may be appropriate to consider the strength of the federal interests involved when considering whether a federal law of general applicability unduly intrudes upon state sovereignty. 521 U.S. at 932. In contrast, federal laws that are specifically targeted at regulating the states rather than private actors are virtually *per se* invalid:

> [w]here . . . it is the whole object of the law to direct to functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that defect.

Id. See also White v. Massachusetts, 460 U.S. 204, 207 n.3 (1983) ("state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, states should similarly share existing freedoms from federal constraints . . .") *quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980).

The non-targeting principle of *Printz* does not interfere with Congress's authority to preempt state *regulation* of private activity, since private parties do not possess anything analogous to the police power of states—*i.e.* the power to compel compliance with governmental standards under penalty of law. Conversely, the non-targeting principle should have particular force when states are buying and selling goods and services in the marketplace like private actors, and where comparable private economic

decisions presumably could not be prohibited. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The conclusion that interpreting the federal Burma sanctions to preempt the Massachusetts selective purchasing law would conflict with the non-targeting principle of *Printz* cannot be avoided by resorting to the court of appeals' tortured conclusion that the purchasing law somehow constitutes regulation. The court of appeals suggested that under *Wisconsin v. Gould*, 475 U.S. 282 (1986), state market participation measures may sometimes be construed as "regulation" subject to federal preemption even when comparable private market participation measures are permitted. *See* Pet. App. at 47-48. Gould involved a Wisconsin statute that debarred repeated violators of the National Labor Relations Act (NLRA) from eligibility for state contracts. 475 U.S. at 287-88. The primary defect of the Wisconsin statute at issue in *Gould* was that it supplemented federal sanctions under the NLRA that Congress has intended to be exclusive. The Massachusetts selective purchasing law, in contrast, was enacted three months *before* Congress enacted the federal Burma sanctions, and thus cannot conceivably be interpreted as an attempt to enforce the federal sanctions.

The distinction between states acting as market participants and states exercising their regulatory police powers constitutes a clear line that provides guidance to both the courts and Congress regarding the allocation of power between the state and federal governments. This Court should reject the court of appeals' attempt to blur that line beyond recognition. As Chief Justice Rehnquist noted regarding a similar effort to extend the dormant commerce clause to cover state market participation activities, the attempt to recharacterize market measures as regulation is "both artificial and unconvincing," and the rational offered by the court of appeals in defense of

its conclusion that the Massachusetts selective purchasing law constitutes regulation is "merely a restatement of the conclusion." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 12 and n.1 (1984) (Rehnquist, J., dissenting, joined by O'Connor, J.).[14]

C. A Finding of Preemption Would Strain the Capacity of the Federal Courts Under Article III to Decide Cases and Controversies

A ruling that the federal Burma sanctions preempt state and local market measures related to Burma would place the federal courts in a position that would strain their role under Article III of the Constitution. Different state and local jurisdictions have addressed their economic ties with Burma in different ways. Some have merely passed resolutions denouncing the Burmese government. Some jurisdictions have limited investment in companies doing business in Burma, and others, such as Massachusetts, have given preferences in the award of state contracts to businesses that do not do business in Burma. Some have done both. *See* statutes cited in Memorandum for Respondent National Foreign Trade Council at 4 n.4.

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[14] *See also Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 U.S. Op. Off. Legal Counsel 49, 57 (April 6, 1986):

> The plurality opinion in *South-Central Timber* . . . is not binding precedent, and we believe that not all of its reasoning flows logically from the structure of the market participation doctrine. Wherever the state exercises its power as a buyer or investor to impose some contractual term on a company with which it deals, it is acting as in its proprietary rather than regulatory capacity. The kind of contractual condition the state chooses to impose should not affect the application of the market participation doctrine, given the rationales supporting the doctrine.

These types of decisions do not easily lend themselves to judicial review. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("the competing considerations in cases involving state propriety action often will be subtle, complex, politicially charged and difficult to assess . . . as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.") [15]

This Court can avoid all of these constitutional issues simply by deferring to Congress's decision not to preempt state and local selective purchasing laws. If Congress chooses at some time in the future to preempt all or some

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[15] As Professor Tribe noted in regard to similar arguments concerning state and local anti-Apartheid measures, to infer such broad preemption without guidance from Congress on the scope of the preemption would require the federal courts to decide

> extraordinarily touchy and complex questions [such] as whether a particular state or city acts improperly when it decides to slow down its rate of investing pension funds in a particular company doing business in South Africa. Is the state or city acting in a preempted manner if it is motivated wholly or partly by moral concerns about apartheid? What if its concerns are purely prudential but are infused, as even prudence must be these days, by recognition that the situation in South Africa is unstable in part because of apartheid and the world's reaction to it? If a decision to slow down the rate of future investment is not preempted, what of a decision to diversify existing investments?
>
> For federal judges to review state and local investment portfolios from this perspective would be difficult at best and incompatible with the Article III judicial power at worst. As the Supreme Court has observed on numerous occasions, such judicial line-drawing is strongly disfavored in the foreign policy realm, an area of particular executive and legislative expertise. . . . Until or unless Congress explicitly demonstrates which of the broad array of state and local measures affecting South Africa it intends to preempt, the judiciary should not be forced to pick and choose without more guidance.

Laurence H. Tribe, *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 upon State and Local Measures*, 132 Cong. Rec. 23292, 23294 (1986).

types of these laws, it can do so in a manner that reduces the chance for constitutional conflict and provides sufficient guidance to the courts to enable them to determine which laws Congress has chosen to preempt.

IV. THIS COURT SHOULD NOT EXPAND THE JUDICIALLY CREATED DORMANT COMMERCE CLAUSE AND DORMANT FOREIGN AFFAIRS DOCTRINES TO PRECLUDE STATE MARKET PARTICIPATION MEASURES

The court of appeals held that, in addition to being implicitly preempted by the federal Burma sanctions, the Massachusetts law was also invalid as an intrusion upon the federal commerce and foreign affairs powers. *See generally* Pet. App. at 14-63. This Court should reject the court of appeals' extension of the judicially created dormant commerce clause and dormant foreign affairs doctrines to reach state market participation measures.

This Court has recognized a market participation exception to the dormant effects of federal powers under the Constitution because "there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the market." *Reeves, Inc. v. Stake*, 447 U.S. 437 (1980). *See also College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2230 (1999) (the justification for the dormant commerce clause "is entirely absent where the States are buying and selling in the market.") This observation applies with equal force regardless of whether the dormant interstate commerce clause, the dormant foreign commerce clause, or the dormant foreign affairs power is involved.[16]

[16] *See Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 U.S. Op. Off. Legal Counsel 49 (April 6, 1986) at 54 ("nothing in the historical record suggests that the Framers were concerned with state proprietary actions affecting either foreign or interstate commerce"), and at 62 ("[t]he historical rationale for the general federal power over foreign affairs does not imply the displacement of state proprietary powers").

No precedent requires the application of these doctrines to limit the states when they are acting as market participants. The Court in *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980) noted that it not had yet "explore[d] the limits imposed on state proprietary actions by the 'foreign commerce' Clause . . . ." Similarly, *Zschernig v. Miller*, 389 U.S. 429 (1968), which remains the sole application by this Court of the dormant foreign affairs doctrine created in that case (*see* Pet. App. at 3), did not involve state proprietary action.[17]

It is arguably inaccurate to refer to the market participation doctrine as an "exception," given that both the dormant commerce clause and the dormant foreign affairs doctrines are judicial creations. Instead, the market participation doctrine might be more properly characterized as an illustration of the general rule that "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Alden v. Maine*, 119 S.Ct. 2240, 2259 (1999), *quoting Nevada v. Hall*, 440 U.S. 410, 425 (1979). Accordingly, if the Court were to extend the dormant commerce clause to restrict state market participation measures, it

[17] The dormant foreign affairs doctrine is arguably even less worthy of expansion than the dormant commerce clause, since it lacks the commerce clause's base in a specific provision of the Constitution. *See* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 Stan. J. Int'l L. 1, 10-14 (1999). Moreover, this Court's decision in *Barclays Bank P.C. v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994) has been widely interpreted as either severely limiting or effectively overruling *Zschernig*. See Brief of Amici Members of Congress in Support of the Petition for Certiorari at 12 and n.13.

would constitute a significant usurpation of power by the federal courts to the detriment of the constitutional authority of both Congress and the states.

CONCLUSION

This Court is engaged in an ongoing debate concerning the extent to which the Constitution contains substantive limitations on Congress's ability to regulate the states in addition to the procedural protections recognized in *Garcia*. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997). In this case, however, there is no need to resolve that debate. Congress has made no effort to displace Massachusetts' exercise of its proprietary authority through its selective purchasing law. The result the NFTC is seeking—an interpretation of our system of federalism that permits the courts rather than Congress to preempt state market participation measures based upon an assessment of the competing state and national interests involved—is consistent with neither the "process' view nor the "substantive limits" view of federalism.

On occasion, concerns over the effects of state legislation on foreign commerce or foreign affairs will require Congress to exercise its preemptive power. Yet until Congress makes a clear statement of its intent to do so, the federal courts have neither the competence nor the constitutional mandate to determine whether state law should be preempted in deference to national interests.

Accordingly, this Court should reverse the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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