No. 99-474

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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 *AMICI CURIAE* STATES OF ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSOURI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, TEXAS, UTAH, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

The 22 *Amici* States submit this brief in support of Massachusetts. The States have a strong interest in state sovereignty and in protecting the right of States to pass laws governing state procurement and investment of state funds. Through these laws, elected State Legislatures legitimately exercise the citizens' sovereign right to decide how to spend and invest public money. Further, the *Amici* States have an interest in the Supreme Court's establishing a clear test that will limit the challenges to actions the States take in their proprietary roles.

New Jersey, New York, and Massachusetts have statutes that restrict the State's purchasing goods from specific countries or from companies that do business in those countries.[1] Currently, at least fourteen States have statutes that govern the State's investment of state funds in certain other countries or in businesses that do business with those countries.[2] The countries in which

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[1] New Jersey and New York restrict state purchasing from Northern Ireland. N.J. Stat. Ann. § 52:34-12.2 (West Supp. 1999); N.Y. State Fin. Law § 165(5) (McKinney 1997). Massachusetts, in addition to its Burma Law, also restricts state purchasing from companies that have links with Northern Ireland. Mass. Gen. Laws Ann. ch. 7, §§ 22C, 22D (West 1996). Maryland and Rhode Island have repealed statutes limiting state purchases of goods produced in South Africa. *See* Md. Code Ann., State Fin. & Proc. §§ 14-501 to 507 (repealed 1994); R.I. Gen. Laws § 37-2-57 (repealed 1999).

[2] States having restrictions on investment of state funds in companies doing business with Northern Ireland include: Connecticut, Florida, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Vermont. *See* Conn.

investments are limited or restricted include Cuba, Northern Ireland, and South Africa. Since the end of apartheid, many States have repealed their laws restricting investments in South Africa.[3] In addition to these

Gen. Stat. Ann. § 3-13h (West 1999); Fla. Stat. Ann. § 121.153 (West 1999); Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999); Mich. Comp. Laws Ann. § 38.1133a (West 1997); Minn. Stat. Ann. § 11A.241 (West 1997); Neb. Rev. Stat. §§ 72-1246.06 to .08 (1996); N.H. Rev. Stat. Ann. §§ 6:32 to :34 (Supp. 1999); N.J. Stat. Ann. §§ 52:18A-89.4 to 89.6 (West Supp. 1999); N.Y. Retire. & Soc. Sec. Law § 423-a (McKinney 1999); 24 Pa. Cons. Stat. Ann. § 8527 (West 1992), 71 Pa. Cons. Stat. Ann. § 5940 (West Supp. 1999), and 72 Pa. Cons. Stat. Ann. § 3773.1 (West 1995); R.I. Gen. Laws § 35-10-14 (1997); Tex. Gov't Code Ann. § 404.024(h) (West 2000); 1989 Vt. Acts & Resolves 50. Florida restricts investments of state funds in companies doing business with Cuba. Fla. Stat. Ann. § 215.471 (West 1999). The following States restrict the investment of state funds in South Africa: Massachusetts, Oregon, and Rhode Island. *See* Mass. Gen. Laws Ann. ch. 32, § 23 (West Supp. 1999); Oregon Anti-Apartheid Act of 1987, Or. Rev. Stat. §§ 293.830 to 293.870 (1997); R.I. Gen. Laws § 35-10-12 (1997).

[3] Arkansas, California, Connecticut, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, North Carolina, Oklahoma, and Texas all have repealed statutes restricting investment of state funds in South Africa. *See* Ark. Code Ann. § 24-3-416 (repealed 1994); Cal. Gov't Code § 16641.5 (repealed 1994); Conn. Gen. Stat. Ann. § 3-13f (repealed 1993); 40 Ill. Comp. Stat. Ann. 5/1-110(4)(b)(4) (repealed 1994); Iowa Code Ann. ch. 12A (repealed 1994); La. Rev. Stat. Ann. § 49:308.2 (repealed 1994); Me. Rev. Stat. Ann. tit. 5, §§ 1951-1954 (repealed 1993); Md. Code Ann., State Fin. & Proc. § 6-208 (repealed 1994); Mich. Comp. Laws Ann. § 37.2402(f) (repealed 1993); Mo. Ann. Stat. § 105.686 (repealed 1994); N.J. Stat. Ann. §§ 52:18A-89.1 to 89.3 (repealed 1994); N.C. Gen. Stat. § 147-69.2(c) (repealed 1995); Okla. Stat. tit. 62 §§ 71(E), 89.2(E) (repealed 1994); Tex. Nat. Res. Code Ann. § 161.173(b), (c)(2), (c)(5) (repealed 1995); and Tex. Const. art. XVI, § 70(r) (repealed by election held Nov. 2, 1999).

types of statutes, many States have "Buy American" laws.[4]

Although the instant case involves a state selective purchasing law, the market participant exception to the dormant Commerce Clause – both interstate and foreign – would apply equally to state laws limiting investment of state funds. Any expansion by this Court of the federal government's dormant foreign affairs power to strike down state laws governing state proprietary actions would threaten state decisions regarding investments as well as decisions regarding procurement.

SUMMARY OF ARGUMENT

The *Amici* States urge this Court to adopt a bright line test in determining when to apply the market participant exception to the Commerce Clause. States are engaged in the marketplace as participants when they make procurement and investment decisions. Consequently, the market participant exception to the Commerce Clause applies. The Commerce Clause analysis,

[4] For example, Iowa, Maryland, New Mexico, Ohio, Oklahoma, and Tennessee have some variety of a "Buy American" law. *See* Iowa Code Ann. § 18.3 (West Supp. 1999); Md. Code Ann., State Fin. & Proc. §§ 17-301 to 306 (1995); N.M. Stat. Ann. § 13-1-188 (Michie 1997); Ohio Rev. Code Ann. §§ 125.09, 125.11, 306.43(G), 5513.07 (Banks-Baldwin Supp. 1999); Okla. Stat. tit. 61, § 51 (West 1997); Tenn. Code Ann. § 54-5-135 (1998).

therefore, is complete. A bright line test provides clear direction to both the States and the courts in evaluating controls the States place on their own procurement and investment decisions.

The roots of the market participant exception to the Commerce Clause support the bright line test. The negative implication of the Commerce Clause, both its interstate and foreign aspects, is directed at limiting the States' authority to regulate commerce, not participate in it. The right of States as guardians and trustees for their people and the public fisc requires that the States have freedom in deciding what restrictions to place on the spending and investing of their money. Applying the market participant exception to the Commerce Clause any time the State is purchasing goods or services or investing its money preserves the right of States when acting in their proprietary role to be free from restrictions that do not affect private parties.

Federal statutes that regulate private entities in making procurement or investment decisions also may regulate a State's decisions in these areas. If so, the statutes apply directly to the States. It is not necessary to try to judge each State decision by whether a private party could or would make the same decision or consider the same factors in reaching a decision.

If this Court does not adopt the bright line test urged by the *Amici* States, an alternate test is proposed. Currently courts frequently look to whether a private business would be likely to act in the way the State is acting in making proprietary decisions. Instead the question should be rephrased: Could a private party legally act as

the State is acting? Stated in this way, the test more accurately reflects the underpinnings of the market participant exception to the Commerce Clause.

The philosophical bases for the market participant exception to the Commerce Clause apply with equal force to both the interstate and foreign aspects of the Commerce Clause. A State's decisions governing its procurement of goods and services or investment of its money constitute participation in the marketplace and not regulation. This does not change because it is foreign markets rather than interstate markets that may be affected. A State's interest in determining its own trading partners is not lessened because foreign commerce may be involved. A State's role as guardian and trustee for its people and of the public fisc is no less when decisions affect foreign commerce. The States' right to be free from restrictions which do not apply to private parties in making proprietary decisions is just as strong regardless of whether interstate or foreign commerce is involved. This case offers the Court the opportunity to clearly hold that the market participant exception applies to both the foreign and interstate aspects of the Commerce Clause.

The market participant exception also should prevent a State's proprietary actions in procuring goods or services or in investing its money from being invalidated under the federal government's foreign affairs power. Decisions that a State makes in these areas are not decisions that could prevent the federal government from exercising its foreign affairs power. The decisions may have an indirect effect on businesses of other countries, but they do not have a direct effect on the federal government's foreign affairs policy.

Further, Congress and the Executive Branch have exercised their foreign affairs power to provide a mechanism for addressing complaints that state laws violate international trade agreements. A process has been established within the trade agreements themselves to handle such complaints. Congress in the Uruguay Round Agreements Act specifically determined that private court action on any basis was inappropriate for complaints under or connected with the trade agreements. The Executive Branch in its Statement of Administrative Action, approved in the Uruguay Round Agreements Act, stated that such lawsuits themselves could interfere with the President's exercise of his foreign affairs power.

ARGUMENT

I. THIS COURT SHOULD ADOPT A BRIGHT LINE TEST IN DETERMINING WHEN TO APPLY THE MARKET PARTICIPANT EXCEPTION TO THE COMMERCE CLAUSE.

The history and public policy foundations of the market participant exception to the Commerce Clause support the application of a bright line test: applying the market participant exception any time a State is acting in its proprietary role making decisions regarding its procurement of goods or services or investment of its money.

The market participant exception to the dormant Commerce Clause, first expressed by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), has a long history. In 1898, the North Dakota Supreme Court addressed whether a state statute requiring that all

county printing be done within the State violated Article 1, Section 8 of the United States Constitution. *Knight v. Barnes*, 75 N.W. 904 (N.D. 1898). The court held that the statute did not violate the interstate Commerce Clause. It stated: "[A]s a question of principle, we are unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz. elect from whom it will purchase supplies needed in the discharge of its corporate functions." *Id.* at 906.

Then, in *Atkin v. Kansas*, 191 U.S. 207 (1903), this Court held that the State, acting as guardian and trustee for its people in the control of the State's affairs, had the power to place conditions upon public work to be done on its behalf, or on behalf of its municipalities: *Id.* at 222-23. Writing for the Court's majority, Justice Harlan stated that the courts have no authority to review the conditions a State places on contracts for public works. "Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." *Id.* at 223. The Court further determined that the motives behind enactment of the statute were irrelevant and did not affect the State's authority. *Id.* at 222. *Cf. Ellis v. United States*, 206 U.S. 246 (1907) (speculation over Congress' motive in passing an act regulating the conditions under which the government would contract cannot be used to limit Congress' authority over government contracts). Summing up the majority decision in *Atkin*, the Court stated:

> We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state

> to prescribe the conditions under which it will permit work of that kind to be done.

191 U.S. at 224.

The principle proclaimed by this Court in *Atkin* – that a State, acting as guardian and trustee for its people, has the power to place conditions on contracts it enters – applies in the case of selective purchasing laws and any time a State acts in its proprietary role. Such application is in accord with the idea that a State, when acting as a contractor, has the same rights as any private contractor. Justice Holmes, writing for the majority in *Ellis*, 206 U.S. at 256, stated that the "government, purely as contractor, in the absence of special laws, may stand like a private person."

This Court's decision in *Hein v. McCall*, 239 U.S. 175 (1915), lends additional support to application of a bright line test. In *Heim*, this Court held that the State of New York had the authority to determine that only United States citizens may be employed in the construction of public works by the State, a municipality, or any person contracting with the State or municipality, and further that preference for such employment must be given to New York citizens. The Court reled upon the principle set forth in *Atkin* that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Id.* at 192-93. The Court also upheld the limitation on the construction of a treaty with Italy regarding the rights of Italian citizens within the United States. The Court of Appeals had concluded that the

treaty "does not limit the power of the state, as a [illegible] etor, to control the construction of its own works [illegible] distribution of its own moneys." *Id.* at [illegible] determined that such a conclusion was inevitable based on the principles it had announced. *Id.*

Although *Atkin* and *Heim* addressed state action via public works, the Court in each case based its opinion on the State acting in its proprietary role and as a participant in the marketplace. Therefore, whether the State is entering a service contract, purchasing goods, or investing its money, the same principles apply. In each situation, the State acts in its proprietary role and as guardian and trustee of the public fisc.

In 1917 the Mississippi Supreme Court analyzed a state law restricting county officials from purchasing records and books from companies not engaged in the printing business in the State. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 76 So. 258 (Miss. 1917). In its Commerce Clause analysis, the court determined the statute did not attempt to regulate any contracts other than the State's own contracts. *Id.* at 260. After pointing out that a private entity has the right to enter a contract with whomever it chooses, the court determined that there is no specific provision of the Constitution requiring the State to enter into a contract with any person or corporation without the State's consent. Consequently, it held that the State cannot be forced to do so. *Id.* Further, the court noted that the statute expressly provided how both resident and nonresident citizens and corporations could qualify to sell to the State, become amenable to process in the State, and do the work within the State. *Id.*

The right of the government to act as any other business when it enters the marketplace was again addressed in *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). In *Perkins* this Court stated: "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id.* at 127.

Although *Perkins* involved an act by the federal government, the principles involved apply equally to state governments when acting as market participants. The Court stated that the purpose of the federal act in *Perkins* was "to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." *Id.* at 128. The Court emphasized that the act did not purport to regulate private businesses but only instructed the government agents with authority to fix the terms and conditions under which the government would purchase goods. *Id.* at 128-29.

This Court in *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), identified several policy considerations underlying the market participant exception. The most important consideration was the absence of any "constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Id.* at 437. Quoting from constitutional scholar Lawrence Tribe, this Court noted that "the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity." *Id.* This Court also identified

the following considerations as supporting the market participant exception to the Commerce Clause:

- Considerations of state sovereignty when the State is acting as guardian and trustee for the State's residents (citing *Heim*, 239 U.S. at 191);
- Considerations of fairness that dictate because state proprietary actions are burdened with the same restrictions as actions by private market participants, state proprietary actions also should receive the same freedom from federal constraints (citing *Senatobia*, 76 So. at 260, and *Tribune Printing & Binding Co. v. Barnes*, 75 N.W. 904, 906 (N.D. 1898) (cited supra as *Knight v. Barnes*));
- The right of a private business to choose its trading partners (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919));
- The practical difficulty in evaluating state proprietary activities under the traditional Commerce Clause analysis (as shown by the case before the Court in *Reeves*).

Reeves, 447 U.S. at 438-39. Each of these underpinnings of the market participant exception would be followed by the application of a bright line test.

Bright Line Test

The market participant exception to the dormant Commerce Clause protects the activities of a State acting in a proprietary manner. Because it is uncertain how a court will determine whether a State is acting purely in its proprietary role, it is important that this Court adopt a

bright line test. An appropriate test would apply the market participant exception to the dormant interstate

the market participant exception is largely dicta, however, because the Court found Wisconsin's law was preempted by the National Labor Relations Act).

mmerce with foreign nations

or investments in other countries or from companies

CONCLUSION