No. 99-474

In the Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF MASSACHUSETTS, ET AL., PETITIONERS

v.

NATIONAL FOREIGN TRADE COUNCIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

Whether a state procurement statute that seeks to effect political change in Burma by discriminating in the award of state contracts against foreign and domestic companies that do business in Burma and the affiliates of such companies (1) violates the Foreign Commerce Clause of the Constitution, (2) is preempted by the federal statutory scheme governing economic sanctions against Burma, or (3) impermissibly interferes with the national government's exclusive power over foreign affairs.

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INTEREST OF THE UNITED STATES

The United States has condemned, in the strongest possible terms, the Burmese government's violations of human rights.[1] The President and Congress have crafted a policy

[1] See, *e.g.*, President's Message to Congress Transmitting a 6-Month Periodic Report on the National Emergency with Respect to Burma 5 (Dec. 14, 1999) (reporting that the Burmese government "has continued to refuse to negotiate with pro-democracy forces and ethnic groups for a genuine political settlement to allow a return to the rule of law and respect for basic human rights"); Remarks by the President to the International Labor Organization Conference 4 (June 16, 1999) (condemning "the flagrant violation of human rights" in Burma); U.S. Dep't of State, 1 *Country Reports on Human Rights Practices for 1998: Report to the Senate Comm. on Foreign Relations and the House Comm. on International Relations* at xvii (1999) (Assistant Secretary of State Koh observes that the Burmese military junta in 1998 "continued its highly repressive policies, targeting all forms of dissent and intensifying its restrictions of free assembly and association"); *id.* at 813 (criticizing the Burmese government's "longstanding severe repression of human rights," including "extrajudicial killings and rape" by soldiers, "[a]rbitrary arrests and detentions for expression of dissenting political views," "forced unpaid

toward Burma that includes economic sanctions, restrictions on U.S. assistance, and coordinated international action to promote respect for human rights and the democratic process in that country. There is thus no disagreement between the United States and Massachusetts on the need for action to encourage reform in Burma. The disagreement is only over whether the State could permissibly take the sort of action reflected in the Massachusetts Burma Act.

The Constitution assigns to the national government the exclusive responsibility to direct the United States' relations with other countries. Accordingly, while States may speak out on matters of foreign policy, the ultimate authority to act on behalf of the United States, and each of its States, in the international arena resides with the President and Congress alone. The national government's ability to exercise that authority effectively, expeditiously, and flexibly may be un-

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civilian labor," and extensive "restrictions on basic rights of free speech, press, assembly, and association"); *Human Rights in Burma: Hearing Before the Subcomm. on International Operations and the Subcomm. on Asia and the Pacific of the House Comm. on International Relations*, 105th Cong., 2d Sess. 2 (1998) (*Human Rights in Burma*) (testimony of Acting Assistant Secretary of State Smith (Sept. 27, 1998)) ("The people of Burma continue to live under a highly repressive, authoritarian military government that is widely condemned for its serious human rights abuses."); Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, *Report on Labor Practices in Burma* 2 (1998) ("The Burmese military government has been widely criticized for human rights abuses," which include "arbitrary, extrajudicial and summary executions, torture, rape, arbitrary arrests and imprisonment, the imposition of forced labor on large sections of the population * * * , forced relocations and confiscation of property."); J.A. 134 (statement of Deputy Assistant Secretary of State Marchick) (noting Secretary of State Albright's expressions of "the United States outrage at egregious violations of human rights and international norms in * * * Burma"); *U.S. Policy Toward Burma: Hearing Before the Subcomm. on Foreign Operations of the Senate Comm. on Appropriations*, 104th Cong., 1st Sess. 2 (1995) (*U.S. Policy Toward Burma*) (testimony of Assistant Secretary of State Lord (July 24, 1995)) (discussing "[e]gregious human rights violations" in Burma).

dermined when States pursue their own foreign-policy objectives in their own ways. That may be so even where, as here, a state or local government is pursuing an objective that is also being pursued by the national government.

The Massachusetts Burma Act, while consistent with United States foreign policy in its ultimate end, seeks to achieve that end by means that diverge from those chosen by the President and Congress. The Act imposes sanctions that are designed to discourage *all* foreign economic engagement with Burma, and that are applicable to *all* entities, both U.S. and foreign, that do business in Burma, including those whose only connection to Burma is through a parent, subsidiary, or affiliate. Because the Act discriminates against foreign commerce beyond what a State may do as a market participant, departs from the carefully crafted framework established by Congress and the President for imposing economic sanctions against Burma, and impermissibly intrudes into the national government's exclusive authority over foreign affairs, the United States has a substantial interest in this case.

STATEMENT

1. It is a principal objective of United States foreign policy to advance the cause of democracy and human rights throughout the world. The United States pursues that objective through a variety of means, including public statements by the President and other U.S. officials, private discussions with foreign leaders, targeted economic assistance, and the threatened or actual imposition of increasingly severe economic sanctions. In pursuing political reform in another country, the United States seeks, whenever possible, to act in concert with other members of the international community, both to maximize the pressure on that country and, with respect to sanctions, to minimize the damage to U.S. competitiveness and to distribute the economic burden equitably. See, *e.g.*, J.A. 107-108 (statement of then-Under

Secretary of State (now Deputy Secretary of the Treasury) Eizenstat).

a. The general statutory framework for the President's imposition of economic sanctions against foreign governments is contained in the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (IEEPA). IEEPA authorizes the President to impose economic sanctions in response to "any unusual and extraordinary threat which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States." 50 U.S.C. 1701(a). IEEPA broadly defines the sorts of sanctions the President may impose; such sanctions are limited to transactions involving persons or property "subject to the jurisdiction of the United States." 50 U.S.C. 1702(a)(1).[2] Presidents have imposed economic sanctions under IEEPA against such nations as Iran (Exec. Order No. 12,170, 3 C.F.R. 487 (1980); see *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)), South Africa (Exec. Order No. 12,532, 3 C.F.R. 181 (1986)), Libya (Exec. Order No. 12,543, 3 C.F.R. 181 (1987)), and Iraq (Exec. Order No. 12,724, 3 C.F.R. 297 (1991)). As discussed below, with respect to Burma, Congress supplemented IEEPA with a statute specifically directed at that country.

b. The United States has sought to effect change in Burma in three areas: democracy, human rights, and narcotics trafficking. The United States has pursued those objectives through both unilateral and multilateral action, in part because unilateral action alone would not be effective, given the limited economic relationship between the United States and Burma.

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[2] The President is required to consult with, and report to, Congress with respect to any exercise of his authority under IEEPA. 50 U.S.C. 1703. Congress may terminate any exercise of that authority. 50 U.S.C. 1706(b).

The United States' policy with respect to Burma is reflected in a statute and an executive order. See Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 to 3009-167 (Federal Burma Act); Exec. Order No. 13,047, 3 C.F.R. 202 (1998) (Burma Executive Order).[3] The Federal Burma Act, titled "Policy Toward Burma," (1) suspends all U.S. economic assistance to Burma with the exception of humanitarian assistance, "counter-narcotics" and "crop substitution" assistance, and assistance "promoting human rights and democratic values," (2) directs U.S. representatives to international financial institutions to oppose loans or other assistance to Burma, and (3) provides that no United States visa should be issued to "any Burmese government official," except as required by treaty or to staff the Burmese mission to the United Nations. Federal Burma Act § 570(a), 110 Stat. 3009-166. The Act also authorizes and directs the President to prohibit "new investment" in Burma by "United States persons" if he determines that the Burmese government has "committed large-scale repression of or violence against the Democratic opposition." § 570(b), 110 Stat. 3009-166. The Act specifically provides, however, that "new investment" does not include "the entry into, performance of, or financing a contract to sell or purchase goods, services, or technology." § 570(f)(2), 110 Stat. 3009-167. In addition, the Act directs the President to "seek to develop, in coordination with members of [the Association of South East Asian Nations] and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c), 110 Stat. 3009-166.

The sanctions prescribed under the Federal Burma Act must remain in effect until "the President determines and

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[3] The Federal Burma Act and the Burma Executive Order, together with IEEPA, are reproduced in the Appendix to this Brief.

certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." Federal Burma Act § 570(a), 110 Stat. 3009-166. In the interim, the President is authorized to waive any of the sanctions, temporarily or permanently, "if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States." § 570(e), 110 Stat. 3009-167.

c. In May 1997, President Clinton, pursuant to the Federal Burma Act and IEEPA, prohibited "new investment in Burma by United States persons." Burma Executive Order § 1. That prohibition, consistent with the definition of "new investment" in the Federal Burma Act, does not extend to "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." *Id.* § 3. A "United States person" is defined as "any United States citizen, permanent resident alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the United States." *Id.* § 4(c). See 31 C.F.R. Pt. 537 (1998) (Burmese Sanctions Regulations).[4]

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[4] The United States has taken other actions as well to press for reform in Burma. For example, the United States has implemented an arms embargo against Burma, suspended developing-country tariff preferences, downgraded U.S. representation in Burma from an ambassador to a charge d'affaires, worked to deny assistance to Burma from the International Monetary Fund, the World Bank, and the Asian Development Bank, sought strong resolutions concerning human rights in Burma at the United Nations General Assembly and the United Nations Commission on Human Rights, worked with the International Labor Organization to condemn the use of forced labor and lack of freedom of association for workers in Burma, and suspended the issuance of U.S. entry visas to high-level Burmese officials and their families. President Clinton, Secretary of State Albright, and other U.S. officials have repeatedly denounced the repressive practices of the Burmese regime. See, *e.g.*, Presidential Proclamation No. 6925, 3 C.F.R. 74 (1997) (suspending visas); *Human Rights*

2. a. In June 1996, several months before the Federal Burma Act was enacted, Massachusetts enacted a statute that restricts the ability of state agencies and state authorities to procure goods and services from entities that do business in Burma. Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M (West Supp. 1998) (Massachusetts Burma Act). During the debate in the Massachusetts House of Representatives, Representative Rushing, the principal sponsor of the Act, characterized the Act as "foreign policy" legislation with the "identifiable goal [of] free democratic elections in Burma." J.A. 39-40. During the subsequent debate in the State Senate, Senator Walsh, a sponsor of the Act, described the Act as an effort to use "tax dollars in Massachusetts" to "stop the violation of human rights" in Burma. J.A. 51.

The Massachusetts Burma Act requires the State to maintain a "restricted purchase list" identifying all entities "currently doing business with Burma," either directly or through a parent, subsidiary, or a subsidiary of a common parent. Massachusetts Burma Act §§ 22G, 22J. An entity is "doing business with Burma" if it is incorporated or headquartered in Burma, has operations, leases, franchises, or distribution agreements there, provides any goods or services to the Burmese government, or promotes the importation or sale of certain Burmese products. *Id.* § 22G. No state agency or state authority may purchase goods or services, other than medical supplies, from a company on the "restricted purchase list" unless there is no other bid or the company's bid is more than 10 percent lower than the lowest bid from an unlisted company. *Id.* §§ 22H, 22I.[5] If a state

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in Burma 8-9 (testimony of Acting Assistant Secretary of State Smith) (Sept. 27, 1998) (describing other U.S. actions with respect to Burma); *U.S. Policy Toward Burma* 3 (testimony of Assistant Secretary of State Lord) (July 24, 1995) (same).

[5] Section 22H(e) contains an exception for companies whose only activity in Burma is providing medical supplies, reporting news, or supplying goods or services relating to international communications.

procurement officer should enter into a contract that is prohibited under the Act, the contract is deemed to be "void." *Id.* § 22L.

b. The restrictions under the Massachusetts Burma Act depart, in critical respects, from those under the Federal Burma Act and the Burma Executive Order. First, consistent with the Federal Burma Act's emphasis on developing "a coordinated, multilateral strategy" including Burma's major trading partners, the federal sanctions are limited to investment by "United States persons." Federal Burma Act § 570(a), 110 Stat. 3009-166. The state sanctions, in contrast, reach foreign persons as well. Second, the federal restrictions on investment are limited to "new investment," a term that does not encompass the continued operation of existing investment in Burma or the purchase or sale of goods or services. § 570(f)(2), 110 Stat. 3009-167. The state sanctions, in contrast, are not limited to new investment. Third, the federal sanctions terminate when "the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government." § 570(a), 110 Stat. 3009-166. The state sanctions contain no termination mechanism, much less one that may be activated by the President. Finally, the federal sanctions may be waived by the President in the interest of national security. § 570(e), 110 Stat. 3009-167. The state sanctions contain no waiver provision.

c. The Massachusetts Burma Act has generated protests from a number of U.S. allies and trading partners. For example, the European Union and Japan filed complaints against the United States in the World Trade Organization (WTO), contending that the Act violates certain provisions of the Agreement on Government Procurement.[6] See J.A. 88-

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[6] H.R. Doc. No. 316, 103d Cong., 2d Sess. 1719 (1994) (Agreement on Government Procurement) (submitted to Congress in connection with

90, 91-92; see also Pet. App. 10 (noting that the Act "has generated protests from a number of this country's trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations"). The United States, working with Massachusetts, has responded to those claims in WTO dispute settlement proceedings.[7] Senior United States officials have acknowledged that the Act and the consequent protests from U.S. allies have been "an irritant" that has, among other things, "diverted the United States' and Europe's attention from focussing where it should be—on Burma." J.A. 166 (testimony of Deputy Assistant Secretary of State Marchick). The Act has thus

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legislation implementing the Uruguay Round trade agreements). An annex to the Agreement lists Massachusetts among the "Sub-Central Government Entities which Procure in Accordance With the Provisions of this Agreement." *Id.* at 1991. In 1993, the Governor of Massachusetts expressed his understanding to the United States Trade Representative that Massachusetts would be required under the Agreement, when adopted, to award procurement contracts "on the basis of competitive procedures consistent with those specified in the [Agreement]" and "not [to] discriminate against suppliers, products, and services of foreign signatories to the [Agreement]." Letter from William F. Weld, Governor, Commonwealth of Massachusetts, to Michael Kantor, U.S. Trade Representative (Dec. 3, 1993).

[7] The United States participated in a series of WTO consultations with the European Union and Japan concerning the Massachusetts Burma Act. A WTO dispute settlement panel was subsequently established. Before any substantive arguments were presented to the panel, the proceedings were suspended, at the request of the European Union and Japan, in light of the district court's ruling in this case. See Letter of Ole Lundby, Chairman of the Panel, to Ambassadors from the European Union, Japan, and the United States (Feb. 10, 1999). Pursuant to Article 12.12 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the panel's authority automatically lapsed on February 10, 2000, one year after the proceedings were suspended. See Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1125, 1234 (1994). The European Union and Japan are not precluded from reinstituting WTO dispute settlement procedures challenging the Act in the future.

complicated the United States' efforts to develop a multilateral strategy toward Burma.

3. a. Respondent National Foreign Trade Council (NFTC), a trade association whose members include companies that have been effectively precluded by the Massachusetts Burma Act from doing business with the State, brought suit to challenge the Act. The district court held, on cross-motions for summary judgment, that the Act "unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs." Pet. App. 81. The court noted that the Act was designed "solely to sanction [Burma] for human rights violations and to change [Burma's] domestic policies" and has had a "disruptive impact on foreign relations," as reflected in the protests of the European Union, ASEAN, and Japan. *Id.* at 81-82.

b. The court of appeals affirmed. Pet. App. 1-73. Applying this Court's decision in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), the court first held that the Massachusetts Burma Act has "more than [the] incidental or indirect effect on foreign relations" that *Zschernig* suggested would be permissible. Pet. App. 23. The court noted that "the design and intent of the [Act] is to affect the affairs of a foreign country," that the Act "diverge[s] in at least five ways from the federal law, thus raising the prospect of embarrassment for the country," and that "the law has resulted in serious protests from other countries, ASEAN, and the European Union." *Ibid.*

The court of appeals further held that the Massachusetts Burma Act violates the Foreign Commerce Clause by discriminating against commerce with Burma and undermining national uniformity in the regulation of foreign commerce. Pet. App. 52-55. The court rejected the State's contention that the Foreign Commerce Clause was not implicated because the State was merely acting as a "market participant." The court reasoned that the State had "crossed over the line from market participant to market regulator" by imposing

on its suppliers "conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts." *Id.* at 44-45.

Finally, the court of appeals held that the Massachusetts Burma Act is preempted by the Federal Burma Act. Pet. App. 60-73. The court observed that the standard for finding preemption is less stringent where a State legislates in an area committed to exclusive federal authority rather than in an area of concurrent federal and state authority. *Id.* at 64-70. The court concluded that the Act, which "risks upsetting Congress's careful choice of tools and strategy" for achieving political reform in Burma, impermissibly conflicts with federal law. *Id.* at 71.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly emphasized that "[i]n 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." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979) (quoting *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933)); see also, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *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."); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-322 (1936).

The national government's preeminent role in acting for the United States in the international arena is reflected in several of the Constitution's express grants of power to Congress in Article I, Section 8,[8] and to the President in

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[8] Those include Congress's powers to "provide for the common Defence * * * of the United States," "regulate Commerce with foreign

Article II, Sections 2 and 3,[9] and in several of its express restrictions on state power in Article I, Section 10.[10] The most significant of those enumerated powers, for present purposes, is Congress's power "[t]o regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3.

The Framers understood that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." *The Federalist No. 42*, at 264 (James Madison) (quoted in *Hines*, 312 U.S. at 63 n.11). Under the Articles of Confederation, the national government's efforts to engage in political and commercial relations with other countries had been undermined by the States.[11] There was even concern that the United States could not prevent a State from embroiling the nation in a war with another country. As Ed-

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Nations * * * and with the Indian Tribes," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 1, 3, 10, 11.

[9] Those include the President's powers to serve as "Commander in Chief of the Army and Navy of the United States," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive Ambassadors." U.S. Const. Art. II, §§ 2, 3.

[10] Those include restrictions on the States' "enter[ing] into any Treaty, Alliance, or Confederation," "grant[ing] Letters of Marque and Reprisal," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement or Compact * * * with a foreign Power," and "engag[ing] in War." U.S. Const. Art. I, § 10.

[11] For example, several States, in contravention of the Treaty of Paris ending the War of Independence, acted to prevent British merchants from collecting their pre-War debts. And, when Britain refused to permit American trade in the West Indies, the conflicting positions of the States precluded a coordinated national response. See Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 342-352 (1979); *Oldfield* v. *Marriott*, 51 U.S. (10 How.) 146, 163-165 (1850).

mund Randolph of Virginia observed at the Constitutional Convention, "particular states might by their conduct provoke war without controul" because, "[i]f a State acts against a foreign power contrary to the laws of nations or violates a treaty," the national government "cannot punish that State, or compel its obedience to the treaty." 1 *The Records of the Federal Convention of 1787*, at 19, 24-25 (M. Farrand ed. 1966).

That instability and inconsistency caused the Framers to propose a Constitution that provided for a single national voice over foreign political and commercial affairs. Proponents of the Constitution perceived that single voice as essential to preserving "[t]he peace of the whole." *The Federalist No. 80*, at 476 (Alexander Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."); see also *The Federalist No. 3*, at 43 (John Jay) (asserting that adherence to the law of nations "will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies"); *The Federalist No. 44*, at 281 (James Madison) (recognizing "the advantage of uniformity in all points which relate to foreign powers"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 228-229 (1824) (Johnson, J., concurring).

The Framers' decision to vest responsibility for foreign commercial and political affairs "in the national government exclusively," *Pink*, 315 U.S. at 233, has several implications for state laws such as the one at issue here.

First, a state law violates the dormant Foreign Commerce Clause if it discriminates against foreign commerce (including against commerce with a particular nation), thereby inviting retaliation against the entire United States, or prevents the United States from speaking with one voice with respect to foreign commerce. Although, in our view, the market-participant exception recognized under the dormant

Interstate Commerce Clause extends at least in some measure to foreign commerce as well, that exception does not permit a State to do what Massachusetts has done here—*i.e.*, use its spending power as a means of regulating conduct beyond the Nation's borders and beyond the particular transactions in which the State is involved.

Second, quite aside from the limitations imposed by the Foreign Commerce Clause of its own force, when a state law addresses concerns of foreign policy and foreign commerce that are also addressed by a federal law, the Supremacy Clause is implicated more strongly than it is in the purely domestic context. Thus, the state law will more readily be found to be preempted as "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. Here, the Massachusetts Burma Act stands as such an obstacle to the effectuation of the United States' multifaceted and multilateral strategy toward Burma, as reflected in the International Emergency Economic Powers Act, the Federal Burma Act, and the Burma Executive Order.

Third, even absent preemption by an Act of Congress or an order of the President, a state law will be struck down if it has "a direct impact upon foreign relations," rather than a mere "incidental or indirect" one. *Zschernig* v. *Miller*, 389 U.S. 429, 434, 441 (1968). For the reasons stated above, the Massachusetts Burma Act is invalid on that ground as well.

ARGUMENT

I. THE MASSACHUSETTS BURMA ACT VIOLATES THE FOREIGN COMMERCE CLAUSE

The Commerce Clause "has long been understood * * * to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 310 (1994) (quoting *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)). Because "the Founders intended the scope of

[Congress's] foreign commerce power to be * * * greater" than its power over interstate commerce, the Court has applied heightened scrutiny when "ascertaining the negative implications of Congress' power to 'regulate Commerce with foreign Nations.'" *Japan Line*, 441 U.S. at 448-449. Accordingly, a state law may violate the Foreign Commerce Clause, even in the absence of a superseding federal law, if the state law *either* discriminates against foreign commerce, *Barclays*, 512 U.S. at 311, 312-314, *or* "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments,'" *Japan Line*, 441 U.S. at 451 (quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)).[12] The Massachusetts Burma Act suffers from both infirmities. The Act therefore violates the Foreign Commerce Clause unless it can be saved on the theory that the State is acting as a market participant in penalizing companies that do business in Burma. As we show in Point C, *infra*, however, the Act cannot be sustained on that theory.[13]

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[12] A state tax must satisfy additional criteria in order to survive a challenge under the Foreign or Interstate Commerce Clause. See *Barclays*, 512 U.S. at 310-311 (citing *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). Questions concerning the validity of state taxes are not presented here. Nor is there any occasion in this case to consider the application of the Foreign Commerce Clause to state measures that do not facially discriminate against foreign commerce or prevent the Nation from speaking with one voice, but nevertheless are claimed to impermissibly burden foreign commerce. Cf. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-354 (1977) (invalidating a "facial[ly] neutral[]" state statute as imposing an undue burden on interstate commerce).

[13] As we have pointed out above (see pp. 11-12 & n.8, *supra*), the Foreign Commerce Clause is one of the explicit provisions manifesting the Constitution's grant of authority to the national government over foreign affairs generally. In *Zschernig*, the Court relied on that general foreign affairs power to invalidate a state inheritance statute that required determinations regarding the conduct of foreign governments. We explain in

A. The Massachusetts Act Discriminates Against Foreign Commerce

The Massachusetts Burma Act facially discriminates against commerce with Burma. The Act penalizes all companies that engage in commerce with Burma, whether directly or through a corporate parent, affiliate, or subsidiary, by effectively foreclosing procurement opportunities with the State.[14] Companies are forced to choose between doing business in Burma and doing business with Massachusetts. Such discrimination is not merely an incidental consequence of the Act. It is the very means that the State has selected to pursue its foreign-policy objectives with respect to Burma. See, *e.g.*, pp. 7-8, *supra*, and pp. 36-37, *infra*.

Contrary to Massachusetts' assertion (Br. 47), a state statute that facially discriminates against interstate or foreign commerce violates the Commerce Clause, even if the statute was not "intend[ed] to secure economic advantages for local businesses at the expense of businesses situated elsewhere." In *Kraft General Foods* v. *Iowa Department of Revenue*, 505 U.S. 71, 78 (1992), this Court rejected a State's

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Section III of this Brief that the Massachusetts Burma Act also is unconstitutional because it impermissibly intrudes into the conduct of foreign affairs by the President and Congress. That is so, however, for essentially the same reasons that the Act is inconsistent with the Foreign Commerce Clause. We have elected to address the Foreign Commerce Clause first because this case, unlike *Zschernig*, involves foreign commerce. In our view, it would be appropriate for the Court to rest its decision on the Clause of the Constitution that is specifically applicable to the subject matter, rather than on the national government's more general power over foreign affairs, of which the Foreign Commerce Clause is but one (albeit significant) exemplification. We will not repeat in detail in Section III all of the ways in which the Massachusetts Burma Act intrudes upon the powers of the national government.

[14] For example, Massachusetts would be required to discriminate against a Pennsylvania company that sells office products solely because the company is owned by a French conglomerate that also owns a Japanese company that sells food products in Burma.

analogous argument that its tax system, which treated dividends received from foreign subsidiaries less favorably than dividends received from domestic subsidiaries, did not violate the Foreign Commerce Clause because "it [did] not favor local interests." The Court explained that a state statute that discriminates against foreign commerce "is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination." *Id.* at 79. "As the absence of local benefit does not eliminate the international implications of the discrimination," the Court said, "it cannot exempt such discrimination from Commerce Clause prohibitions." *Ibid.*

Nor is the Massachusetts Burma Act rendered permissible, as Massachusetts contends (Br. 47), by the fact that the Act applies to domestic, as well as foreign, companies that do business in Burma. A statute may violate the Foreign Commerce Clause by discriminating against foreign *commerce* (*e.g.*, commerce with a particular foreign nation) as well as by discriminating against foreign *persons*.[15]

That conclusion is compelled by the text of the Foreign Commerce Clause, which refers to commerce "with foreign *Nations*," and by its principal purpose, which was to prevent individual States from embroiling this Nation in disputes with other nations, thereby inviting retaliation that would harm the United States as a whole. See pp. 12-13, *supra*; see also *Kraft Gen. Foods*, 505 U.S. at 79; *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 317 (1851) (one of the purposes of the Commerce Clause was to eliminate state laws

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[15] Cf. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 575-583 (1997) (a state property tax violated the Interstate Commerce Clause by discriminating between domestic charitable organizations operated principally for the benefit of state residents and domestic charitable organizations operated principally for the benefit of non-residents).

that create "discriminations favorable or adverse to commerce with particular foreign nations").[16]

B. The Massachusetts Act Prevents The United States From Speaking With One Voice On Foreign Commerce

The Massachusetts Burma Act violates the Foreign Commerce Clause for an additional, independent reason: It prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line*, 441 U.S. at 449; accord *Barclays*, 512 U.S. at 320. The Court has explained that a state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). The Massachusetts Burma Act not only "implicates foreign policy issues"—whether economic sanctions should be used to press for political reform in Burma and, if so, the nature, extent, and duration of those sanctions—but does so through an approach that departs, in significant respects, from the approach chosen by the national government.[17]

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[16] Because the Massachusetts Burma Act facially discriminates against a species of foreign commerce (*i.e.*, commerce with Burma), the Act is unlike the California tax statute that was held to be nondiscriminatory in *Barclays*. The California statute, which prescribed the use of the "worldwide combined reporting" method by multinational corporations, applied the same method to domestic and foreign corporations. *Barclays*, 512 U.S. at 310-311. Indeed, the only claim of discrimination in that case was that the costs of complying with the statute would be higher for foreign corporations than for domestic corporations (*e.g.*, because domestic corporations "already keep most of their records in English, in United States currency, and in accord with United States accounting principles"). *Id.* at 313. The Court concluded that "[t]he factual predicate of [that] discrimination claim, however, is infirm." *Ibid.*

[17] Because Congress and the President have spoken for the United States with respect to sanctions against Burma, there is no occasion to consider the application of the "one voice" aspect of the dormant Foreign

As explained more extensively below (at 31-35), although the national government and the State seek the same end with respect to democratic reform in Burma, they have chosen to do so through different means.[18] The national government has chosen a carefully calibrated strategy of penalties and incentives, which are capable of being applied flexibly by the President in response to the Burmese regime's conduct, the actions of the international community, and other national security considerations. The national government has elected not to penalize U.S. companies with existing investments in Burma or to prohibit "the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." Federal Burma Act § 570(f)(2), 110 Stat. 3009-167. The national government has also recognized that the most effective means to achieve reform in Burma is through "a comprehensive, multilateral strategy" that involves those nations, primarily in Asia, that have stronger economic ties to Burma than has the United States. § 570(c), 110 Stat. 3009-166.

The State's approach is inconsistent with the national government's approach in a number of respects. First, the Massachusetts Burma Act undermines the President's flexibility

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Commerce Clause to state purchasing restrictions where the national government has not spoken.

[18] The Massachusetts Burma Act prevents the United States from "speaking with one voice" with respect to foreign commerce for essentially the same reasons that, as set forth in Sections II and III, *infra*, the Act is preempted by the federal statutory scheme governing economic sanctions against Burma (see pp. 30-35, *infra*) and interferes with the national government's exclusive authority over foreign affairs (see pp. 35-38, *infra*). As explained in this Section, whether or not the Massachusetts Burma Act is actually preempted by the Federal Burma Act and the Burma Executive Order, the Act prevents the United States from speaking with one voice with respect to the regulation of commerce with Burma (and therefore violates the Foreign Commerce Clause) because the different federal strategy embodied in the Federal Burma Act and the Burma Executive Order *is* the one voice of the United States on the subject.

in dealing with the Burmese regime. Whereas the sanctions under the Federal Burma Act and the Burma Executive Order may be adjusted in response to changing circumstances, the sanctions under the Massachusetts Burma Act are applied inflexibly. See pp. 31-33, *infra*. Second, the Massachusetts Burma Act seeks to discourage all business by U.S. companies in Burma, contrary to Congress's and the President's decision that only "new investment" is to be prohibited. See pp. 33-34, *infra*. Third, the Massachusetts Burma Act operates against foreign companies as well as U.S. companies, which has antagonized U.S. allies and complicated the development of a multilateral strategy toward Burma. See pp. 34-35, *infra*. Clearly, then, the Act undermines the United States' ability to "speak with one voice."

Indeed, if the Massachusetts Burma Act were sustained, a multitude of different, and differing, state and local measures sanctioning foreign governments could be expected. At least 18 local governments have adopted similar, although not necessarily identical, selective-purchasing statutes directed at Burma. J.A. 155-156. And various state and local governments have adopted or considered similar selective-purchasing statutes aimed at other countries, including China, Cuba, Egypt, Indonesia, Iran, Iraq, Laos, Morocco, Nigeria, North Korea, Pakistan, Saudi Arabia, Sudan, Switzerland, Tibet, Turkey, and Vietnam. J.A. 144-156. Cf. *Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984) (in determining whether a state tax discriminates against interstate commerce, the Court inquires whether the tax is "such that, if applied by every jurisdiction, there would be no impermissible interference with free trade") (internal quotation marks omitted).[19]

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[19] Massachusetts suggests (Br. 19) that Congress has acquiesced in the Massachusetts Burma Act by declining to preempt it. In *Barclays*, the Court explained that Congress's acquiescence in a state statute that discriminates against foreign commerce must appear with "unmistakable

C. The Massachusetts Act Is Not Saved On The Theory That The State Is Acting Simply As A Market Participant

The State contends that the Massachusetts Burma Act does not violate the Foreign Commerce Clause—whether or not the Act discriminates against foreign commerce or undermines national uniformity—because the State is acting as a "market participant" in refusing to deal with companies that do business in Burma. The Massachusetts Burma Act cannot be sustained on that theory.[20]

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clarity," whereas Congress's acquiescence in a state statute that undermines the United States' ability to "speak with one voice" on foreign commerce need not be as explicit. 512 U.S. at 323. The Court applied only the latter standard in *Barclays* because the California tax statute at issue there, unlike the Massachusetts Burma Act, did not discriminate against foreign commerce. Moreover, this case does not present the sort of evidence of congressional acquiescence in a state statute that the Court deemed sufficient in *Barclays*. Whereas Congress repeatedly declined to enact legislation that would have precluded the taxing method used by California (see *Barclays*, 512 U.S. at 325-328), Congress has not considered and rejected legislation to preclude state laws such as the Massachusetts Burma Act, and that Act is in significant tension with the strategy adopted by Congress and the President for bringing about reform in Burma.

[20] This case presents no question concerning the interpretation of federal statutes governing the President's authority in prescribing the terms for procurement by federal agencies. See Federal Property and Administrative Services Act, 40 U.S.C. 486(a) (authorizing the President to "prescribe such policies and directives * * * as he shall deem necessary to effectuate the provisions of [this] Act"); see also *AFL-CIO* v. *Kahn*, 618 F.2d 784, 789 (D.C. Cir.) (en banc) (noting that the Act "grants the President particularly direct and broad-ranging authority" over federal procurement), cert. denied, 443 U.S. 915 (1979); *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.) (noting the Act's "broad grant of procurement authority" to the President), cert. denied, 404 U.S. 854 (1971); cf. *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1333-1339 (D.C. Cir. 1996).

1. This Court has identified a "narrow exception to the dormant [Interstate] Commerce Clause for States in their role as 'market participants.'" *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 589 (1997). The Court has not yet decided whether, or to what extent, the market-participant exception applies to foreign commerce. See *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 438 n.9 (1980) ("We have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause * * * . We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."). It is significant, however, that even in the purely domestic context, the Court has never extended the market-participant exception to state action analogous to that at issue here, *e.g.*, to a state procurement statute that discriminates against companies that do business in another State in order to influence that other State's internal policies.

The market-participant exception originated in two cases in which the State, as a participant in a commercial activity, preferred its own citizens over citizens of other States. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Court held that a State, in paying a "bounty" to encourage the processing of abandoned automobiles into scrap metal, could prefer local processors over out-of-state processors. The Court reasoned that the State was not seeking to regulate the market for abandoned automobiles; "[i]nstead, it ha[d] entered into the market itself to bid up their price." *Id.* at 806. The Court then concluded that the Commerce Clause does not "prohibit[] a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 810. Similarly, in *Reeves*, the Court held that a State, as the operator of a cement plant, could choose to sell the cement only to its own citizens. 447 U.S. at 440-447.

The Court's subsequent decisions make clear that the market-participant exception does not exempt all of a State's

procurement decisions from the constraints of the Commerce Clause. In *White* v. *Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), the Court upheld an executive order issued by the Mayor of Boston that required that city residents constitute 50 percent of the workforce on public construction projects funded wholly with city funds. The Court reasoned that such a preference for city residents did not violate the Commerce Clause because, "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant." *Id.* at 214-215. The Court acknowledged that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business." *Id.* at 211 n.7. The Court found it "unnecessary in this case to define those limits with precision," however, because "[e]veryone affected by the order is, in a substantial if informal sense, working for the city." *Ibid.* Thus, in *White*, the Court again sustained a procurement provision that simply preferred the city's (and thus the State's) own residents in the expenditure of the city's own funds on the city's own construction projects. The city did not broadly make employment on city-funded construction projects open to residents and non-residents alike but then disqualify residents of a particular State based, for example, on the city's disapproval of the policies of that State. Nor did the city seek to influence the contractors' actions aside from their work for the city itself.

The Court addressed some of the limits on the market-participant exception in *Wisconsin Department of Industry, Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282 (1986), which concerned a Wisconsin statute that barred the State from doing business with companies that had committed multiple violations of the National Labor Relations Act (NLRA). The State did not dispute that, if the statute was "regulatory" in nature, the statute would be preempted

under *San Diego Building & Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The Court rejected the State's argument that the statute "escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power," which the Court found to be "a distinction without a difference, at least in this case, because on its face the debarment statute serves plainly as a means of enforcing the NLRA." *Gould*, 475 U.S. at 287. In other words, given that "the point of the statute is to deter labor law violations," *ibid.*, the statute was regulatory, although the statute involved the exercise of the State's spending power. The Court also rejected the State's related argument that it was merely acting as a market participant in refusing to deal with companies that violated the labor laws. The Court observed that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin simply is not functioning as a private purchaser of services; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289 (internal quotation marks and citation omitted). The Court has since explained its holding in *Gould* on the ground that the state statute in that case "addressed employer conduct unrelated to the employer's performance of contractual obligations to the State" for the purpose of "deter[ring] NLRA violations." *Building & Constr. Trades Council* v. *Associated Builders*, 507 U.S. 218, 228-229 (1993).

Similarly, in *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82 (1984), a plurality of the Court concluded that Alaska was not acting as a market participant in requiring those who purchased timber on state lands to have the timber processed within the State. *Id.* at 93-99 (plurality opinion of Justice White). The plurality observed that the market-participant doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. The plurality concluded that the

market-participant exception was inapplicable because "the State [was] attempting to govern the private, separate economic relationships of its trading partners" in a market in which the State was not a participant. *Id.* at 99.

2. We do not disagree with the State's submission that the market-participant exception applies, at least to some extent, to foreign as well as domestic commerce. For example, South Dakota, in selling cement from its cement plant, could prefer its own citizens not only over a would-be purchaser from Wyoming, as in *Reeves*, but also over a would-be purchaser from Canada, in the absence of a federal statute or treaty providing otherwise. And the preferences in *Hughes* and *White* for local residents could have been enforced against residents of other countries as they were against residents of other States absent a contrary federal statute or treaty.[21]

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[21] This Court has reserved the question whether "Buy American" statutes, which give a preference in a State's purchases to goods produced in the United States over goods produced in other countries, violate the Commerce Clause. See *Reeves*, 447 U.S. at 437 n.9. The lower courts have divided on the question. Compare *Trojan Techs., Inc.* v. *Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (sustaining Buy American statute), cert. denied, 501 U.S. 1212 (1991), and *K.S.B. Tech. Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 776 (N.J. 1977) (same), with *Bethlehem Steel Corp.* v. *Board of Comm'rs*, 80 Cal. Rptr. 800, 803 (Ct. App. 1969) (invalidating Buy American statute). A Buy American statute differs from the state actions at issue in *Reeves*, *Hughes*, and *White*, because the State is not simply preserving the benefits of its expenditures for its own citizens as against everyone else, domestic and foreign alike. The State is singling out suppliers of imported goods for disfavored treatment. In contrast to the Massachusetts Burma Act, however, a Buy American statute does not single out particular foreign governments for disfavored treatment, seek to affect the internal policies of a foreign government, or penalize companies merely because they do business in a particular country. In considering the validity of such Buy American statutes as applied to goods from particular countries, the Agreement on Government Procurement (see note 6, *supra*) now would have to be consulted.

There is no occasion in this case, however, to consider the precise limits of the market-participant exception in the context of foreign commerce. Whatever those limits might be, the Massachusetts Burma Act exceeds them. The Commerce Clause confers on Congress, not the States, the power to "regulate" commerce "with foreign Nations, and among the several States." Accordingly, an exercise of a State's procurement power falls outside the market-participant exception whenever it is "regulatory" in nature.

Here, several characteristics of the Massachusetts Burma Act make clear that the Act, like the state statutes in *Gould* and *South-Central Timber*, is properly regarded as regulatory in nature. First, in contrast to the state action that this Court has held to come within the market-participant exception, the Massachusetts Burma Act does not seek to advance the economic interest of the State or its own citizens through the State's participation in the marketplace. Second, the "point of the statute," *Gould*, 475 U.S. at 287, is to deter U.S. and foreign companies from doing business in Burma, and thereby to pressure the Burmese regime for political reform. The Act thus "address[es] [such companies'] conduct unrelated to [their] performance of contractual obligations to the State." *Associated Builders*, 507 U.S. at 228-229; accord *South-Central Timber*, 467 U.S. at 97 (plurality opinion) ("The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further."). Third, as reflected in the Act's design, operation, and scope, the Act seeks to affect the conduct not only of the State's own contracting partners, but also of third parties—and, indeed, the conduct of those third parties outside the United States. Because the Act penalizes companies that do not themselves do business in Burma, but that merely have a parent, a subsidiary, or an affiliate that does business in Burma, the Act regulates conduct even further from a company's own "contractual obligations to the State" than did

the statutes in *Gould* and *South-Central Timber*. And the Act ultimately seeks, of course, to affect the conduct of Burmese officials.[22]

The conclusion that the Massachusetts Burma Act falls outside the market-participant exception is especially evident when the analogous question is considered in the context of commerce among the States. If Massachusetts refused to do business with any companies that do business in Texas, or their parents, subsidiaries, or affiliates, in order to induce a change in the internal policies of Texas, there could be little doubt that Massachusetts would violate the Commerce Clause. Such a boycott is no more consonant with that Clause when a State targets another country rather than another State. The Interstate Commerce Clause was intended to prevent "economic Balkanization" and retaliation by one State against another, see *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995), and the Foreign Commerce Clause was designed to prevent individual States from embroiling the Nation in disputes with other nations and triggering retaliation against the United States as a whole, see *Kraft Gen. Foods*, 505 U.S. at 79. It would be inconsistent with those overriding purposes of the Commerce Clause to sustain a state statute that singles out companies because they do business in another State or another nation for the purpose of affecting the internal policies of that State or nation.

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[22] That some private companies might engage in boycotts of suppliers does not mean that Massachusetts' conduct falls within the market-participant exception. As the Court has explained, "[t]he private actor under such circumstances would be attempting to 'regulate' the suppliers and would not be acting as a typical proprietor." *Associated Builders*, 507 U.S. at 229. But the private actor, unlike the State, would not be subject to the constraints of the dormant Commerce Clause. See *ibid.* ("When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding.").

That is not to say that the Constitution leaves no room for States to take action with respect to another country based on concerns about its record on human rights or similar matters. A State may adopt a resolution condemning the conduct of a repressive foreign regime. A State may petition Congress and the President to take action against the regime, including the imposition of economic sanctions, or to authorize the States themselves to take certain action. A State may decline to send its own officials on trade missions to the country so long as the repressive regime remains in power. And a State may call attention to its concerns in other ways. Such measures would not involve the State in any regulation of foreign commerce. They consequently would not implicate the Foreign Commerce Clause.

Moreover, we are not prepared to say that there would be no instances in which a State could take action in a commercial setting to express its concerns about violations of human rights. For example, a state statute that required state pension funds to divest their holdings in companies doing business in a particular country would present different considerations under the Foreign Commerce Clause than does a state statute that restricts a State from entering into procurement contracts with such companies. While a divestment statute might be regarded as regulatory to the extent that it is perceived to be seeking to affect conduct unrelated to the companies' performance in the financial markets, such a statute might also be regarded as serving only to disassociate the State, as an ultimate "owner" of such companies through the pension funds, from any affinity with a repressive regime that results from stock ownership, not to regulate the companies' conduct with respect to that regime. See *Board of Trustees* v. *Mayor & City Council*, 562 A.2d 720, 746 (Md. 1989) (describing the purpose of a divestment statute as "simply to ensure that city pension funds would not be invested in a manner that was morally offensive to many city residents and many beneficiaries of the pension

funds"), cert. denied, 493 U.S. 1093 (1990).[23] Nor could such a statute be expected to have as direct a regulatory effect as the Massachusetts Burma Act, because stock sold by the pension fund would be purchased by someone else, and the transaction would not be conditioned on any conduct by the purchaser, the company, or the foreign government. It may be that in appropriate circumstances a State could take other actions for similar purposes in a commercial setting. There is no occasion in this case, however, to consider the validity of state divestment statutes targeted at companies doing business in a particular country, or to consider the application of the market-participation exception to other state action with respect to foreign commerce. Whatever may be the precise limits of the market-participant exception, the Massachusetts Burma Act exceeds them.[24]

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[23] See also *Constitutionality of South African Divestment Statutes Enacted by State and Local Governments*, 10 Op. Off. Legal Counsel 49, 51-59 (1986) (concluding that state and local divestment statutes come within the market-participant exception). The Office of Legal Counsel Opinion assumed that the same analysis would apply to statutes that prohibit state or local governments from entering into procurement contracts with companies that do business in a particular country. For the reasons discussed in the text, however, a statute like the Massachusetts Burma Act does not fall within the market-participant exception. To the extent that the Office of Legal Counsel Opinion is inconsistent with the views set forth in this Section or in Sections II and III, it no longer represents the position of the United States.

[24] Even if the Court were to hold that States have the latitude under the dormant Foreign Commerce Clause to adopt a policy of mandatory divestment from companies doing business in another country, it would not necessarily follow that States would have the same latitude to adopt a policy of mandatory divestment from companies doing business in another State. Whether the dormant Interstate Commerce Clause preserves any such power for the States would be informed by its purpose "to create an area of free trade among the several States," *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 618 (1981), by the reciprocity and mutual respect owed by the States to one another as coordinate sovereigns under the plan of the Constitutional Convention, and by the applicability of self-

II. THE MASSACHUSETTS BURMA ACT IS PREEMPTED BY THE FEDERAL STATUTORY SCHEME GOVERNING ECONOMIC SANCTIONS AGAINST BURMA

Because the regulation of foreign commerce and the conduct of foreign policy are committed to the national government exclusively, and because tension between federal and state laws in those areas raises unique concerns, the Supremacy Clause applies with special force to state laws that deal with foreign commerce and foreign policy. As this Court has explained, when a state law operates in a field of "uniquely federal interest," as opposed to "a field which the States have traditionally occupied," the "conflict with federal policy need not be as sharp" in order for the state law to be preempted. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 507 (1988). Accordingly, when a State legislates in an area "that touch[es] international relations," the Court should be "more ready to conclude that a federal Act * * * supersede[s] state regulation." *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

In *Hines*, the Court held that a Pennsylvania alien registration law was preempted by the subsequently enacted federal Alien Registration Act, even though the federal Act did not contain an express preemption provision or impose inconsistent obligations on aliens. 312 U.S. at 62-74. The Court explained that, at least in an area that is "so intimately blended and intertwined with responsibilities of the national government" over "the exterior relation of this whole nation with other nations and governments," *id.* at 66, a state law must yield to a federal law on the same subject if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 67. The Court emphasized that "Congress

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executing provisions of the Constitution that embody shared values and protect fundamental human rights in *all* of the States.

was trying to steer a middle path" in the Alien Registration Act, *id.* at 73, excluding from the final version various provisions that had been criticized as unduly harsh, such as a requirement that aliens carry identification cards at all times, *id.* at 71-73 & n.32. The Court found that the continued enforcement of the state law, which imposed requirements on aliens that were similar to some of those that had been omitted from the federal law, would undermine Congress's purpose "to obtain the information deemed to be desirable in connection with aliens * * * in such a way as to protect [their] personal liberties." *Id.* at 74.

In three respects, the Massachusetts Burma Act similarly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (IEEPA), the Federal Burma Act, and the Burma Executive Order. That is so even though the ultimate end sought by the United States and the State is the same: a free and democratic Burma that fully respects the human rights of its people.

A. Congress and the President have crafted a policy toward Burma that emphasizes the President's flexibility and discretion to impose, adjust, and suspend economic sanctions to reflect changing circumstances. The Massachusetts Burma Act, in contrast, undermines the President's flexibility and discretion with respect to Burma.

IEEPA "codifies Congress's intent to confer broad and flexible power upon the President to impose and enforce economic sanctions against nations that the President deems a threat to national security interests." *United States* v. *McKeeve*, 131 F.3d 1, 10 (1st Cir. 1997). IEEPA broadly defines the situations in which the President may impose economic sanctions, 50 U.S.C. 1701(a), and broadly defines the sorts of economic sanctions that the President may impose, 50 U.S.C. 1702(a)(1). IEEPA thus gives the President considerable flexibility with respect to the use of

economic sanctions to seek to influence the conduct of a foreign government. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 673 (1981) (recognizing the importance of sanctions under IEEPA as a "'bargaining chip' to be used by the President when dealing with a hostile country").

The Federal Burma Act, which authorizes and directs the President to impose particular economic sanctions to respond to a particular international threat, applies that flexible approach in the specific context of Burma. The President is, for example, given broad discretion not only over whether to impose certain sanctions, but also over whether to suspend or terminate those sanctions and the other sanctions imposed under the Act. Federal Burma Act, § 570(a) and (e), 110 Stat. 3009-166 to 3009-167. Senator Cohen, the principal sponsor of the Federal Burma Act, emphasized the importance of giving "the administration flexibility in reacting to changes, both positive and negative, with respect to the behavior of the [Burmese regime]." 142 Cong. Rec. 19,212 (1996). Similarly, Senator McCain, a cosponsor, described the Act as "giv[ing] the President, who, whether Democrat or Republican, is charged with conducting our Nation's foreign policy, some flexibility." *Id.* at 19,221.

The Massachusetts Burma Act is in tension with Congress's purpose to assure that the President has extensive discretion over the taking of economic action directed at a foreign government and the nature, extent, and duration of that action. The Act does not acknowledge any authority in the President to modify, suspend, or terminate its economic sanctions.[25] As a consequence, the Executive Branch's

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[25] Although Congress or the President could expressly preempt state and local economic sanctions, such action could not, in some instances, be taken without significant diplomatic (or other) costs. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 436 (1964) (recognizing that "[o]ften the State Department will wish to refrain from taking an official position"

flexibility in dealing with the Burmese regime or in building international coalitions could be diminished, thereby undermining the ultimate goal of both the United States and Massachusetts.

B. In the Federal Burma Act and the Burma Executive Order, Congress and the President deliberately chose to "steer a middle path," *Hines*, 312 U.S. at 73, to the extent of permitting U.S. companies to continue to engage in many categories of business in Burma. The Federal Burma Act authorizes the President to prohibit only "new investment" in Burma by "United States persons," and excludes from the scope of federal restrictions the "performance of * * * a contract to sell or purchase goods, services, or technology." Federal Burma Act § 570(c) and (f), 110 Stat. 3009-166 to 3009-167.[26] The Burma Executive Order, issued pursuant to the Federal Burma Act and IEEPA, incorporates those restrictions. Thus, as one of its co-sponsors observed, the Federal Burma Act is a means of "strik[ing] a balance between unilateral sanctions against Burma and unfettered United States investment in that country." 142 Cong. Rec. at 19,279 (Sen. Breaux).

The Massachusetts Burma Act is inconsistent with the choice made by Congress and the President to restrict only "new investment" in Burma by "United States persons." It discriminates against *all* prospective contractors that do business in Burma. It extends not only to U.S. companies but also to foreign companies. It applies not only to companies that do business in Burma themselves, but also to

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on whether an act of a foreign government violates international law because doing so "might be inopportune diplomatically" or might produce "[a]dverse domestic consequences").

[26] IEEPA permits the President to impose economic sanctions broader than those contained in the Federal Burma Act and the Burma Executive Order, but only with respect to transactions involving persons or property "subject to the jurisdiction of the United States." 50 U.S.C. 1702(a)(1).

companies with a parent, an affiliate, or a subsidiary that does business in Burma. And it applies not only to companies engaging in "new investment" in Burma, but also to companies engaging, directly or indirectly, in a wide array of other economic activity in Burma, even activity that commenced before its enactment. The Act thus discourages the sort of continuing economic activity in Burma by U.S. companies that Congress and the President chose not to prohibit.

C. The Federal Burma Act directs the President to "seek to develop, in coordination with members of ASEAN and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." Federal Burma Act § 570(c), 110 Stat. 3009-166. The Senate sponsors of the Act perceived that multilateral action is the most effective means of achieving those goals. See, *e.g.*, 142 Cong. Rec. at 19,212 (Sen. Cohen) ("[T]o be effective, American policy in Burma has to be coordinated with our Asian friends and allies."); *id.* at 19,219 (Sen. Feinstein) ("Only a multilateral approach is likely to be successful.").[27]

The Massachusetts Burma Act, by discriminating against foreign companies as well as U.S. companies that do business

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[27] As a general matter, the United States pursues its foreign-policy objectives through multilateral cooperation, whenever possible. See, *e.g.*, J.A. 108 (testimony of then-Under Secretary of State Eizenstat) ("Sanctions are much more likely to be effective when they have multilateral support and participation. Multilateral sanctions maximize international pressure on the offending state while minimizing damage to U.S. competitiveness and more equitably distributing the sanctions burden across the international community."); accord J.A. 162 (testimony of Deputy Assistant Secretary of State Marchick); see also *Human Rights in Burma* 708 (testimony of Acting Assistant Secretary of State Smith) (Sept. 28, 1998) (describing the United States' multilateral strategy with respect to Burma).

in Burma, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The Act has generated friction between the United States and its allies because of its application to foreign companies, and thereby has distracted attention from Congress's purpose of encouraging the development of "a comprehensive, multilateral strategy" toward Burma. See pp. 8-9 & n.7, *supra* (discussing protests from the European Union, Japan, and ASEAN). Under Secretary of State Larson has thus observed that the Act "complicates efforts to build coalitions with our allies" to encourage democratic reform in Burma. Alan Larson, *State and Local Sanctions: Remarks to the Council of State Governments* 5 (Dec. 8, 1998). He has noted, for example, that "the EU's opposition to the Massachusetts law has meant that U.S. government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do about the Massachusetts Burma law." *Id.* at 6.[28] More broadly, the Massachusetts Burma Act and other such state and local statutes have, according to U.S. embassy reports, raised allies' concerns about the United States' credibility in international negotiations and its ability to deliver on its international commitments.

III. THE MASSACHUSETTS BURMA ACT IMPERMISSIBLY INTRUDES INTO THE CONDUCT OF FOREIGN AFFAIRS

This Court has recognized that state action may impermissibly infringe upon the national government's exclusive authority to conduct foreign affairs "even in [the] absence of a treaty" or an Act of Congress. *Zschernig*, 389 U.S. at 441.

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[28] See also J.A. 115 (testimony of then-Under Secretary of State Eizenstat) (observing that the Massachusetts Burma Act and similar measures "risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against [Burma] to a potential WTO dispute over [the Act's] consistency with our international obligations").

The Massachusetts Burma Act, even if not preempted by federal law, is nonetheless invalid as inconsistent with the Constitution's assignment of the foreign-affairs power to the national government, not the States.

In *Zschernig*, the Court struck down a state probate law that prevented the distribution of an estate to a foreign heir if the proceeds of the estate were subject to confiscation by his government. The Court explained that such statutes, which required state courts to engage in "minute inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," had a "great potential for disruption or embarrassment" of the United States in the international arena. 389 U.S. at 435. The Court concluded that such statutes therefore had "a direct impact upon foreign relations," *id.* at 441, and not merely "some incidental or indirect effect," *id.* at 434. Accordingly, even though the state statute involved a subject "traditionally regulated" by the States and was not affirmatively preempted by an Act of Congress, *id.* at 440-441, the statute was held to constitute "forbidden state activity," *id.* at 436.

The Massachusetts Burma Act, even more clearly than the state statute in *Zschernig*, is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432. In its purpose, its operation, and its consequences, the Act has an impact on foreign relations that is "direct," not merely "incidental." *Id.* at 441, 434.[29]

First, the Massachusetts Burma Act, as its sponsors declared, was designed as "foreign policy" legislation to "stop the violation of human rights" in Burma. J.A. 39 (statement of Rep. Rushing); J.A. 51 (statement of Sen. Walsh); see also

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[29] The tension between the Massachusetts Burma Act and the national government's policy toward Burma is addressed more extensively in Section II, *supra*.

J.A. 31 (letter of Rep. Rushing). The State acknowledged earlier in this case that the Act is part of a "growing effort . . . to apply indirect economic pressure against the Burma regime for reform." Pet. App. 9. The Act thus constitutes a deliberate attempt by a State to conduct its own foreign policy.

Second, by its structure and design, the Massachusetts Burma Act operates to apply pressure on the Burmese regime through third parties, *i.e.*, companies, foreign and domestic alike, that seek to do business with the State, whether or not their business in Burma bears any relation to their business with State. Massachusetts does not suggest that the Act in any way advances its interests in procuring quality goods at a low price or in dealing only with responsible contractors; to the contrary, by eliminating qualified low bidders, the Act impairs the State's economic interests in order to advance its foreign-policy interests. Nor does the Act serve simply to disassociate Massachusetts from a direct relationship with the Burmese regime. Thus, the scope of the Act confirms that, as its sponsors stated, the Act is foreign-policy legislation.

Finally, as explained above (at 8-9, 34-35), the Massachusetts Burma Act has adversely affected the United States' own foreign policy in several respects. Most significantly, the Act has undermined the development of "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." Federal Burma Act § 570(c), 110 Stat. 3009-166. As senior U.S. officials have stated, the Massachusetts Burma Act, by antagonizing U.S. allies and trading partners, has diverted attention from Burma itself and complicated the implementation of such a multilateral strategy, which the United States views as the most effective means to seek reform in Burma. See pp. 9, 34-35, *supra*. In addition, the Act is inconsistent with the choice of Congress and the President to permit some U.S. economic activity in Burma

(short of "new investment"). The Act also has the potential to undermine the President's flexibility to adjust the economic sanctions against Burma based on the conduct of the Burmese regime, the actions of the international community, or other national security concerns.[30]

In sum, whatever the outer limits of the foreign affairs doctrine applied in *Zschernig*, those three characteristics of the Massachusetts Burma Act render it plainly invalid. The Act, in its purpose and effect, has implemented a state foreign policy toward Burma, and the Act has interfered with the conduct of the United States' own foreign policy. The Act thus has the sort of "direct" and detrimental, not merely "incidental," impact on the national government's foreign-affairs power that renders state action impermissible under *Zschernig*. 389 U.S. at 434, 441.

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[30] The judgment by the United States condemning the abuses of the Burmese regime is now formally embodied in the Federal Burma Act and the Burma Executive Order. Consequently, the Massachusetts Burma Act does not present the concern, identified in *Zschernig*, of the States' making their own independent judgments regarding "the 'democracy quotient' of a foreign regime." 389 U.S. at 435.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The International Emergency Economic Powers Act, 50 U.S.C. 1701-1706, provides:

§ 1701. Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

§ 1702. Presidential authorities

(a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities; and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent

thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulations, instruction, or direction issued under this chapter.

(b) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as foods, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or[1]

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph re-

[1] So in original. The word "or" probably should not appear.

cords, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of the Appendix to this title, or under section 2405 of the Appendix to this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18; or

(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.

§ 1703 Consultation and reports

(a) Consultation with Congress

The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Report to Congress upon exercise of Presidential authorities

Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) Periodic follow-up reports

At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

(d) Supplemental requirements

The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act [50 U.S.C. 1641].

§ 1704. Authority to issue regulations

The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.

§ 1705. Penalties

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

§ 1706. Savings provisions

(a) Termination of national emergencies pursuant to National Emergencies Act

(1) Except as provided in subsection (b) of this section, notwithstanding the termination pursuant to the National Emergencies Act [50 U.S.C. 1601 et seq.] of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(b) Congressional termination of national emergencies by concurrent resolution

The authorities described in subsection (a)(1) of this section may not continued to be exercise under this section if the national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act [50 U.S.C. 1622] and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

(c) Supplemental savings provisions; supersedure of inconsistent provisions

(1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) [50 U.S.C. 1601(a)(1), (2), (3)] and of paragraphs (A), (B), and (C)] of Section 202(a) [50 U.S.C. 1622(a)(A), (B), and (C)] of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) [50 U.S.C. 1601(a)] and of title II [50 U.S.C. 1621 et seq.] of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

(d) Periodic reports to Congress

If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

The Federal Burma Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166, provides:

POLICY TOWARD BURMA

SEC. 570. (a) Until such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government. The following sanctions shall be imposed on Burma:

(1) BILATERAL ASSISTANCE.—There shall be no United States assistance to the Government of Burma, other than:

(A) humanitarian assistance,

(B) subject to the regular notification procedures of the Committees on Appropriations, counter-narcotics assistance under chapter 8 of part I of the Foreign Assistance Act of 1961, or crop substitution assistance, if the Secretary of State certifies to the appropriate congressional committees that —

(i) the Government of Burma is fully cooperating with United States counter-narcotics efforts, and

(ii) the programs are fully consistent with United States human rights concerns in Burma and serve the United States national interest, and

(C) assistance promoting human rights and democratic values.

(2) MULTILATERAL ASSISTANCE.—The Secretary of the Treasury shall instruct the United States executive director of each international financial institution to vote against any loan or other utilization of funds of the respective bank to or for Burma.

(3) VISAS.—Except as required by treaty obligations or to staff the Burmese mission to the United States, the United States should not grant entry visas to any Burmese government official.

(b) CONDITIONAL SANCTIONS.—The President is hereby authorized to prohibit, and shall prohibit United States persons from new investment in Burma, if the President determines and certifies to Congress that, after the date of enactment of this Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition.

(c) MULTILATERAL STRATEGY.—The President shall seek to develop, in coordination with members of the ASEAN and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups within Burma.

(d) PRESIDENTIAL REPORTS.—Every six months following the enactment of this Act, the President shall report to the Chairmen of the Committee on Foreign Relations, the Committee on International Relations and the House and Senate Appropriations Committees on the following:

(1) progress toward democratization in Burma;

(2) progress on improving the quality of life of the Burmese people, including progress on market reforms, living standards, labor standards, use of forced labor in the tourism industry and environmental quality; and

(3) progress made in developing the strategy referred to in subsection (c).

(e) WAIVER AUTHORITY.—The President shall have the authority to waive, temporarily or permanently, and sanction referred to in subsection (a) or subsection (b) if he determines and certifies to Congress that the application of such sanction would be contrary to the national security interests of the United States.

(f) DEFINITIONS.—

(1) The term "international financial institutions" shall include the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guarantee Agency, the Asian Development Bank, and the International Monetary Fund.

(2) The term "new investment" shall mean any of the following activities if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma, on or after the date of the certification under subsection (b):

(A) the entry into a contract that includes the economical development of resources located

in Burma, or the entry into a contract providing for the general supervision and guarantee of another person's performance of such a contract;

(B) the purchase of a share of ownership, including an equity interest, in that development;

(C) the entry into a contract providing for the participation in royalties, earnings, or profits in that development, without regard to the form of the participation:

Provided, That the term "new investment" does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology.

The Burma Executive Order, Exec. Order No. 13,047, 3 C.F.R. 202 (1998), provides:

Prohibiting New Investment in Burma

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 570 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (Public Law 104-208) (the "Act"), the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 101 *et seq.*), and section 301 of title 3 of the United States Code;

I, WILLIAM J. CLINTON, President of the United States of America, hereby determine and certify that, for purposes of section 570(b) of the Act, the Government of Burma has committed large-scale repression of the democratic opposition in Burma after September 30, 1996, and further determine that the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and declare a national emergency to deal with that threat.

Section 1. Except to the extent provided in regulations, orders, directives, or licenses that may be issued in conformity with section 570 of the Act and pursuant to this order, I hereby prohibit new investment in Burma by United States persons.

Sec. 2. The following are also prohibited, except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)) or in regulations, orders, directives, or licenses that may be issued pursuant to this order:

(a) any approval or other facilitation by a United States person, wherever located, of a transaction by a foreign person where the transaction would constitute new investment in Burma prohibited by this order if engaged in by a United States person or within the United States; and

(b) any transaction by a United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order.

Sec. 3. Nothing in this order shall be construed to prohibit the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology, except:

(a) where the entry into such contract on or after the effective date of this order is for the general supervision and guarantee of another person's performance of a contract for the economic development of resources located in Burma; or

(b) where such contract provides for payment, in whole or in part, in:

(i) shares of ownership, including an equity interest, in the economic development of resources located in Burma; or

(ii) participation in royalties, earnings, or profits in the economic development of resources located in Burma.

Sec. 4. For the purpose of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, judicial person organized under the laws of the United States (including foreign branches), or any person in the United States;

(d) the term "new investment" means any of the following activities, if such an activity is undertaken pursuant to an agreement, or pursuant to the exercise or rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma on or after the effective date of this order:

(i) the entry into a contract that includes the economic development of resources located in Burma;

(ii) the entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma;

(iii) the purchase of a share of ownership, including an equity interest, in the economic development of resources located in Burma; or

(iv) the entry into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation;

(e) the term "resources located in Burma" means any resources, including natural, agricultural, commercial, financial, industrial, and human resources, located

within the territory of Burma, including the territorial sea, or located within the exclusive economic zone or continental shelf of Burma;

(f) the term "economic development of resources located in Burma" shall not be construed to include not-for-profit educational, health, or other humanitarian programs or activities.

Sec. 5. I hereby delegate to the Secretary of State the functions vested in me under section 570(c) and (d) of the Act, to be exercised in consultation with the heads of other agencies of the United States Government as appropriate.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by section 570(b) of the Act and by IEEPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate the authority set forth in this order to other officers and agencies of the United States Government. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 7. Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 8. (a) This order shall take effect at 12:01 a.m., eastern daylight time, May 21, 1997.

(b) This order shall be transmitted to the Congress and published in the Federal Register.

/s/ WILLIAM J. CLINTON
WILLIAM J. CLINTON

THE WHITE HOUSE
May 20, 1997