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ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT, *Petitioners*,

v.

NATIONAL FOREIGN TRADE COUNCIL, *Respondent*.

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

BRIEF OF NONPROFIT ORGANIZATIONS, AMICI CURIAE: ALLIANCE FOR DEMOCRACY, CATHOLIC FOREIGN MISSION SOC. OF AMERICA, CENTER FOR CONSTITUTIONAL RIGHTS, CONSUMERS CHOICE COUNCIL, FREE BURMA COAL., JEWISH LABOR COMM., HUMAN RIGHTS WATCH, HUMANE SOC. OF THE U.S., INT'L LABOR RIGHTS FUND, L.A. BURMA FORUM, NEW ENG. BURMA ROUNDTABLE, PHYSICIANS FOR HUMAN RIGHTS, REV. FRANK GRISWOLD—PRES. BISHOP—EPISCOPAL CHURCH, SIERRA CLUB, AMERICAN LANDS ALLIANCE, ARISE

(Additional Nonprofit Organizations Listed on Inside Cover)

IN SUPPORT OF PETITIONERS & FOR REVERSAL

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QUESTIONS PRESENTED

Did the Court of Appeals err in failing to consider the importance of international human rights law and principles as authority for the states to adopt a selective purchasing scheme? Did the Court err in overlooking the broad impact on state laws and long standing practices dating back to the slave trade? Did the Court err in failing to consider the consistency of the law with the stated federal goal of human rights as a part of foreign policy?

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STATEMENT OF *AMICI CURIAE*

Amici curiae are all engaged in aspects of advocacy for human rights, labor rights, and environmental justice in Burma and elsewhere, which are threatened by the decision of the Court of Appeals.[1] They include religious and voluntary organizations with over ten million members active at the local, state, national and international levels. The parties are concerned with the issues raised by this case regarding the legal authority of states to use selective purchasing to fulfill obligations of international law and to meet the demands of public morality reflected in international human rights principles. Specifically, *amici curiae* are concerned that the Court of Appeals failed to properly consider international human rights obligations, and the effect of the decision on a broad range of state and local activities in which *amici* have interests.

Amici curiae have authorized this brief to be filed in their names by virtue of individual letters on file with counsel. Counsel to the respondent, National Foreign Trade Council, has given their consent to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The Massachusetts Burma Law is a constitutionally valid and appropriate means for the state to respond to the moral concerns of the citizens of Massachusetts and gives effect to important objectives of international human rights within United States law and policy. Promoting respect for human rights, including an end to the inhumane practices of forced labor—a motivation for the Burma Law—is a primary purpose of the United Nations

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[1] As required under Supreme Court Rule 37.6, counsel on this brief disclose that counsel for a party did not author any part of this brief. Funding for preparation of this brief was provided through the institutional support of Harvard Law School Human Rights Program, which is a program for research and clinical legal education.

Charter and major human rights treaties and declarations, including treaties ratified by the United States.

States' authority to legislate to promote these goals arises from their plenary power to legislate for public morality and from the delegation of authority to the states effected through the ratification of international human rights law. Since the prohibition of the slave trade, it has been the practice of states to adopt legislation that reflects the same moral impetus as the Burma Law. Moreover, the United States has frequently proclaimed human rights to be a primary goal of U.S. foreign policy and has even adopted the goal into its foreign assistance laws. The power to determine how public funds may be used to avoid contributing to human rights violations is consistent with these traditional powers, international law, and foreign policy. Massachusetts' Burma Law is a particularly apt application of this power, given current circumstances in Burma in which it is impossible to gauge the extent to which investment relies directly or indirectly on compulsory labor.

The Court of Appeals failed to consider the importance of the international human rights obligations that are adopted into U.S. law, only taking cognizance of certain disputed obligations under international trade law. As a result, the ruling of the Court will have a disruptive effect on a legitimate basis of state legislative authority. Further, by giving short shrift to the violations of human rights in Burma, the Court neglected the essential link between the law and the state's legislative authority.

The Massachusetts Law comes at a time of heightened global interaction, when it is difficult or even irrelevant to distinguish between laws of domestic and international effect. There is increasingly little distinction for Massachusetts taxpayers as to whether their money is spent to support forced labor in Burma, or in Massachusetts. States are deeply involved in foreign trade and actions that affect

foreign policy. The division of power between federal and state authorities is resolved largely through practice. The states have served as a laboratory for action on human rights that is then adopted by the federal government. Legislative initiatives like the Burma Law fulfill the U.S. commitment to international treaties that recognize the duties of individuals to help bring about respect for human rights. Where state legislation such as the Burma Law is consistent with federal law and policy, it would be inadvisable and potentially disruptive for the courts to intervene. In the absence of an impasse that prevents the federal system from ensuring that state action does not intrude upon foreign affairs and foreign commerce authority, the courts should uphold the Massachusetts law unless and until Congress explicitly determines to preempt it.

REASONS FOR GRANTING THE WRIT

I. THE MASSACHUSETTS BURMA LAW IS AN APPROPRIATE EXERCISE OF STATE POWER TO LEGISLATE IN PURSUIT OF INTERNATIONAL HUMAN RIGHTS OBJECTIVES

International human rights law creates an affirmative obligation on nation states to promote respect for universal human rights, including an end to forced labor and slave-like practices. The law serves as a foundation for the legislative authority of states of the United States in three respects. First, as adopted into U.S. law through Senate ratification, states have an explictly recognized role in the implementation of laws (*see* § A.2, *infra*). Second, to the extent it is customary international law, international human rights law (IHRL) is incorporated into federal law, providing separate grounds for state legislative jurisdiction (*see* § A.3, *infra*); and third, (*see* § I.B., *infra*), states have sovereign powers to legislate for the protection of public morality, of which human rights forms a part.

A. International human rights law as adopted or incorporated into U.S. law supports state action to protect human rights.

1. International treaties to which the United States is a party create binding obligations acknowledged in U.S. law to respect and protect against violations of human rights, and to promote universal adherence to human rights norms.

The constitutive documents of international human rights law (IHRL) commit the United States to promote universal human rights and to take measures to suppress egregious violations. Articles 55 and 56 of the U.N. Charter require members of the U.N. to "take joint and separate action" for the achievement of "universal respect for and observance of, human rights and fundamental freedoms for all . . .". United Nations Charter, arts. 55, 56 Stat. 1031, T.S. 993, *entered into force*, Oct. 24, 1945. Moreover, the Universal Declaration of Human Rights (UDHR), the cornerstone of IHRL, calls on member states to take "progressive measures, national and international, to secure universal and effective recognition and observance [of human rights] . . .". Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. Doc. A/810 at 71 (1948). Finally, the constitutive documents of the International Labor Organization (ILO) require member states to implement policies to bring about universal respect for basic rights, affirming that "all national and international policies and measures, in particular those of an economic and financial character" are acceptable "only in so far as they may be held to promote and not to hinder" social justice. Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Instrument for the Amendment of the Constitution of ILO Constitution, *entered into force* April 20 1948, *re-entered into force for the United States*, Feb. 18. 1980, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 104.

These obligations represented a revolutionary breakthrough in international law, extending the protection of the law beyond member states to individuals. Moreover, the treaties recognize that individuals also play a role in the protection and promotion of human rights. International Covenant on Civil and Political Rights, pmbl. para. 5, art. 5(1) (*entered into force* Mar. 23, 1976), 999 U.N.T.S. 171 at 173, 174; Universal Declaration of Human Rights, art. 29, G.A. Res. 217A, U.N. GAOR 3d Sess. U.N. Doc. A/810 (1948). Legislative initiatives such as the Massachusetts Burma Law, An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), ch. 130, 1996 Mass. Acts 239 (codified at Mass. Gen. Laws Ann. ch. 7 §§ 22G-22M (West Supp. 1999) (hereinafter, Burma Law), because of their close proximity to local citizens' initiatives, exemplify this aspect of individual responsibility.

International treaties prohibiting slavery and slave-like conditions, including forced labor and torture, clearly indicate that enforcement of human rights is the concrete obligation of every member, not simply a diffuse commitment of international organizations. In ratifying these treaties, the U.S. has committed itself to the eradication of such violations practiced in Burma.

The first international efforts to outlaw slavery were made during the Congress of Vienna of 1815. Following WWI, the world community enacted the Slavery Convention of 1926,[2] in which contracting parties agreed to take all measures to "prevent forced labour from developing into conditions analogous to slavery." Brief of *Amicus*

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2 Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926. *entered into force* Mar. 9, 1927; for the U.S. Mar. 21, 1929, 46 Stat. 2183, *amended by* the Protocol Amending the Slavery Convention of Sept. 25, 1926, *entered into force* Dec. 7, 1953 for the protocol; July 7, 1955 for annex to protocol; Mar. 7, 1956 for the U.S., 7 U.S.T. 479.

Curiae, AFL-CIO et al, to the U.S. Court of Appeals for the First Circuit in *NFTC v. Laskey et al, citing Forced Labour in Myanmar (Burma),* Report of the Commission of Inquiry appointed under Art. 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29) (1998), para. 199 and 200.

Thus, for example, ILO Convention (No. 105) Concerning the Abolition of Forced Labor outlaws forced or compulsory labor in five specific circumstances, ILO 105, *entered into force,* Jan. 10, 1957, 320 U.N.T.S. 291, ratified May 14, 1991, which have been violated by the Burmese military regime. (*See,* § I.C. *infra.*) Among them:

> Each Member of the ILO which ratifies this Convention undertakes to suppress and not to make use of any form of compulsory labour . . .
>
> (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
>
> (b) as a method of mobilising and using labour for purposes of economic development;
>
> (c) as a means of labour discipline. . . .

(Art. 1). Comments made by senators in support of the ILO Convention indicate an acknowledgement of an implicit extraterritorial purpose. In arguing for passage of ILO Convention No. 105 in 1967, former Supreme Court Justice and Ambassador Arthur Goldberg reasoned, "[w]hen countries are permitted to use forced labor to produce goods and services, that, of course, places our own country at a great competitive disadvantage." Hearing of the Ad Hoc Subcommittee on Human Rights Conventions, of the Committee on Foreign Relations (Feb. 23, 1967). Prior to Senate ratification in 1991, the chair of

the Senate Foreign Relations Committee, Jesse Helms, explained that the ILO Convention authorizes policy measures to suppress forced labor outside of the territory of the United States. 137 Cong. Rec. S5728, 102nd Cong., 1st Sess. (1991) (statement of Sen. Helms).

The Convention Against Torture (CAT) also requires States Parties to take measures to prohibit acts of torture and cruel, inhuman or degrading treatment or punishment *at home or abroad.* It explicitly requires states to punish torturers (or extradite them to a state that will do so) no matter what the country of origin. (Art. 4, CAT, S. Treaty Doc. No. 100-20, 102nd Cong., 2d Sess. v-vi (1988), G.A. res. 39/46, annex, 29 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force,* June 26, 1987, *ratified* 1992).

2. *International Human Rights Conventions, adopted into U.S. law by ratification, reserve substanital responsibility for implementation of human rights norms to the states.*

Cognizant of the goals of the IHRL conventions and their place in fulfilling the purpose of the United Nations and the ILO, Congress has knowingly granted authority to the states to act with extraterritorial effect.

To this end, Congress has ratified Convention No. 105 on Forced Labor, the CAT, and the International Covenant on Civil and Political Rights (ICCPR). Within each of these conventions, not only has Congress committed itself to a long standing obligation to suppress slavery and forced labor, it has explicitly reserved to the states a practical role in implementation.

The Constitution of the ILO (Art. 19.7), overseeing Convention No. 105 on Forced Labor (instructing member States to suppress and not to make any use of forced or compulsory labor like that currently practiced in Burma), contains a federalism clause that defers to the

authority of sub-national governments, including states. Constitution of the International Labour Organization, 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, *amended by* 7 U.S.T. 245, T.I.A.S. No. 3500, 191 U.N.T.S. 143 (1953), 14 U.S.T. 1039, T.I.A.S. No. 5041, 466 U.N.T.S. (1962), U.S.T. 3253, T.I.A.S. No. 7987 (1972). The role of the states in the application of conventions is also important.

U.S. Representative to the ILO, Philip M. Kaiser, explained the meaning of the ILO Constitution's federalism clause:

> Where, in a country with a federal government like our own, it is decided that the subject of a convention comes under the jurisdiction of the constituent states *as well as* the federal authority, that particular convention is treated like a recommendation. It is referred to the state for such action as they care to take. . . .

Hearing, Subcommittee on Labor and Public Welfare on S.J. Res. 117, 84th Cong. 2d Sess. (1956) (Statement of Asst. Secretary of Labor Philip M. Kaiser).

A federalist reservation was included when the U.S. Senate ratified both the CAT (prohibiting acts of torture and cruel, inhuman or degrading treatment and requiring affirmative steps to punish torture that occurs *at home or abroad*) and the ICCPR (obligating signatories to respect and ensure the enumerated rights to all individuals without regard to status and to adopt legislation to put into effect these rights and their remedies). The ICCPR reservation on federalism (similar to that adopted for the CAT) states:

> That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.

Understanding No. 5, 138 Cong. Rec. S4784 (1992).

Clearly, the obligation to implement these two conventions, one to suppress torture and forced labor, the other to enforce protection of basic human rights, was explicitly left in part to the states.

3. *Customary International Law (CIL), as part of U.S. law, provides further authority for state legislation intended to promote universal respect for human rights and suppress its violations.*

Since 1900, it has been accepted that CIL forms an integral part of U.S. law to be applied by the courts. *The Paquete Habana*, 175 U.S. 677 (1900).

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves particularly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Id.* at 700.

The American Law Institute's Third Restatement of Foreign Relations Law (Restatement), explains that CIL "results from a general and consistent practice of [nation] states followed by them from a sense of obligation" and is also created by international agreements "when such agreements are intended for adherence by [nation] states generally." Restatement (Third) of Foreign Relations Law § 102 (1987).

Violations of CIL as recognized by U.S. courts include "slavery or slave trade," "torture or other cruel, inhuman

or degrading treatment or punishment," and "a consistent pattern of gross violations of internationally recognized human rights." *Id.* All of these violations have been documented in Burma, and are legitimated and supported by continued U.S. economic involvement with the illegitimate ruling regime (*see* § I.C. *infra*). Thus, the United States has a *duty* to respond to these violations of CIL by appropriate means including shaping "its trade, aid or other national policies so as to dissociate itself from the violating state or to influence that state to discontinue the violations." *Id.* § 702, cmt. o (1987).[3]

Customary international law as part of federal law requires actions to deter or prevent violations of human rights. Thus, as the Massachusetts Burma statute is consistent with CIL and federal common law, it should be viewed as contributing to, rather than contradicting, federal law. Moreover, if it is consistent with international law then, by analogy to the *Charming Betsy* standard,[4] it should be deemed consistent with federal law intended to achieve the same purpose, namely the federal Burma statute. Foreign Operations, Export Financing, and Related Programs Appropriations Act 1997, § 570, 110 Stat. 3009-166 to 3009-167 (enacted by the Omnibus Consoli-

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[3] As CIL develops, it becomes part of federal common law. In *Xuncax v. Gramajo*, the court states that "it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law." *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (citing *The Poquette Habana,,* 175 U.S. 677 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820); *Trajano v. Marcos* (Marcos Estate I), 978 F.2d 493, 502 (9th Cir.), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring); *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

[4] *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (that Congress will be assumed to have acted in accordance with international law unless the contrary conclusion is unavoidable).

dated Appropriation Act 1997), Pub. L. No. 104-208 § 101(c), 110 Stat. 3009-121 to 3009-172 (1996).

B. The Massachusetts law, which conditions public spending on the values embodied by international human rights law, is consistent with the states' traditional authority to legislate for the general welfare and public morals.

The powers of the states are plenary, in contrast to the enumerated powers of the federal government, "which underscore the vital role reserved to the states by constitutional design (citations omitted)." *John H. Alden, et al., Petitioners v. Maine*, 119 S. Ct. 2240, 2247 (1999). "Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance." *Id.*

As the Court of Appeals acknowledged, "It is by now well understood that a state can, through its purchasing practices, pursue a variety of objectives, as long as its actions do not violate other laws or the Constitution." *National Foreign Trade Council v. Andrew S. Natsios et al.*, 181 F.3d 38, 70 (1st Cir., June 22, 1999), *citing Foto USA, Inc. v. Board of Regents of the Univ. Sys. of Florida*, 141 F.3d 1032, 1036-37 (11th Cir. 1998).

States may use their purchasing power to advance social goals, which include limiting state business to market actors that comport with standards of integrity and public morality. *Trap Rock Industries, Inc. v. Kohl*, 284 A.2d 161, 166 (N.J. 1971). This authority is recognized as an exception to commerce clause limits on state powers when the state acts as a "guardian and trustee" of taxpayer resources. *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, 441 (1980).

Reeves and *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), involved situations in which states in-

tended their commercial activity to enhance public values. *NFTC*, 181 F.3d at 64. The Court of Appeals in the instant case recognized that the Supreme Court upheld state legislation based on public values in these cases. *Id.*

In the context of state selective purchasing laws aimed at South Africa's apartheid policy, constitutional scholar Laurence Tribe testified to the U.S. Senate that, although U.S. foreign policy is constitutionally reserved to the federal government, "it is equally fundamental that states and their public subdivisions are assigned the responsibility, under our Constitution, of deciding where and how to invest the public resources they collect through taxing and other sovereign measures." Absent a Congressional choice to "displace this historically localized responsibility" of states, Tribe explained, "[T]here is nothing in federal constitutional law that could conceivably support taking from state legislatures and municipal authorities this basic control over their own economic destinies." 132 Cong. Rec. S 12533, 99th Cong., 2d Sess. (1986).

International human rights law is increasingly looked to as a standard for public values and morality. It constitutes "those benefits deemed essential for individual well-being, dignity and fulfillment and . . . a common sense of justice, fairness, and decency." Louis Henkin, THE AGE OF RIGHTS 2 (1996).

A number of states and municipalities have explicitly linked general welfare, public morality and economic concerns to international human rights, recognizing and incorporating various international human rights accords as local law. Rhode Island used a U.N. General Assembly resolution on the rights of mentally retarded persons as a guide for state policy. *Cited in* Peter J. Spiro, *The States and International Human Rights*, 66 Fordham L. Rev. 567, n.84 (1997): Rhode Island Gen. Laws 18 020 05 (1996). Burlington, Iowa incorporated provisions of the International Convention on the Elimination of All Forms

of Racial Discrimination.[5] *Id.* at 591 and n.84. Berkeley, California incorporated Articles 55 and 56 of the U.N. Charter (on international economic and social cooperation) into a Human Rights Ordinance; [6] and San Francisco passed a local ordinance to implement the protections of the Convention on the Elimination of All Forms of Discrimination Against Women.[7]

It is clear that standards of public morality may be contravened by international trade that brings products made under morally abhorrent circumstances into the state of Massachusetts, displacing other products and enabling repressive governments to continue to violate rights with impunity. Under the Court of Appeals decision, Massachusetts might exclude products of local labor or rights abusers from state purchase, but would be forced to purchase products created under patently worse conditions abroad. Massachusetts citizens must be allowed to choose whether their purchasing dollars should support slave labor conditions in Burma, just as they choose to exclude local producers who fail to meet local standards of integrity and public morality.

C. The Massachusetts Burma Law is a legitimate response to the unavoidable connection between the activity of companies doing business in Burma and the capacity of the Burmese military regime to commit human rights violations.

For more than ten years, the Burmese military regime has consistently committed gross human rights violations. The government "killed thousands of civilians in seizing power, and has since killed, tortured, raped, imprisoned and forcibly relocated hundreds of thousands of Burmese people." Amnesty International, "Myanmar: 10th Anni-

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[5] Human Rights Ordinance 2807 (Sept. 2, 1986).

[6] Ordinance 5985 N.S. (Aug. 16, 1990).

[7] Ordinance No. 128-98, Chapter 12K, Apr. 13, 1998, *see* website *www.ci.sf.ca.us/cosw/cedaw/*.

versary of Military Repression," (August 7, 1998). U.S. government, UN and ILO reports document continuing violations including forced labor, suppression of a democratically elected government, and suppression of individual political rights. *See* U.S. State Department Report to Congress (June 13, 1997) 104-106; Appendix, 490-492.

In a comprehensive study detailing the horrors of forced labor, the U.S. Department of Labor states that forced labor affects thousands of people every day and "has most likely been suffered by millions in recent years." U.S. Dept. of Labor, Bureau of International Labor Affairs, *Report on Labor Practices in Burma* (Sept. 1998) at n.151. Human Rights Watch estimated that at least two million people had been forced to work since 1992 on construction roads, railways and bridges. Human Rights Watch/Asia, BURMA—ENTRENCHMENT OR REFORM? HUMAN RIGHTS DEVELOPMENTS AND THE NEED FOR CONTINUED PRESSURE (July 1995) at 14. The massive use of forced labor on infrastructure projects and in some state enterprises has been well documented by international organizations, such as the International Labour Organization, the UN Human Rights Commission, and private human right monitors, including some who are amici on this brief.

The Burmese government's use of forced labor on such a vast scale, coupled with its egregious violations of worker rights, has clear implications for international trade and the world economy. International commerce with companies owned or controlled by the Burmese military regime, direct business relations with the regime, and virtually all trade with Burma contribute to the continuation of human rights violations by providing support for the government's balance of payments, which is directly connected with military expenditures by the Burmese military regime for purposes of domestic suppression. *See* U.S. Embassy, Rangoon, *Foreign Economic Trends Report—Burma* (1997) at 15-16.

Through the enactment of selective purchasing laws, states are denying economic support for a system which relies heavily on forced labor. The Burmese government commonly employs forced labor in the pursuit of economic development and, at times, economic profit. Companies investing in Burma have no effective means of gauging to what extent their investment relies on the product of compulsory labor, directly or indirectly. Until the Burmese government brings an absolute end to the practice, and this can be independently verified, companies investing in Burma run the risk of being complicit in the exploitation and perpetuation of this grave violation of human rights. The people of Massachusetts should not be forced themselves to be complicit in such continuing violations.

II. MASSACHUSETTS' BURMA LAW IS CONSISTENT WITH A MAJOR FEDERAL FOREIGN POLICY GOAL TO PROMOTE UNIVERSAL RESPECT FOR HUMAN RIGHTS

International human rights is a principal goal of this country's foreign policy. Recognizing the obligations to which the U.S. is a party under international law, Congress codified the observance of such a policy in the Foreign Assistance Act:

> The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations . . ., promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

§ 502B of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2304(a)(1).

The federal government has used human rights practices as a basic indicator of its willingness to maintain

relations with specific countries, prohibiting foreign and security assistance to gross violators of human rights. *Id.* at (a)(2), and 22 U.S.C. § 2151(n).

This policy has been retained through four presidential administrations and has inspired a variety of laws, proclamations and initiatives intended to encourage the involvement of a broad spectrum of the U.S. population, from local citizens to corporations.[8] The Executive has been engaged in efforts to set moral guidelines in foreign economic relations through codes of conduct and model business principles.[9] Even before the articulation of a general human rights policy, the federal government linked concerns over slave labor with trade in the Hawley Tariff Act of 1930, which prohibited the importation into the U.S. of products made by convict labor. Pub. L. No. 71-361, 46 Stat. 590.

It does not diminish the consistency with U.S. foreign policy that a European Union (EU) official would criticize Massachusetts' law. *See, NFTC*, 181 F.3d at 54. The EU was focusing entirely on the World Trade Organization (WTO); but the WTO is a separate economic trade regime that provides its own mechanisms for conflict resolution that *inter alia* involve a high degree of diplomacy. Further, WTO implementing legislation unambiguously prohibits private causes of action such as the National Foreign Trade Council challenge to the Massachusetts

[8] *See e.g.*, the International Religious Freedom Act of 1998, 22 U.S.C.A. §§ 6401-6450 (Supp. 1999); Prohibition of acquisition of products produced by forced or indentured child labor, E.D. of President, June 12, 1999; Treasury and Government Appropriations Act for 1998, 105 P.L. 61, 111 Stat. 1272, 1997 enacted H.R. 2378 as cited in 143 Cong. Rec. D1103, October 20, 1997 (concerning child labor).

[9] *See e.g.*, Clinton Administration Model Business Principles (U.S. Dept. of Commerce 1996); and Apparel Industry Partnership Agreement, *see* website of Lawyers Committee for Human Rights at www.lchr.org/sweatshop/aipfull.htm.

Burma Law that are related to the alleged inconsistency of a state law with WTO rules. Uruguay Round Agreements Act of 1994 (URAA). P.L. 103-465, § 102; 19 U.S.C. § 3512.

It is, moreover, ironic that EU concerns would influence the court in this domain, when their adamant objections to other state policies that raise international human rights violations have been essentially ignored. The EU and other foreign nations, international and non-governmental organizations, have repeatedly condemned such local state practices as police brutality, prison conditions, and the death penalty. *See, e.g.*, Human Rights Committee, Comments on U.S.A., U.N. GAOR, Hum. Rts. Comm., 53rd Sess., 1413th mtg., P 17 U.N. Doc. CCPR/C/79/Add. 50 (1995), *cited by* Spiro, 66 Fordham L. Rev. at 572 and n.4. The European Parliament went so far as to adopt a resolution strongly condemning the execution by Texas of Karla Faye Tucker; some M.P.s called for an investment boycott of states imposing the death penalty; and shareholder pressure in Europe is mounting for the withdrawal of investments from such states. *See,* "UK Presidency Plays up Human Rights in Trade Policy," Eur. Rep., Feb. 7, 1998, *cited in* Peter J. Spiro, *Role of the States in Foreign Affairs: Foreign Relations Federalism*, 70 U. Col. L. Rev., 1223, at 1263 and n.155 (1999). Having rejected the EU's concerns for the human rights implications of state laws in the past, far less should the courts be swayed in this situation, where the EU is asking to invalidate a state law that actually conforms to international human rights law.[10]

The EU has challenged various other U.S. state laws as well, arguing that numerous kinds of state law consti-

[10] In ratifying international human rights treaties, the federal government has "made a state's respect for the right of its inhabitants . . . a concern of U.S. foreign policy." Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 150 (2d ed. 1996).

tute trade barriers, including subsidies,[11] health and safety standards,[12] environmental standards [13] and taxation of multinational corporate income.[14] Based on EU trade reports and the WTO provisions that they cite, a 1994 study identified 90 potential conflicts between WTO provisions and state law in California alone.[15] Canada has similarly complained about various categories of state law including state-level inspection requirements for goods and food safety,[16] licensing and taxation of alcoholic beverages,[17] and newsprint recycling requirements.[18]

III. THE COURT OF APPEALS' DECISION UNDERMINES A TRADITION OF STATES' INVOLVEMENT IN LEGISLATING TO PROMOTE HUMAN RIGHTS AND HUMANITARIAN CONCERNS, DATING BACK TO STATE PROHIBITION OF THE SLAVE TRADE

The Decision of the Court of Appeals undermines a long tradition of state activism at the juncture of international trade and human rights. From the abolition of the slave trade to apartheid in South Africa, a rich tradition of state activism has helped give voice to citizen concern and indeed, shaped domestic and foreign policy. When the drafters of the Constitution agreed to bar federal legislation to ban the slave trade (until 1808), there was no implication that states would have to follow suit. U.S. CONST. art. I, §9 cl. 1. In fact, one author of the Federalist Papers pleaded with the states to take action during that period. Despite the absence of federal legislation, the practice of slavery "may be totally abolished," wrote James Madison, "by a concurrence of the Few States which continue the unnatural traffic, in the prohibitory example which has been given so great a majority of the Union." THE FEDERALIST 43 (James Madison).

Economic boycotts and other forms of citizen activism have been a traditional method adopted by states and municipalities to convey the sentiments of the population since the Boston Tea Party. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constituitonal Order*, 139 U. Pa. L. Rev. 287, 331 (1990) (citing colonial boycotts used to oppose British rule, and the right of assembly asserted to justify exercises of popular power (at 336)). *See further*, Brief for Petitioner, *NAACP v. Claibourne Hardware Co.*, 458 U.S. 886 (1982) (describing the centrality of boycotts in the American democratic tradition).

From the ratification of the Constitution, state and local governments participated in foreign policy without legal challenge. Despite a long-standing policy of neutrality in the war between Great Britain and France declared by President Washington, in 1798 the city of Boston raised $125,000 to build two battleships in response to public cries for war against France. There were several other challenges to federal supremacy in the nineteenth century that were resolved through political means. Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 65 Foreign Policy 158, 164 (1986).

This tradition of activism on the local and state level has continued without threatening federal supremacy in

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[11] *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 23 (Brussels, Oct. 1998).

[12] *Id.* at 11.

[13] *Id.*

[14] *Id.* at 5.

[15] *See* Robert Stumberg, GATT IMPACT ON STATE LAW: CALIFORNIA (Center for Policy Alternatives, 1994).

[16] *See* Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 13 (Ottawa, Jan. 1999).

[17] *Id.* at 15.

[18] *Id.*

foreign affairs. For example, in the 1970s, even before the federal government took action, 13 states responded to the Arab League's boycott of Israel with anti-boycott laws of their own. Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs,* Council on Foreign Relations, 94 (1998).

The use of economic leverage to effect international affairs through trade became even more significant in the 1980s. Divestment in South Africa was spearheaded by state and local jurisdictions for nearly two decades in express disagreement with the stated federal policy of constructive engagement. By the fall of 1985, divestment bills had been enacted by 19 states and 62 cities and counties. In the end, however, it culminated in the federal Comprehensive Anti-Apartheid Act of 1986. Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469, 471-472 (February 1987).

The moral interests of municipalities affecting foreign affairs is also expressed through other means involving citizen activism and local initiatives. It is largely recognized that promotional programs like sister-city arrangements not only have an impact on foreign relations, but were intended to do so. Indeed, these programs began after WWII as a proposal by President Dwight D. Eisenhower to deliver foreign aid and to involve ordinary citizens in foreign relations. Eduardo E. Neret & Marcio W. Valladares, *The Florida International Affairs Act: A Model for State Activism in Foreign Affairs*, 1 J. Transnational Law & Policy 197, n.3 (1992). According to Sister Cities International, there are 2,100 sister city arrangements in 127 countries.[19] A number of cities, including Atlanta, Berkeley, Louisville, Milwaukee, St. Paul

[19] *See* website of Sister Cities International: *www.sister-cities.org* ("Facts at a Glance").

and Wichita have used their sister-community ties to pursue specific human rights objectives, such as stopping the forced removal of black townships in South Africa. Shuman at 174. "Diplomacy" by state and municipal elected officials is another example, such as the lobbying visit to Vietnam of a California mayor and state senator for the release of men whose families had left Vietnam at the end of the war and resettled in California.[20]

IV. THE COURT OF APPEALS DECISION PLACES THE CONSTITUTIONALITY OF MANY STATE AND LOCAL LAWS IN DOUBT, AND WILL LIKELY LEAD TO A DRAMATIC INCREASE IN LEGAL CHALLENGES

State and municipal involvement in foreign affairs has increased steadily in recent years with the knowledge and awareness of the federal government and Congress. In myriad ways, states have entered the foreign policy domain; some are explicitly linked to trade, while others have more express human rights or social objectives. Many are linked to state and local procurement. The constitutionality of all is at stake if the Court of Appeals' decision is allowed to stand.

In this era of enormous economic and technological change, citizens are demanding that their state and local governments do more to protect and enhance their interests. What's more, pervasive global interdependence has diminished the distinctions between national and sub-

[20] In 1989, Irvine (CA) mayor Larry Agran and California state senator Art Torres went to Vietnam to lobby for the release of 30 men whose families had fled Vietnam and resettled in California. By the end of the year, the visit had achieved the first "good faith" release. Michael H. Schuman, *Id.* at 174. Mayors of larger U.S. cities often lead international missions to pursue economic, social, cultural and other objectives. Fry at 84.

national interests, as well as between local values and international human rights.[21]

State and local governments directly control vast procurement budgets. Spiro, 70 U. Colo. L. Rev. at 1249. It is therefore not surprising that states and municipalities now see international trade and foreign investment as critical to their economic well-being and affecting their social policies. At least 16 states have official international trade offices, Alejandra Carvajal, *Note: State and Local "Free Burma" Laws the Case for Sub-National Trade Sanctions,* 29 Law & Pol'y Int'l Bus. 257, n.71, and nearly four-fifths of the states maintain more than 160 offices abroad for trade, investment, and tourism promotion purposes. Fry at 15. Almost all state governments have established executive agencies or bureaus attached to the Office of the Governor that specialize in international economic activities. *Id.* at 72.

Florida is one state that has been extremely active in foreign relations and investment. The "Florida International Affairs Act" is a far-reaching statute, the express purpose of which is to "articulate a clear policy for international economic development and policy formation . . ."; lobby and promote Florida's interests at both national and international levels; work to "influence state, federal and international trade policies that affect Florida's ability to compete in world markets"; and establish a commission to "study and make recommendations on the state's policy concerns related to immigration, criminal justice, human

21 For example, foreign firms are creating jobs in the U.S. five times faster than American owned companies; one in six private-sector jobs in the U.S. is now linked to the global economy. The number of Americans working for subsidiaries of foreign companies in the U.S. now equals five million. Fry at 32 and 6; and *see study by* Organization for International Investment, as reported in L.A. Times, 23 April 1998.

rights, drugs and other internationally related issues."[22] Other states have created similar though less comprehensive bodies, including Arizona, California, Illinois, Kentucky and New Jersey. Neret & Valladares at 200-202 and n.68.

State procurement limits or divestment have been adopted to influence other foreign issues including perceived employment discrimination against the Catholic minority in primarily Protestant Northern Ireland. Fourteen states, including Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, and 34 cities have enacted advisory or mandatory divestment laws directed towards firms that have business relationships with Northern Ireland. Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions,* 13 Nw. J. Int'l L. Bus. 563, 568-569 (1993). Indeed, Massachusetts approved a restriction on public pension investment in firms that sell weapons or munitions that are used in Northern Ireand. An Act Terminating the Investment of Public Pension Funds in Firms Contributing to the Oppression in Northern Ireland, Mass. Gen. Laws. Ann. Ch. 32, § 23(1)(d)(iii), *approved* April 4, 1983.

The mere threat of losing financial services contracts with state and local governments persuaded Swiss banks to settle claims related to their failure to return the assets of Holocaust victims. Matthew Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism,* 35 Stan. J. Int'l Law 1, 7 (1999), *citing* Stephen D. Moore, *Choices Few to Swiss Banks on War Claims,* Wall St. J., Aug. 14, 1998, A12. *See also, U.S. States get involved in Nazi-Era Swiss Bank Controversy,* Agence France Presse, Oct. 22, 1997.

22 Fla. Stat. Ann. § 288.801 (1991).

Moreover, many jurisdictions have selective purchasing laws similar to the Massachusetts law that restrict their procurement of goods and services from companies that do business in countries that suppress democracy and violate human rights. *NFTC*, 181 F. 3d at 47. In addition to Massachusetts, over 20 municipalities have enacted analogous laws restricting purchases from companies that do business in Burma. Other jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, Sudan, Indonesia, Tibet, and other nations. Organization for International Investment, State and Municipal Sanctions Report, as of July 16, 1999.[23]

In addition to procurement measures intended to express support for democracy and human rights, as discussed above, numerous municipalities and 48 states have adopted at least one environmental procurement preference that could be challenged under the Court of Appeals' reasoning.[24] The 48 states with environmental purchasing preferences include 34 states with preferences for recycled materials generally,[25] 20 states with separate purchasing

[23] *See* website: www.ofii.com/issues/sanction.html.

[24] As with the Massachusetts Burma Law, foreign governments have suggested that environmental procurement preferences constitute trade barriers. *See* European Commission, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT at 2 and 18-19 (Brussels, Oct. 1998); Department of Foreign Affairs and International Trade, REGISTER OF UNITED STATES BARRIERS TO TRADE at 14 (Ottawa, Jan. 1999); Ministry of International Trade & Investment, 1998 REPORT ON THE WTO CONSISTENCY OF TRADE POLICIES BY MAJOR TRADING PARTNERS (Japan 1998).

[25] Alaska Stat. § 36.30.337 (Michie 1998); Cal. Pub. Cont. Code § 12310 (West 1998); Del. Exec. Order 82 (1990); Fla. Stat. Ann. § 287.045 (West 1998); Haw. Rev. Stat. § 103D-1005 (1997); 415 Ill. Comp. Stat. 20/3 (West 1998); Ind. Code § 5-22-15-16 (Michie 1998); Iowa Code Ann. § 216B.3 (West 1997); Kan. Stat. Ann. § 75-3740b (1997); Ky. Rev. Stat. Ann. § 45A.520 (Banks-Baldwin 1998); La. Rev. Stat. Ann. § 30:2415 (West 1998); Me. Rev. Stat. Ann. tit. 5, § 1812 (West 1997) (recycled materials other than paper); Md. Code Ann., State Fin. & Proc. § 14-402 (1998); Minn. Stat. Ann. § 16B.121 (West 1998); Miss. Code Ann., § 49-31-7 (1998); Mo. Ann. Stat. § 34.031 (West 1997) (recycled solid waste materials); Mont. Code Ann. § 75-10-806 (1997); Neb. Rev. Stat. § 81-15,159 (Michie 1998); Nev. Rev. Stat. § 386.417 (1997); N.H. Rev. Stat. Ann. § 21-I:11 (1997); N.M. Stat. Ann. § 13-1-135.1 (Michie 1998); N.Y. Pub. Auth. Law § 2878-a (McKinney 1998); N.C. Gen. Stat. § 130A-309.14 (1997); Ohio Rev. Code. Ann. § 125.082 (West 1998); Okla. Stat. Ann. tit. 74, § 85.53 (West 1998); Or. Rev. Stat. § 279.570 (1997); R.I. Gen. Laws § 37-2-76 (1997); S.C. Code Ann. § 44-96-140 (1997) (recycled and recyclable materials); S.D. Codified Laws § 5-23-41 (Michie 1998); Tex. Health & Safety Code § 361.426 (West 1998); Vt. Stat. Ann. tit. 3, App. Ch. 7, Exec. Order 24-86 (recycled materials and nonwasteful packaging); Wash. Rev. Code Ann. § 43.19.A.005 (West 1998); W. Va. Code § 20-11-7 (1998); Wis. Stat. Ann. § 16.72 (1998).

preferences for recycled paper,[26] and several addressing other recycled materials.[27]

Many local governments have also adopted procurement policies for products with recycled content, ranging from paper[28] to street signs[29] to playgrounds to park benches

[26] Alaska Stat. § 36.30.333 (Michie 1998); Ariz. Rev. Stat. Ann. § 41-2533 (West 1998); Ark. Code Ann. § 19-11-260 (Michie 1998); Cal. Pub. Cont. Code § 12162 (West 1998); Cal. Educ. Code § 32373 (West 1999) (educational agencies); Colo. Rev. Stat. Ann. § 24-103-207 (West 1998); Conn. Gen. Stat. Ann § 4a-67a (West 1998); Ga. Code Ann. § 50-5-60.2 (Michie 1998); Me. Rev. Stat. Ann. tit. 5, § 1812-B (West 1997); Mass. Gen. Laws. Ann. ch. 7 § 22 (West 1998); Mich. Comp. Laws Ann. § 18.1261b (West 1998); Minn. Stat. Ann. § 16B.122 (West 1998); N.J. Stat. Ann. § 13:1E-99.27 (1998); N.D. Cent. Code § 54-44.4-08 (1997); Or. Rev. Stat. § 279.630 (1997) (recycled and recyclable); 53 Pa. Cons. Stat. § 4000.1511 (1999); S.D. Codified Laws 5-23-22.4 (Michie 1998); Tenn. Code Ann. § 68-211-606 (1998); Tex. Gov't Code Ann. § 2155.446 (West 1998); Utah Code Ann. § 63-56-20.7; Va. Code Ann. § 11-47.2.

[27] *E.g.*, Colo. Rev. Stat. Ann. § 8-19.5-101 (West 1998) (plastics); Conn. Gen. Stat. Ann. § 4b-51a (West 1998) (construction materials); Idaho Code § 40-707 (1998) (highway construction and maintenance); 58 Pa. Cons. Stat. § 479 (1999) (oil products); Tex. Gov't Code Ann. § 2155.447 (West 1998) (oil products).

[28] *E.g.*, D.C. Code Ann. § 6-3413 (1998); N.Y.C. Admin. Code § 6-122 (1998); City of Richmond Code (Virginia) § 22-4 (1993).

[29] Columbus, Ohio has an ordinance requiring street signs to be made from recycled materials. Eleanor Lewis & Eric Weltman,

and fences,[30] to ordinances creating a general preference for recycled materials.[31] Other environmental procurement measures at the state and local level aim to reduce dependence on petroleum-based products. These include nine states with price preferences for soybean-based ink,[32] five states with statutes requiring bio-based or clean alternative fuel for governmental motorized vehicles,[33] and a variety of statutes and ordinances requiring energy efficiency to be taken into account in procurement decisions.[34]

Government Buying Can Save Tax Dollars and the Environment, Int'l City-County Mgmt. Ass'n, Feb. 1993, at 2.

30 Chicago recently adopted an ordinance with a purchasing preference for playgrounds, park benches and fences made from recycled plastic. Alice Horrigan, *Choosing to Recycle—Because it Pays*, E, Mar. 13, 1997.

31 *E.g.*, Baltimore County Code § 15-91 (1988); Itasca County, Minnesota, *see* Lewis & Weltman, *supra*, King County, Washington, *see* Richard Keller, *Buying Recycled: Investing Dollars to Close the Loop*, World Wastes, Jan. 1994; City of Los Angeles Admin. Code, art. 6, § 10.32 (1998); Newark, New Jersey, *see* Lewis & Weltman, *supra*.

32 Ark. Code Ann. § 18-11-102 (Michie 1998); 30 Ill. Comp. Stat. 500/45-15 (West 1998); 50 Ill. Comp Stat. 520/10 (West 1998) (local government purchases and contracts); Ind. Code § 5-22-15-18 (1998); Iowa Code Ann. § 216B.3 (West 1998); Ky. Rev. Stat. Ann. § 57.035 (Banks-Baldwin 1997): Minn. Stat. Ann. § 16B.121 (West 1998); Mo. Ann. Stat. § 34.175 (West 1997); N.D. Cent. Code § 54-44.4-07 (1997); S.D. Codified Laws § 5-23-37 (Michie 1998). Iowa also has a preference for soybean-based hydraulic fluids. Iowa Code Ann. § 307.21 (West 1998).

33 Cal. Educ. Code § 17911.5 (West 1998) clean fuel school buses); Conn. Gen. Ann. § 4a-59 (West 1998) (clean alternative fuel); Ind. Code § 5-22-15-19 (1998) (soy diesel, bio-diesel); Iowa Code Ann. § 18.18 (West 1997) (minimum ethanol requirements and alternative methods of propulsion); Wash. Rev. Code Ann. § 43.19.637 (West 1998) (clean fuel motorized vehicles).

34 The statutes include Ariz. Rev. Stat. Ann. § 34-455 (buildings) (West 1998); Conn. Gen. Stat. Ann. § 16a-38 (West 1998) (lifecycle cost analyses in major capital projects); Minn. Stat. Ann. § 216C.19 (West 1998) (roadway lighting; N.H. Rev. Stat. Ann.

Another type of state and local environmental procurement policy is a limit on tropical hardwood purchases. To date, three states and nine cities have passed laws that limit the purchase of wood from tropical rainforests, only buying tropical timber that is harvested using ecologically sound management practices.[35]

In addition to environmental objectives, local governments have also used their purchasing power to promote fair labor practices. Dozens of cities and counties—including Pittsburgh, Cleveland, North Olmstead (OH), and San Francisco—have laws banning the procurement of products made in sweatshops.[36] Similarly, nearly two

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§ 21-I:19-a (1997) (buildings); Or. Rev. Stat. § 276.915 (1997); Tex. Gov't Code Ann. § 2166.403 (1999); Vt. Stat. Ann. tit. 3 § 2291 (1998); Wis. Stat. § 16.847 (1998). New York City requires government purchases of motor vehicles to be low emissions vehicles. N.Y.C. Admin. Code § 6-121 (1998). Austin, Texas has a purchasing preference for solar electric systems, *see* Lewis & *Weltman, supra*, while San Jose, CA requires streetlights to be energy efficient, and Phoenix, Arizona requires energy efficiency in all municipal building lighting, *see Id.*

35 Ariz. Rev. Stat. Ann. § 34-201 (West 1998); N.Y. State Fin-Law § 165 (McKinney 1998); Tenn. Code Ann. § 4-3-1112 (1998); Baltimore, Maryland, Ord. No. 635 (passed 1991), *see* John Javna, *Now let's remind your rep: Rally behind recycling bill*, Atlanta J. and Atlanta Const. Mar. 24, 1991, *available in* 1991 WL 7779914; Bellingham, Washington, Resolution No. 43-90 (passed Aug. 1990); Berkeley, California (tropical hardwoods, redwoods) (Renee Koury, *Endangered Timber Banned in Berkeley*, L.A. Daily News, Oct. 30, 1995, *available in* 1995 WL 5424835); Los Angeles, California, *see* Tracey Kaplan, *Children Get City to Bar Hardwoods*, L.A. Times, Oct. 9, 1991 *available in* 1991 WL 2221464; Long Beach, California, *see* "Tropical Timber Trade Restrictions," Rainforest Relief (Jan. 27, 1999 facsimile); San Francisco, Ordinance No. 391-90; Santa Clarita, California, *see* Kaplan, *supra*; Santa Monica (California) Mun. Code, ch. 2.28; Ventura, California, *see* Tina Daunt, *Ventura City Hall Joins Boycott of Hardwoods*, L.A. Times, Mar. 17, 1992, *available in* 1992 WL 2937933.

36 *See* U.S. Newswire, *Pittsburgh Joins City Fight Against Sweatshops* (Sept. 23, 1998); Linda Himelstein, *Going Beyond City Limits? Muncipalities Are Exercising Their Clout on Social Issues —And Business is Balking*, Bus. Wk. (July 7, 1997).

dozen cities require companies receiving municipal contracts to pay their employees a "living wage." [37] The constitutionality of all of these laws is placed in doubt and subject to challenge based upon the Court of Appeals' ruling that market participation measures are subject to the self-executing limits of the federal foreign affairs power and the foreign commerce clause.

V. BECAUSE IT IS CONSISTENT WITH FEDERAL LAW AND POLICY, THE MASSACHUSETTS LAW SHOULD BE UPHELD ABSENT EXPLICIT CONGRESSIONAL PREEMPTION, WHICH HAS NOT OCCURRED

Where, as in matters of human rights policy in foreign affairs, the states and federal government have worked out a constitutionally appropriate means of dividing authority and limiting inappropriate state intrusions, it would be disruptive and imprudent for the courts to intervene.

In the effort to give substance to the U.S. policy of promoting human rights, the states have served as a "laboratory." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting). State practice has explored various means to achieve the federally endorsed goal. In the case of the Burma Law, the state is acting consistently with its own traditional powers and U.S. obligations under international law. Moreover, by enabling local initiatives in the realm of human rights, through its closer proximity to the citizen, the state is giving effect to another important aspect of international human rights law expressed in treaties ratified by the United States, namely the recognized duty of individuals to "strive for the promotion and observance" of human rights. International Covenant on Civil and Political Rights, pmbl. para. 5, art. 5(1).

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[37] Yumi Wilson, *S.F. Sets Up 15-Member Panel to Study Effect of Living-Wage Law.* S.F. Chron. A23 (Nov. 24, 1998) available at 1998 WL 3928728.

The U.S. Congress has demonstrated a keen awareness and capacity to respond to state initiatives. *See, e.g., Amici Curiae* Brief of Members of Congress. At times, the federal government has endorsed and even followed the example of state and local action. At other times, the federal government has resolved to preempt the state action, leaving no question that state and local entities are excluded from participating in that aspect of foreign policy. For example, when the United States adopted legislation to counter the Arab League's boycott of Israel, Congress expressly preempted existing state legislation and occupied the field. Export Administration Act of 1979, 50 U.S.C. § 2401-2420 (1994 & Supp. III 1998). In contrast, when adopting the Comprehensive Anti-Apartheid Act of 1986, Congress did not do so. Lewis at 471-472.

This is consistent with many other areas of foreign affairs where in recent years of fast-accelerating globalization, the give and take between federal and state governments has yielded to a level of state involvement in foreign affairs that would have been unimaginable 30 years ago. *See, generally*, § IV, *supra.* For example, despite severe constitutional limitations (U.S. Const. Art. 1 sec. 10 (3)), "all states have entered into international agreements accords or pacts with national or sub-national governments abroad." Fry at 73.

In this context, it would be highly destructive to the federal-state relationship to strike down all those laws that produced more than an "incidental" effect on foreign affairs. *NFTC*, 181 F.3d at 53 (applying the standard of *Zschernig v. Miller*, 389 U.S. 429 (1968)). It would, furthermore, engage the court in a diplomatic and political, rather than a legal inquiry, to determine whether such laws were likely to create untoward embarrassment

as opposed to the embarrassment that is a function of policies like the promotion of human rights.[38]

By enacting the federal Burma statute, Pub. L. No. 104-208, § 101(c), Congress has answered the question of whether this is an issue on which, as a matter of foreign policy, the U.S. is prepared to accept possible embarrassment. Moreover, Congress may intervene at any time to preempt such a law. This is in marked contrast to other forms of state action in foreign affairs, such as ad-hoc state measures and "sense resolutions" which Congress has no power to stop. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION at 164 (note). There is thus further justification for allowing the political process to determine the outcome.

CONCLUSION

If a state law is consistent with important international obligations, as in the present case of Massachusetts' Burma Law, Congress and the Executive should be left to determine whether the particular means employed by the state should be maintained. As Congress has demonstrated its willingness to do this in the past, and as there exists no impasse that prevents their acting in this case, the Burma Law should be left to stand.

Thus, the Court should overturn the decision of the Appeals Court in order to affirm the rights of States to legislate in accordance with international human rights law and principles, and alleviate the uncertainties about existing laws and regulations created by the Appeals Court's decision.

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[38] Governments are rarely known to welcome scrutiny of their human rights records. It is well known in U.S. diplomatic circles, for example, that every February when the Congressionally mandated Human Rights Country Conditions Reports are published U.S. envoys are subject to a barrage of criticism that frequently disrupts other foreign policy goals. Such criticism sometimes comes even from our close allies.

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