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United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:98-cv-10757-JLT

National Foreign v. Baker, et al

Parties and Attorneys
Docket Proceedings - (Last)

Date Filed:	Apr. 30, 1998
Nature of suit:	950 Constitutional - State Statute
Demand:	$0
Assigned to:	Judge Joseph L. Tauro
Cause:	28:2201 Declaratory Judgment
Date terminated:	Nov. 18, 1998
Jurisdiction:	Federal Question
Jury demand:	None

Parties and Attorneys

Plaintiff

National Foreign Trade Council

Attorneys and Firms

Gregory A. Castanias
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
(202) 879-3734
gcastanias@jonesday.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jacqueline M. Holmes
Jones, Day, Reavis & Pogue
599 Lexington Avenue
New York, NY 10022
(212) 326-3939
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Melissa Hart
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
(202) 879-3734
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael A. Collora
Collora LLP
600 Atlantic Avenue
12th Flr.
Boston, MA 02210
(617) 371-1002
Fax: (617) 371-1037
mcollora@collorallp.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Robert H. Klonoff
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
(202) 879-3734
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Timothy B. Dyk
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, DC 20005
(202) 879-3734
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Charles D. Baker
in his official capacity as Secretary of Administration and Finance of theh Commonwealth of Massachusetts

Attorneys and Firms

Thomas A. Barnico
Attorney General's Office
Room 2019
One Ashburton Place
Boston, MA 02108-1698
(617) 727-2200 x 3380
Fax: (617) 727-3076
tom.barnico@state.ma.us
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Philmore in his official capacity as State Purchasing Agent for theh Commonwealth of Massachusetts, III

Attorneys and Firms

Thomas A. Barnico
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

U.S. Chamber of Commerce e

Attorneys and Firms

Andrew N Vollmer
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

James D. Smeallie
Holland & Knight, LLP
10 St. James Avenue
Boston, MA 02116
(617) 523-2700
jd.smeallie@hklaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John A. Trenor
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Organization for International Investment

Attorneys and Firms

Andrew N Vollmer
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

James D. Smeallie
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

John A. Trenor
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

European Union

Attorneys and Firms

David G. Leitch
Hogan & Hartson

555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-6853
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Gil A. Abramson
Hogan & Hartson, LLP
111 South Calvert Street
Suite 1600
Baltimore, MD 21202-1109
(410) 659-2700
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Richard L. Weiner
Hogan & Hartson L.L.P.
555 Thirteenthh Street, N.W.
Washington, DC 20004
(202) 637-5600
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Roger P. Alford
Hogan & Hartson
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-6853
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Movant

Washington Legal Foundation

Attorneys and Firms

Daniel J. Popeo
Washington Legal Foundation
1705 N Street, NW
Washington, DC 20036
(202) 857-0240
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

David M. Young
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 588-0302
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Evan Slavitt
Bodoff & Associates
225 Friend Street
Suite 704
Boston, MA 02114-1812
(617) 742-7300
Fax: (617) 742-9969
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Docket Proceedings

Reverse Proceedings

Req #	Filed	#	Docket Text
1	Apr. 30, 1998	1	Complaint filed. Case assigned to Judge: Chief Judge Tauro. Receipt #: 5909 Amount:$ 150.00. Fee Status: pd (cmg) (Entered: 05/01/1998)
2	Apr. 30, 1998		Summons issued for Charles D. Baker, Philmore Anderson III (cmg) (Entered: 05/01/1998)
3	Apr. 30, 1998	2	Motion by National Foreign for preliminary injunction , or, alternatively For Consolidation and Expedited Consideration of the Merits , FILED.(c/s) (cmg) (Entered: 05/01/1998)
4	Apr. 30, 1998	3	Memorandum by National Foreign in support of [2-1] motion for preliminary injunction, [2-2] motion For Consolidation and Expedited Consideration of the Merits , FILED.(c/s) (cmg) (Entered: 05/01/1998)
5	Apr. 30, 1998	4	Motion by National Foreign for leave to file in excess , FILED.(c/s) (cmg) (Entered: 05/01/1998)
6	Apr. 30, 1998	5	Motion by National Foreign for attys. Dyk, Klonoff, Castanias and Hart to appear pro hac vice , FILED.(c/s0 (cmg) (Entered: 05/01/1998)
7	May 01, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [4-1] motion for leave to file in excess . FILED.(cc/cl) (cmg) (Entered: 05/01/1998)
8	May 01, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [5-1] motion for attys. Dyk, Klonoff, Castanias and Hart to appear pro hac vice, FILED.(cc/cl) (cmg) (Entered: 05/01/1998)
9	May 01, 1998	6	Notice of appearance of attorney for Charles D. Baker, Philmore Anderson III by Thomas A. Barnico, FILED.(c/s) (cmg) (Entered: 05/04/1998)
10	May 07, 1998	7	STIPULATION (Motion) by Charles D. Baker, Philmore Anderson III, to extend time to 14 days to respond to Motion for P.I. , FILED.(c/s) (cmg) (Entered: 05/11/1998)
11	May 11, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [7-1] stipulation motion to extend time to 14 days to respond to Motion for P.I., FILED.(cc/cl) (cmg) (Entered: 05/11/1998)
12	May 11, 1998	8	Return of service executed as to Philmore Anderson III with service on 5/7/98 filed. Answer due on 5/27/98 for Philmore Anderson III (cmg) (Entered: 05/12/1998)
13	May 11, 1998	9	Return of service executed as to Charles D. Baker with service on 5/7/98 filed. Answer due on 5/27/98 for Charles D. Baker (cmg) (Entered: 05/12/1998)
14	May 21, 1998	10	Answer by Charles D. Baker, Philmore Anderson III to complaint , FILED.(c/s) (cmg) (Entered: 05/21/1998)
15	June 02, 1998	11	Motion by National Foreign for protective order , FILED.(c/s) (cmg) (Entered: 06/04/1998)
16	June 02, 1998	12	Memorandum by National Foreign in support of [11-1] motion for protective order , FILED.(c/s) (cmg) (Entered: 06/04/1998)
17	June 02, 1998	13	Affidavit of Frank D. Kittredge re: [11-1] motion for protective order , FILED.(c/s) (cmg) (Entered: 06/04/1998)
18	June 02, 1998	17	Motion by National Foreign for Jacqueline Holmes to appear pro hac vice , FILED.(c/s) (cmg) (Entered: 06/22/1998)
19	June 10, 1998	14	Memorandum by Charles D. Baker, Philmore Anderson III in opposition to [11-1] motion for protective order , FILED.(c/s) (cmg) (Entered: 06/11/1998)
20	June 19, 1998	15	Chief Judge Joseph L. Tauro . Notice of Hearing/conference: set scheduling conference for 11:30 7/8/98 before Chief Judge Joseph L. Tauro . Joint statement to be filed five days prior to conf., FILED.(cc/cl) (cmg) (Entered: 06/22/1998)
21	June 19, 1998	16	Chief Judge Joseph L. Tauro . Discovery Order entered: On or before 6/30/98, the parties shall have exchanged and reviewed all relevant documents in accordance with Local Rule 26.2(A) and sworn statements in accordance with Local Rule 26.1(B). Counsel to notify the court in writing 10 days prior to conf. of all pending motions, FILED.(cc/cl) (cmg) (Entered: 06/22/1998)
22	June 22, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [17-1] motion for Jacqueline Holmes to appear pro hac vice ,FILED.(cc/cl) (cmg) (Entered: 06/22/1998)
23	June 29, 1998		STIPULATION (Motion) by National Foreign, Charles D. Baker, Philmore Anderson III setting deadlines for exchange of documents, FILED. (cmg) (Entered: 06/29/1998)
24	June 29, 1998	20	Chief Judge Joseph L. Tauro . Stipulation entered re: exchange of documents, FILED. (cc/cl) (cmg) (Entered: 07/02/1998)
25	June 30, 1998	18	Joint statement by National Foreign, Charles D. Baker, Philmore Anderson III , re: Local Rule 16.1(D), FILED.(c/s) (cmg) (Entered: 07/02/1998)
26	June 30, 1998	19	Rule 16.1 Certification filed by Charles D. Baker, Philmore Anderson III, FILED.(c/s) (cmg) (Entered: 07/02/1998)
27	July 02, 1998	31	Statement of counsel filed by National Foreign , Re: L.R. 26.1(B)(1) disclosure, FILED. (c/s) (cmg) (Entered: 07/13/1998)
28	July 06, 1998	21	Motion by National Foreign to amend [1-1] complaint , FILED.(c/s) (cmg) (Entered: 07/07/1998)
29	July 06, 1998	22	Memorandum by National Foreign in support of [21-1] motion to amend [1-1] complaint , FILED.(c/s) (cmg) (Entered: 07/07/1998)
30	July 06, 1998	23	Statement of counsel filed by Philmore Anderson III , Re: Local Rule 26.1(B)(2), FILED. (c/s) (cmg) (Entered: 07/07/1998)
31	July 07, 1998	24	Motion by U.S. Chamber of Com, Organization for Int for leave to file Amicus Curriae , FILED.(c/s) (cmg) (Entered: 07/13/1998)

32	July 07, 1998	25	Motion by European Union for leave to file Amicus Curiae Brief , FILED.(c/s) (cmg) (Entered: 07/13/1998)
33	July 07, 1998	26	Motion by European Union for R. Weiner, D. Leitch, R. Alford to appear pro hac vice fee status: pd fee amt: $50.00 Receipt #: 7487 , FILED.(c/s) (cmg) (Entered: 07/13/1998)
34	July 08, 1998	27	Chief Judge Joseph L. Tauro . Protective Order entered, FILED.(c/s) (cmg) (Entered: 07/13/1998)
35	July 08, 1998		Scheduling conference held . (cmg) (Entered: 07/13/1998)
36	July 08, 1998	29	Chief Judge Joseph L. Tauro . Clerk's Notes: re: scheduling conf. Amicus Briefs Allowed. Motions to appear Pro Hoc Vice Allowed. Motion for Protective Order Allowed, Order entered. Dates in joint statement adopted. Motion to amend held in abeyance. set status conference for 10:00 9/23/98 before Chief Judge Joseph L. Tauro Court Reporter: B. Sakurai. (cmg) (Entered: 07/13/1998)
37	July 09, 1998	28	STIPULATION (Motion) by Washington Legal , for leave to file Amicus Curiae Brief , FILED.(c/s) (cmg) (Entered: 07/13/1998)
38	July 09, 1998	30	Chief Judge Joseph L. Tauro . Order entered granting [25-1] motion for leave to file Amicus Curiae Brief; granting [24-1] motion for leave to file Amicus Curiae; granting [11-1] motion for protective order. The parties may treat Pltf's Motion for a Prleiminary Injunction as the Pltf's Motion for S/J and opening briefs in support thereof. Pltf's stipulation of facts to be filed by 7/22/98. Deft's may file cross motion for S/J by 7/22/98. Pltf may file reply brief by 8/5/98. set status conference for reset to 10:00 9/23/98 before Chief Judge Joseph L. Tauro , FILED.(cc/cl) (cmg) (Entered: 07/13/1998)
39	July 13, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [26-1] motion for R. Weiner, D. Leitch, R. Alford to appear pro hac vice fee status: pd fee amt: $50.00 Receipt #: 7487, FILED.(cc/cl) (cmg) (Entered: 07/13/1998)
40	July 13, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [28-1] stipulation motion for leave to file Amicus Curiae Brief, FILED.(c/s) (cmg) (Entered: 07/16/1998)
41	July 13, 1998	32	Amicus Curiae brief by Washington Legal , FILED.(c/s) (cmg) (Entered: 07/16/1998)
42	July 15, 1998	33	Document disclosure by National Foreign, FILED.(c/s) (cmg) (Entered: 07/16/1998)
43	July 20, 1998	34	Joint motion by National Foreign, Charles D. Baker, Philmore Anderson III to amend [30-1] order establishing filing schedule , filed. . (mr) (Entered: 07/21/1998)
44	July 23, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [34-1] joint motion to amend [30-1] order establishing filing schedule...The parties shall file their joint stipulation of facts no later than 7/24/98; set cross motion filing for summary judgment deadline for 7/27/98 and responsive brief no later than 7/27/98; reply brief by 8/13/98 . cc/cl (tmc) (Entered: 07/24/1998)
45	July 24, 1998	35	STIPULATION of facts by National Foreign, Charles D. Baker FILED.(c/s) (cmg) (Entered: 07/27/1998)
46	July 24, 1998	36	Transcript of proceedings for held on proceeding date: 7/8/98 before Judge: Chief Judge Tauro. Court Reporter: Barbara Sakurai (cmg) (Entered: 07/27/1998)
47	July 27, 1998	37	Motion by Charles D. Baker, Philmore Anderson III for summary judgment and Statementof Undisputed Material Facts FILED.(c/s) (cmg) (Entered: 07/28/1998)
48	July 27, 1998	38	Memorandum by Charles D. Baker, Philmore Anderson III in support of [37-1] motion for summary judgment and Statementof Undisputed Material Facts , FILED.(c/s) (cmg) (Entered: 07/28/1998)
49	July 27, 1998	39	Affidavit of Harold Fisher re: [37-1] motion for summary judgment and Statement of Undisputed Material Facts , FILED.(c/s) (cmg) (Entered: 07/28/1998)
50	July 27, 1998	40	Affidavit of Kathleen Molony re: [37-1] motion for summary judgment and Statement of Undisputed Material Facts , FILED.(c/s) (cmg) (Entered: 07/28/1998)
51	July 27, 1998	41	STIPULATION by Charles D. Baker, for leave to file memo in excess of 20 pages , FILED. (cmg) (Entered: 07/28/1998)
52	July 27, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [24-1] motion for leave to file Amicus Curriae . FILED.(cc/cl) (cmg) (Entered: 07/28/1998)
53	July 27, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [25-1] motion for leave to file Amicus Curiae Brief FILED.(cc/cl) . (cmg) (Entered: 07/28/1998)
54	July 27, 1998	42	Amicus Curiae brief by U.S. Chamber of Com , FILED.(c/s) (cmg) (Entered: 07/28/1998)
55	July 27, 1998	43	Amicus Curiae brief by National Foreign , filed. (cmg) (Entered: 07/28/1998)
56	Aug. 10, 1998		Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) (Entered: 08/25/1998)
57	Aug. 13, 1998		Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) (Entered: 08/13/1998)
58	Aug. 13, 1998	44	Response by National Foreign in opposition to [37-1] motion for summary judgment and Statementof Undisputed Material Facts , FILED.(c/s0 (cmg) (Entered: 08/14/1998)
59	Aug. 13, 1998	45	Supplemental Affidavit of Frank D. Kittredge , re: [44-1] opposition response , FILED. (c/s) (cmg) (Entered: 08/14/1998)
60	Aug. 25, 1998		Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) (Entered: 08/25/1998)
61	Sept. 15, 1998	46	Letter by Michael A. Collora dated: 9/14/98 to: Z.Lovett re: Hearing on 9/23/98 filed. (mr) (Entered: 09/15/1998)
62	Nov. 04, 1998	47	Chief Judge Joseph L. Tauro . Memorandum and Order entered. The plaintiff's motion for summary judgment and its unopposed motion to amend the compalint are ALLOWED. The Defendant's cross motion for sumary judgment is DENIED. (see order for details) cc/cl (mr) (Entered: 11/05/1998)
63	Nov. 04, 1998	48	Chief Judge Joseph L. Tauro . Order entered denying [37-1] motion for summary

			judgment and Statementof Undisputed Material Facts, granting [21-1] motion to amend [1-1] complaint, mooting [2-1] motion for preliminary injunction, mooting [2-2] motion For Consolidation and Expedited Consideration of the Merits. (motion for preliminary injunction and motion for consolidation and expedited consideration of the merits treated as plaintiff's motion for summary judgment.) Plaintiff's motion for summary judgment (#2) is ALLOWED. cc/cl (mr) (Entered: 11/05/1998)
64	Nov. 13, 1998	49	Motion by National Foreign for final judgment and Declaratory relief , filed. c/s (mr) (Entered: 11/16/1998)
65	Nov. 17, 1998	50	Chief Judge Joseph L. Tauro . Judgment entered for National Foreign against Charles D. Baker, Philmore Anderson III. , cc/cl (mr) (Entered: 11/18/1998)
66	Nov. 18, 1998		Case closed. (mr) (Entered: 11/18/1998)
67	Nov. 23, 1998	51	Notice of appeal by Charles D. Baker, Philmore Anderson III filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 321 10574 Appeal record due on 12/23/98 (Appealing judgment on 11/17/98). (fmr) (Entered: 11/24/1998)
68	Nov. 23, 1998		Copy of Notice of Appeal mailed to all counsel of record. Transcript Notice and Order form provided to appellant's counsel. (fmr) (Entered: 11/24/1998)
69	Nov. 23, 1998	52	Defendants' certificate regarding completion of transcript. (fmr) (Entered: 11/24/1998)
70	Nov. 23, 1998	55	Motion by Charles D. Baker, Philmore Anderson III to stay pending appeal , FILED. (c/s) (cmg) (Entered: 12/08/1998)
71	Nov. 25, 1998	53	STIPULATION (Motion) by National Foreign , to extend time to request attys' fees , FILED.(c/s) (cmg) (Entered: 11/30/1998)
72	Dec. 04, 1998	54	Transcript of proceedings for held on proceeding date: 9/23/98 before Judge: Chief Judge Tauro. Court Reporter: Barbara Sakurai. (cmg) (Entered: 12/04/1998)
73	Dec. 04, 1998		Mail sent to Daniel Popeo returned by Post Office because: moved, not forwardable. (cmg) (Entered: 12/04/1998)
74	Dec. 07, 1998	56	Memorandum by National Foreign in opposition to [55-1] motion to stay pending appeal , FILED.(c/s) (cmg) (Entered: 12/08/1998)
75	Dec. 14, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered granting [53-1] stipulation motion to extend time to request attys' fees, FILED.(cc/cl) (cmg) (Entered: 12/15/1998)
76	Dec. 14, 1998		Chief Judge Joseph L. Tauro . Endorsed Order entered denying [55-1] motion to stay pending appeal . . . The defts having filed a Notice of Appeal on 11/23/98, this motion is Denied as moot, FILED.(cc/cl) (cmg) (Entered: 12/15/1998)
77	Dec. 16, 1998		Transmitted supplemental record on appeal: re: [51-1] appeal (Appeals case manager supplemented documents #51,53,55&56 to the USCA).. (fmr) (Entered: 12/16/1998)
78	Dec. 28, 1998		Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) (Entered: 12/29/1998)
79	June 22, 1999	57	Opinion of the Court of Appeals re: [51-1] appeal , entered. (cmg) (Entered: 06/24/1999)
80	July 15, 1999	58	Mandate of US Court of Appeals re: [51-1] appeal affirming the district court judgment. Entered (lau) (Entered: 07/19/1999)
81	July 15, 1999		Record on appeal returned from U.S. Court of Appeals, re: . (lau) (Entered: 07/19/1999)
82	July 15, 1999		Closed flag. (lau) (Entered: 07/19/1999)
83	Feb. 29, 2000		Copy of all pleadings, certified copy of docket forwarded to U.S. Supreme Court per its request. (cmg) (Entered: 02/29/2000)
84	July 28, 2000	59	Motion by National Foreign for attorney fees , filed. c/s (kf) (Entered: 08/01/2000)
85	July 28, 2000	60	Memorandum by National Foreign in support of [59-1] motion for attorney fees , filed. c/s (kf) (Entered: 08/01/2000)
86	July 28, 2000	61	Appendix by National Foreign in support of [60-1] support memorandum for motion for attorneys fees, filed. c/s (kf) (Entered: 08/01/2000)
87	Aug. 04, 2000	62	Motion by Charles D. Baker, Philmore Anderson III to extend time to 9/1/00 to respond to Motion for atty's fees , FILED.(c/s) (cmg) (Entered: 08/07/2000)
88	Aug. 11, 2000		Judge Joseph L. Tauro . Endorsed Order entered granting [62-1] motion to extend time to 9/1/00 to respond to Motion for atty's fees, FILED.(cc/cl) [EOD Date 8/11/00] (cmg) (Entered: 08/11/2000)
89	Aug. 30, 2000	63	Motion by Charles D. Baker, Philmore Anderson III to extend time to 9/15/00 to respond to Pltf's Request for Attys Fees , FILED.(c/s) (cmg) (Entered: 08/31/2000)
90	Aug. 31, 2000		Judge Joseph L. Tauro . Endorsed Order entered granting [63-1] motion to extend time to 9/15/00 to respond to Pltf's Request for Attys Fees , FILED.(cc/cl) [EOD Date 8/31/00] (cmg) (Entered: 08/31/2000)
91	Sept. 15, 2000	64	Response by Charles D. Baker, Philmore Anderson III in opposition to [59-1] motion for attorney fees , FILED.(c/s) (cmg) (Entered: 09/18/2000)
92	Sept. 25, 2000		Copies of pleadings sent to U.S. Supreme Court on 2/00 returned this date. (cmg) (Entered: 09/25/2000)
93	Oct. 03, 2000		Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) (Entered: 10/03/2000)
94	Oct. 03, 2000		Mail sent to Melissa Hart returned by Post Office because: attempted, not known. (cmg) (Entered: 10/03/2000)
95	Oct. 04, 2000		Mail sent to Daniel J. Popeo returned by Post Office because: attempted, not known. (cmg) (Entered: 10/04/2000)
96	Oct. 04, 2000		Mail sent to Timothy B. Dyk returned by Post Office because: forwarding order expired. (cmg) (Entered: 10/04/2000)
97	Oct. 18, 2000		Judge Joseph L. Tauro . Endorsed Order entered denying as moot [59-1] motion for attorney fees, FILED.(cc/cl) [EOD Date 10/20/00] (cmg) (Entered: 10/20/2000)
98	Oct. 18, 2000	65	Judge Joseph L. Tauro . Agreed Judgment Concerning Attys' Fees entered for

		National Foreign, FILED.(cc/cl) [EOD Date 10/20/00] (cmg) (Entered: 10/20/2000)
99	Oct. 30, 2000	Mail sent to Robert H. Klonoff returned by Post Office because: attempted, not known. (cmg) (Entered: 10/30/2000)
100	Nov. 08, 2000	Mail sent to Daniel J. Popeo, Esq. returned by Post Office because: forwarding order expired. (sat) (Entered: 11/08/2000)
101	Nov. 15, 2000	Mail sent to Gregory A. Castanias returned by Post Office because: attempted, not known. (cmg) (Entered: 11/15/2000)
102	Nov. 15, 2000	Mail sent to Timothy B. Dyk returned by Post Office because: attempted, not known. (cmg) (Entered: 11/15/2000)
103	Nov. 15, 2000	Mail sent to Robert H. Klonoff returned by Post Office because: attempted, not known. (cmg) (Entered: 11/15/2000)
104	Nov. 15, 2000	Mail sent to Melissa Hart returned by Post Office because: attempted, not known. (cmg) (Entered: 11/15/2000)

regarding the weight to be given the expert's testimony and the jury's role"); *see also Hoult v. Hoult,* 57 F.3d 1, 7–8 (1st Cir.1995) (citing with approval similar instruction on expert testimony); *United States v. Barnette,* 800 F.2d 1558, 1568–1569 (11th Cir. 1986) (similar instruction on expert testimony placed expert's opinion in proper perspective for the jury), *cert. denied,* 480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987); *see generally United States v. McCarty,* 440 F.2d 681, 682 (6th Cir.1971) (rejecting argument that court erred in denying requested expert witness instruction inasmuch as charge as a whole "included its purport"). Alternatively, plaintiffs also fail to demonstrate that the giving of the requested instructions would have changed the outcome of the trial.

Finally, as previously discussed, Rule 703, F.R.E., allows an expert to base an opinion on hearsay or other facts or data reasonably relied upon by experts in that particular field. Nevertheless, "It is not necessary for the court to instruct the jury with respect to this hearsay and other dangers associated with reliance by experts on non-admissible evidence." *United States v. Gallo,* 118 F.R.D. 316, 318 (E.D.N.Y.1987).[45] This is not the case where this court omitted an entire issue or claim from the given charge. Rather, plaintiffs simply requested limiting instructions on the foundation and underpinnings of expert testimony. Such a limiting instruction is not required.

In sum, the given charge did not confuse or mislead the jury with respect to expert testimony. Moreover, the failure to give instructions 41 and 42 did not amount to a clear miscarriage of justice. Accordingly, plaintiffs are not entitled to a new trial based on this argument.

CONCLUSION

In accordance with the foregoing discussion, plaintiffs' motion for a new trial (Docket Entry # 80) is **DENIED.**

45. Although the above statement is dicta, it is worth noting that the author of the *Gallo* opinion is Chief Judge Jack B. Weinstein, author of the well known treatise on evidence bearing his name, *Weinstein's Federal Evidence* (1998).

NATIONAL FOREIGN TRADE COUNCIL, Plaintiff,

v.

Charles D. BAKER, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts, and, Philmore Anderson, III, in his official capacity as State Purchasing Agent for the Commonwealth of Massachusetts, Defendants.

CA No. 98–10757–JLT.

United States District Court,
D. Massachusetts.

Nov. 4, 1998.

Nonprofit organization advocating open international trade sued Massachusetts officials, seeking declaratory judgment that procurement statute generally prohibiting Massachusetts and its agents from purchasing goods or services from anyone doing business with Union of Myanmar was unconstitutional. Parties cross-moved for summary judgment. The District Court, Tauro, Chief Judge, held that: (1) organization had standing to challenge Massachusetts' "Burma Law," and (2) "Burma Law" unconstitutionally impinged on federal government's exclusive authority to regulate foreign affairs.

Summary judgment granted for nonprofit organization.

1. Associations ⇐20(1)

Nonprofit organization advocating open international trade had standing to challenge Massachusetts' "Burma Law," which generally prohibited Massachusetts and its agents from purchasing goods or services from anyone doing business with Union of Myanmar, given that members of organization who had

prohibited contacts could not bid on state contracts on equal basis, and thus could sue individually, challenging such statutes was germane to organization's purpose of representing its members' interests in foreign trade, and relief sought, prohibiting statute's enforcement, did not require participation by individual members. M.G.L.A. c. 7, §§ 22G–22M.

2. Associations ⚿20(1)

Association may sue on behalf of its members if (a) its members would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

3. States ⚿18.43, 100

Massachusetts' "Burma Law," which generally prohibited Massachusetts and its agents from purchasing goods or services from anyone doing business with Union of Myanmar, unconstitutionally infringed on federal government's exclusive authority to regulate foreign affairs; statute was enacted solely to sanction Myanmar for human rights violations and to change its domestic policies, and law had disruptive impact on foreign relations. M.G.L.A. c. 7, §§ 22G–22M.

4. States ⚿18.43

That Massachusetts' "Burma Law," which generally prohibited Massachusetts and its agents from purchasing goods or services from anyone doing business with Union of Myanmar, did not establish direct contact between Myanmar and Massachusetts was irrelevant to determination of whether statute unconstitutionally infringed on federal government's power over foreign affairs. M.G.L.A. c. 7, §§ 22G–22M.

5. States ⚿18.43

State interests, no matter how noble, do not trump the federal government's exclusive foreign affairs power.

6. States ⚿18.43

Nonprofit organization advocating foreign trade did not establish that federal appropriations act impliedly preempted Massachusetts' "Burma Law," which generally prohibited Massachusetts and its agents from purchasing goods or services from anyone doing business with Union of Myanmar, inasmuch as alleged conflict between federal government's intent to utilize multilateral sanctions with other nations and Burma Law's unilateral approach did not exist, in that federal statute also provided for unilateral sanctions against Myanmar. Omnibus Consolidated Appropriations Act of 1997, § 101 et seq., 110 Stat. 3009; M.G.L.A. c. 7, §§ 22G–22M.

7. States ⚿18.11

To establish preemption, plaintiff must show that Congress intended to exercise its authority to set aside a state law.

8. Federal Civil Procedure ⚿843

Motion to amend complaint challenging constitutionality of state statute to allege § 1983 violation, so as to entitle plaintiff to attorney fees, would be allowed, given that it was unopposed and would not prejudice defendant state officials. 42 U.S.C.A. §§ 1983, 1988.

Timothy B. Dyk, Robert H. Klonoff, Gregory A. Castanias, Melissa Hart, Jones, Day, Reavis & Pogue, Washington, DC, Jacqueline M. Holmes, Jones, Day, Reavis & Pogue, New York, NY, Michael A. Collora, Dwyer & Collora, Boston, MA, for National Foreign Trade Council.

Thomas A. Barnico, Attorney General's Office, Boston, MA, for Charles D. Baker, Philmore III.

Andrew N. Vollmer, John A. Trenor, Wilmer, Cutler & Pickering, Washington, DC, James D. Smeallie, Sherburne, Powers & Needham, Boston, MA, for U.S. Chamber of Commerce, Organization for International Investment.

David G. Leitch, Gil A. Abramson, Roger P. Alford, Hogan & Hartson, Washington, DC, Richard L. Weiner, Hogan & Hartson L.L.P., Washington, DC, for European Union.

Daniel J. Popeo, Washington Legal Foundation, Washington, DC, Evan Slavitt, Gads-

by & Hannah LLP, Boston, MA, David M. Young, Washington Legal Foundation Washington, DC, for Washington Legal Foundation.

MEMORANDUM

TAURO, Chief Judge.

Plaintiff National Foreign Trade Council ("NFTC") brings this action against two officials of the Commonwealth [1] seeking a declaratory judgment that the so-called "Massachusetts Burma Law" [2] is unconstitutional.

The Massachusetts Burma Law is a procurement statute that prohibits the Commonwealth and its agents from purchasing goods or services from anyone doing business with the Union of Myanmar (formerly known as the Nation of Burma). The statute authorizes the Operational Services Division (OSD), an agency within the Executive Office of Administration and Finance, to establish a "restricted purchase list" of companies "doing business with Burma" as defined by the statute. Once OSD makes a preliminary finding that a company does business with Myanmar, the company can submit a sworn affidavit to refute the finding. OSD then makes a final decision whether to place a company on the "restricted purchase list."

The Commonwealth is allowed to procure from a "restricted purchase list" company only when: (1) the procurement is essential and the restriction would eliminate the only bid or offer, or would result in inadequate competition, M.G.L.A. ch. 7, § 22H(b); (2) the Commonwealth is purchasing certain medical supplies, § 22I; or (3) there is no "comparable low bid or offer" [3] by an unrestricted bidder, § 22H(d).

Plaintiff claims that the Burma Law is invalid because it (1) intrudes on the federal government's exclusive power to regulate foreign affairs; (2) discriminates against and burdens international trade in violation of the Foreign Commerce Clause; and (3) is preempted by a federal statute and an executive order imposing sanctions on Myanmar.

Before the court are the parties' cross motions for summary judgment. For reasons stated below, the court finds that the Massachusetts Burma Law impermissibly infringes on the federal government's power to regulate foreign affairs.

I.

ANALYSIS

A. STANDING

[1, 2] Defendants argue that Plaintiff [4] lacks standing to sue because its members have not been injured by the Burma Law. The Supreme Court's test for organizational standing provides that an association may sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Plaintiff NFTC satisfies the first prong of the *Hunt* test. As shown by the parties' Joint Stipulation, NFTC members on the "restricted purchase list" cannot bid on Massachusetts contracts on an equal basis.[5] Those members could, therefore, sue on an individual basis. *See Clinton v. City of New*

1. Charles D. Baker, the Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, the State Purchasing Agent for the Commonwealth of Massachusetts.

2. Act of June 25, 1996, Chapter 10, § 1, 1996 Mass. Acts 210, codified at Mass. Gen. Laws, Ch. 7, §§ 22G–22M.

3. A "comparable low bid," as defined by the statute, is one that is up to 10% higher than a bid from a company on the restricted list. In essence, a company on the "restricted purchase list" can only win the bid if its offer is at least 10% lower than the lowest bid by an unrestricted company.

4. Plaintiff NFTC, a nonprofit corporation, has strongly advocated open international trade and investment since its founding in 1914.

5. The parties have stipulated that: (1) more than thirty NFTC members are on the "restricted purchase list;" (2) some NFTC members have severed their business connections with Myanmar, thereby affecting their competitive edge in the global market; (3) at least one member, who had contracts with Massachusetts in the past, did not

York —— U.S. ——, ——, 118 S.Ct. 2091, 2100, 141 L.Ed.2d 393 (1998) (holding that "Probable economic injury resulting from [governmental actions] that alter competitive conditions" satisfy the 'injury-in-fact' requirement of Article III and, therefore, anyone who is "likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test") (quoting 3 K. Davis & R. Pierce, Administrative Law Treatise 13–14 (3d ed.1994)). *See also Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,* 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (holding that the plaintiff had standing because it was "able and ready to bid on contracts and that a discriminatory policy prevent[ed] it from doing so on an equal basis").

Plaintiff also satisfies the second prong of *Hunt.* The Joint Stipulation states, "Founded in 1914, the NFTC has historically represented its members' interests in the area of foreign trade." Joint Stipulation ¶ 2. *See also* Declaration of Frank D. Kittredge ¶ 5. The NFTC is "organized and authorized to represent the interests of its members in free international trade and commerce." The NFTC Resolution of April 21, 1998, Exhibit 2 of the Joint Stipulation. Challenging statutes like the Massachusetts Burma Law, which acts as a barrier to free trade, is "germane" to the organization's purpose.

Plaintiff seeks declaratory judgment prohibiting enforcement of the Burma Law. Neither the claims nor the relief requested in Plaintiff's Complaint requires participation by individual members. Plaintiff, therefore, satisfies the third prong of the *Hunt* test, and has standing to bring this action on behalf of its members.

B. CONSTITUTIONALITY OF THE MASSACHUSETTS BURMA LAW

1. *The Constitution Grants Federal Government Exclusive Authority Over Foreign Affairs*

Under our constitutional framework, the federal government has exclusive authority to conduct foreign affairs. Numerous constitutional provisions evidence the Framers' intent to vest plenary power over foreign affairs in the federal government. Article I, § 8, cls. 1 and 3 give Congress sole authority to provide for the common defense, and to regulate commerce with foreign nations. Article II, § 2, cl. 2 authorizes the President to make treaties and appoint ambassadors. Article I, § 10, cls. 1–3 prohibit the states from making treaties, entering into agreements with other countries, or imposing duties on imports and exports. These provisions demonstrate that "one of the main objects of the Constitution [was] to make us, as far as regarded our foreign relations, one people, and one nation." *Holmes v. Jennison,* 39 U.S. (14 Pet.) 540, 575, 10 L.Ed. 579 (1840).

The Supreme Court has consistently recognized the exclusive role assigned to the federal government in the area of foreign affairs. The Court has admonished, "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink,* 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *see also United States v. Belmont,* 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) ("Complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

The Supreme Court, in *Zschernig v. Miller,* 389 U.S. 429, 434–35, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), declared invalid state laws with more than "some incidental or indirect effect in foreign countries," or that have "great potential for disruption or embarrassment" of United States foreign policy. *Zschernig* involved a probate law that conditioned the right of a nonresident alien to inherit property from an Oregon resident on reciprocal treatment by the beneficiary's country of origin. Even though probate matters are within the traditional jurisdiction of the states, and even though the Oregon stat-

bid on new contracts because of the statute; and (4) at least one member on the "restricted purchase list" lost a contract prior to joining NFTC because its bid was not 10% lower than the winning bid. *See* Joint Stipulation ¶¶ 30, 36–37, 32, and 38.

ute was facially neutral, the Supreme Court struck it down under the foreign affairs doctrine, because of its possible effect on foreign nations. *Id. Zschernig* teaches that states and municipalities must yield to the federal government when their actions affect significant issues of foreign policy.

2. *Massachusetts Burma Law Impermissibly Burdens U.S.-Foreign Relations*

[3] The Massachusetts Burma Law has more than an "indirect or incidental effect in foreign countries," and a "great potential for disruption or embarrassment." *Zschernig,* 389 U.S. at 434–35, 88 S.Ct. 664, 19 L.Ed.2d 683. It, therefore, unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs.

The Commonwealth concedes that the statute was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policies. Indeed, its legislative history makes this intent clear. Representative Rushing of the Massachusetts House of Representatives stated that "if you're going to engage in foreign policy, you have to be able to identify a goal that you will know when it is realized .... [T]he identifiable goal is, free democratic elections in Burma." MA House Debate on H2833: July 19, 1995, transcript at 4–5. State Senator Hicks criticized the bill as an improper attempt to make foreign policy: "This particular body has no particular responsibility to make a statement on this ... international matter. [T]he appropriate forum ... would be the U.S. Congress." MA Senate Debate on H2833: April 10, 1996, transcript at 10.

The *amicus* briefs here as well as the Joint Stipulation further demonstrate the Burma Law's disruptive impact on foreign relations. The European Union (EU), as an *amicus,* observes that the Massachusetts Burma Law: (1) interferes with the normal conduct of EU–U.S. relations; (2) raises questions about the ability of the U.S. to honor international commitments it has entered in the framework of the World Trade Organization (WTO); and (3) poses a great risk to the proliferation of similar state sanction laws, which in turn would aggravate international tensions.[6] *See* EU Brief, p. 2; *see also* Joint Stipulation ¶ 40 & Exhibit 15, Ambassador Hugo Paeman's Letter to then-Governor Weld of Massachusetts (stating that the Burma Law is a breach of the WTO agreements, and would have a "damaging effect on bilateral EU–US relations"). Japan and the Association of the South East Asian Nations (ASEAN) also filed complaints against the statute with the U.S. government. *See* Joint Stipulation, ¶ 42. Both EU and ASEAN formally noted their oppositions to the Burma Law at the WTO in June and July of 1997. *See* Joint Stipulation, ¶¶ 41–42.

Defendants argue that the Burma Law does not intrude on the federal government's foreign affairs power because: (1) the Constitution permits certain state actions that indirectly affect foreign affairs; (2) the Burma Law does not establish a direct contact between the state and the Nation of Myanmar; (3) important state interests embodied in the First and Tenth Amendments justify the statute; and (4) as the foreign affairs' doctrine is itself "vague," the court should leave to the legislative branch the issue of whether to invalidate the Massachusetts Burma Law and similar state procurement statutes.

Defendants first challenge the scope of the foreign affairs power, and argue that the Burma Law does not infringe on what they view as a more limited federal government power. In an attempt to confine the federal government's foreign relations power, Defendants cite the following federal and state court decisions upholding selective purchasing and divestment statutes. *Trojan Tech., Inc. v. Com. of Pennsylvania,* 742 F.Supp. 900, 903 (M.D.Pa.1990), *aff'd,* 916 F.2d 903, 913–14 (3d Cir.1990) (upholding a Pennsylvania statute that required U.S.-made steel in all state construction projects); *Board of Trustees v. Mayor and City Council of Baltimore,* 317 Md. 72, 562 A.2d 720, 744 (Md. 1989) (upholding a Baltimore statute that withdrew city's investments from South Africa); and *K.S.B. Technical Sales Corp. v. New*

6. There are currently eighteen municipal sanction laws issued against Myanmar. *See* Joint Stipulation, ¶ 44. Massachusetts itself is planning to introduce a similar legislation against Indonesia. *Id.* at exhibit 15.

Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774, 782–84 (N.J.1977) (upholding a New Jersey "Buy American" statute).[7]

None of these cases is persuasive precedent with respect to the circumstances at issue here. *Trojan,* 742 F.Supp. 900, 903–04, and *K.S.B. Technical Sales,* 75 N.J. 272, 381 A.2d 774, 782–84, involved "Buy American" statutes, whose purpose and effect were to create jobs and promote economic development at home. Although these statutes benefitted Americans economically, they did not single out a particular foreign country for particular treatment, as does the Massachusetts Burma Law. The Third Circuit specifically distinguished the statute in *Trojan* from the one in *Zschernig* on this basis. *See* 916 F.2d at 913 (holding that the Pennsylvania statute applied to "steel from any foreign source, regardless of whether the source country might be considered friend or foe," and therefore, unlike the Oregon statute struck down in *Zschernig,* did not involve the state in the conduct of foreign affairs). Furthermore, at least one court has held that even Buy–American statutes may violate the foreign affairs doctrine. *See Bethlehem Steel Corp. v. Board of Com'rs,* 276 Cal.App.2d 221, 224–26, 80 Cal.Rptr. 800 (1969) (holding unconstitutional a California "Buy American Law" that awarded state construction contracts only to companies that agreed to use American-made products).

The Baltimore statute in *Board of Trustees* required the City to withdraw its investments in South Africa. *See* 317 Md. 72, 562 A.2d 720. Unlike the Massachusetts Burma Law, the Baltimore statute only modified the City's own conduct, and did not seek to influence individuals or companies in their private commercial activities. *Id.*

Several lower federal and state court decisions support the conclusion that the Burma Law unconstitutionally burdens the federal foreign affairs power. In *Springfield Rare Coin Galleries, Inc. v. Johnson,* 115 Ill.2d 221, 104 Ill.Dec. 743, 503 N.E.2d 300, 305 (Ill.1986), the Illinois Supreme Court held unconstitutional a provision that exempted sales tax on all rare coins except for South African Krugerrands. In *New York Times Co. v. City of New York Comm'n on Human Rights,* the New York Court of Appeals reversed New York City Commission on Human Rights's ruling and upheld New York Time's practice of accepting employment advertisements from South African employers. *See* 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963, 968 (N.Y.1977) ("Even longstanding State regulation of traditional fields of law, such as the rules governing the descent and distribution of estates, must fall by the wayside if enforcement of State regulations would 'impair the effective exercise of the Nation's foreign policy.' ") (quoting *Zschernig,* 389 U.S. at 440, 88 S.Ct. 664). In *Tayyari v. New Mexico State Univ.,* 495 F.Supp. 1365, 1376 (D.N.M.1980), the U.S. District Court for the District of New Mexico invalidated a motion passed by the Regents of the State University that denied Iranian students admissions and readmissions until the return of American hostages. The District Court held that the Regents' true purpose was "to make a political statement." *Id.* at 1376. These holdings are consistent with the Supreme Court's decision in *Zschernig,* and bolster the conclusion that the Massachusetts Burma Law is an unconstitutional infringement on the federal government's power over foreign affairs.

[4, 5] In another effort to avoid the sweep of the foreign affairs doctrine, Defendants argue that the Burma Law does not establish direct contact between Myanmar and the Commonwealth. This is true, but irrelevant under the *Zschernig* test. *Zschernig* examines the substantive impact a state statute has on foreign relations. *See* 389 U.S. at 434–35, 88 S.Ct. 664. The Massachusetts Burma Law was designed with the purpose of changing Burma's domestic policy. This is an unconstitutional infringement on the foreign affairs powers of the federal government. State interests, no matter how noble, do not trump the federal government's exclusive foreign affairs power. *Cf. U.S. v. Pink,* 315 U.S. 203, 233, 62 S.Ct. 552, 86

7. *North American Salt Co. v. Ohio Dept. of Transp.,* 122 Ohio App.3d 213, —— N.E.2d ——, 1997 WL 447643 (Ohio App. 10 Dist.1997) recently joined this line of state precedents, wherein the Court of Appeals of Ohio upheld an Ohio "Buy American" statute.

L.Ed. 796 (1942); *U.S. v. Belmont*, 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937).

Plaintiff also argues that the statute is invalid because (1) federal law preempts the Massachusetts Burma Law; and (2) The Massachusetts Burma Law violates the Foreign Commerce Clause. Because neither argument is dispositive in this case, this opinion does not address them in detail, but offers the following observations.

[6] Plaintiff argues that "actual conflict" between the Omnibus Consolidated Appropriations Act of 1997 and the Massachusetts Burma Law impliedly preempts the Burma Law.

[7] To establish preemption, Plaintiff must show that Congress intended to exercise its authority to set aside a state law. *See Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 67 (1st Cir.1997). Plaintiff's burden is particularly heavy because Plaintiff argues implied, rather than express, preemption. *Id.* Plaintiff has failed to carry this burden.

The alleged main conflict between the statutes was the federal government's intent to utilize multilateral sanctions with other nations and the Burma Law's unilateral approach. This argument is not persuasive, because the federal statute actually provides for unilateral sanctions against Myanmar. The evidence does not establish sufficient actual conflict for this court to find implied preemption. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (courts will not infer preemption based on speculation; conflict must be real).

Plaintiff offers the Foreign Commerce Clause as another ground for invalidating the Massachusetts Burma Law. *See* U.S. Const., art. I, § 8, cl. 3; *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) (holding that state regulations that discriminate against foreign commerce or impede the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments" are unconstitutional). Defendant raises as a defense the market-participant exception to the dormant Commerce Clause. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983). Although the Third Circuit has extended this exception to foreign commerce, neither the Supreme Court nor the First Circuit has addressed the issue. *See Trojan Tech., Inc. v. Com. of Pennsylvania*, 916 F.2d 903, 909–13 (3d Cir.1990) (holding that "Buy American" statutes which affect foreign commerce are not subject to review under the Foreign Commerce Clause).

This court need not decide whether or how the market-participant exception applies to foreign commerce, as the Massachusetts Burma Law is an unconstitutional infringement of federal government's power over foreign affairs.

Massachusetts' concern for the welfare of the people of Myanmar as manifested by this legislative enactment, may well be regarded as admirable. But, under the exclusive foreign affairs doctrine, the proper forum to raise such concerns is the United States Congress.

C. *MOTION TO AMEND THE COMPLAINT*

[8] Plaintiff seeks to amend its Complaint to allege a 42 U.S.C. § 1983 violation by the state officials, which would entitle Plaintiff to attorneys' fees under § 1988. As this motion is unopposed and would not prejudice Defendants, it is allowed.

II.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment and its unopposed Motion to Amend the Complaint are ALLOWED. Defendants' Cross Motion for Summary Judgment is DENIED.

the time was duplicative. It simply argues that "this was not a case warranting the investment of three attorneys."

[33–35] We find no abuse of discretion in allowing recovery for the time spent by three attorneys. TWA does not suggest the time spent by three attorneys was duplicative, just that it was unnecessary. After consideration, the district court rejected this argument. Counsel's time spent pursuing unsuccessful claims, however, is generally non-compensable "unless it can be shown that the [unsuccessful and successful] claims were interconnected." *Krewson*, 74 F.3d at 19. "Interconnection" can be found when the "claims include[ ] a common core of facts or were based on related legal theories." *Lipsett v. Blanco*, 975 F.2d 934, 940 (1st Cir.1992) (quotations omitted). Although it may be true that Koster's breach of contract and discrimination claims arose out of the same cluster of facts, we need not decide this question because it is the fee target's burden to show a basis for segregability. *See id.* at 941. TWA did not meet this burden either before the district court or this court.

We affirm the judgment of the district court except for the award of damages. We order a new trial on the issue of emotional damages only if Koster decides not to remit $932,000 (plus any interest accrued).

NATIONAL FOREIGN TRADE COUNCIL, Plaintiff, Appellee,

v.

Andrew S. NATSIOS, in his official capacity as Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, in his official capacity as State Purchasing Agent for the Commonwealth of Massachusetts, Defendants, Appellants.

No. 98–2304.

United States Court of Appeals, First Circuit.

Heard May 4, 1999.

Decided June 22, 1999.

Nonprofit corporation representing member companies that engage in foreign trade sought declaratory and injunctive relief against two Massachusetts officials, challenging constitutionality of the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma (Myanmar). Summary judgment for plaintiff was granted by the United States District Court for the District of Massachusetts, Tauro, Chief Judge, 26 F.Supp.2d 287, and officials appealed. The Court of Appeals, Lynch, Circuit Judge, held that: (1) the Massachusetts Burma Law is unconstitutional as encroaching on the federal government's exclusive power over foreign relations; (2) Massachusetts did not act as a mere market participant within exception to Commerce Clause restrictions; (3) the Law violates the Foreign Commerce Clause; and (4) federal law imposing sanctions on Burma preempted the Massachusetts Burma Law.

Affirmed.

1. Federal Courts ⚿776

Court of Appeals reviews de novo district court's determinations on cross-motions for summary judgment, on stipulated facts and uncontested affidavits.

2. States ⚿18.43

Power over foreign affairs is vested exclusively in the federal government. U.S.C.A. Const. Art. 1, §§ 8, 9, 10.

3. Constitutional Law ⚿27

When it comes to foreign affairs, the powers of the federal government are not limited, and the broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.

4. States ⚿18.43

State may make some agreements with foreign governments without the consent of Congress so long as they do not impinge upon the authority or the foreign relations of the United States. U.S.C.A. Const. Art. 1, § 10, cl. 2; Restatement (Third) of Foreign Relations Law § 201.

5. States ⚿18.43, 100

The Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, has more than an incidental or indirect effect on foreign relations and is unconstitutional as encroaching on the federal government's exclusive power over foreign relations, even though the mechanism created under the Law scrutinizes companies doing business in Burma rather than the Burmese government itself. U.S.C.A. Const Art. 1, § 8, cls. 1, 3, 4, 10, 11; M.G.L.A. c. 7, §§ 22G-22M, 40F 1/2

6. States ⚿18.43

In determining whether a state law is unconstitutional as encroaching on the federal government's exclusive power over foreign relations, courts do not balance the nation's interests in a unified foreign policy against the particular interests of an individual state; instead, there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed.

7. States ⚿18.43

In determining whether a state law is unconstitutional as encroaching on the federal government's exclusive power over foreign relations, the effect of the law is not measured solely by the level or frequency of scrutiny of conditions in a foreign country.

8. States ⚿18.43

Factors that could be considered in determining whether state law had more than an incidental or indirect effect on foreign relations, so as to be unconstitutional as encroaching on the exclusive power of the federal government over foreign relations, were: (1) that the design and intent of the law was to affect the affairs of a foreign country; (2) that state, with its large purchasing power by scores of state authorities and agencies, was in a position to effectuate that design and intent and has had an effect; (3) that the effects of the law may well be magnified should state prove to be a bellwether for other states; (4) that the law had resulted in serious protests from this country's allies and trading partners; and (5) that state has chosen a course divergent from the federal law, thus raising the prospect of embarrassment for the country.

9. States ⚿18.43

The effect of state and local laws should not be considered in isolation in determining whether such laws encroach on exclusive federal power over foreign relations; rather, courts must consider the combined effects of similar laws in numerous jurisdictions.

10. States ⚿18.43

Executive Branch views are not dispositive in determining whether a state law impermissibly interferes with the federal government's foreign affairs power.

11. States ⚿18.43

Foreign government views, although not dispositive, are one factor to consider in determining whether a law impermissibly interferes with the federal government's foreign affairs power.

12. States ⚿18.43

The courts, and not only Congress, may determine whether a state law interferes with the foreign affairs power of the federal government.

13. Courts ⚿91(1)

The lower federal courts are to follow directly applicable Supreme Court precedent, even if that precedent appears weakened by pronouncements in subsequent decisions, and are to leave to the Supreme Court the prerogative of overruling its own decisions.

14. Commerce ⚿56

The market participant exception to the dormant domestic Commerce Clause does not shield state law from challenges brought under the federal foreign affairs power.

15. States ⚿18.43

The federal government's foreign affairs power exceeds the power expressly granted in the text of the Constitution, and state action, even in traditional areas of state concern, must yield to the federal power when such state action has more than an indirect effect on the nation's own foreign policy.

16. Federal Courts ⚿611, 915

Contention that the Tenth Amendment insulated from constitutional scrutiny the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, was waived where raised only in a brief footnote. U.S.C.A. Const.Amend. 10; M.G.L.A. c. 7, §§ 22G–22M, 40F 1/2.

17. States ⚿4.4(1)

Tenth Amendment did not insulate from scrutiny under the foreign affairs powers of the federal government the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, despite contentions that invalidating the law compels Massachusetts to engage in commerce with companies that do business in Burma, that state's purchasing decisions lie at the core of state sovereignty, and that the Massachusetts law is an expression of a moral position on an important issue of public policy. U.S.C.A. Const. Amend. 10; M.G.L.A. c. 7, §§ 22G–22M, 40F 1/2.

18. Constitutional Law ⚿38

Strong state interests do not make an otherwise unconstitutional state law constitutional.

19. Constitutional Law ⚿82(6.1)

A state government's First Amendment interests, if any, do not weigh into a consideration of whether a state has impermissibly interfered with the federal government's foreign affairs power. U.S.C.A. Const. Amend. 1.

20. Commerce ⚿10

The Commerce Clause provides protection from state legislation inimical to the national commerce even where Congress has not acted. U.S.C.A. Const. Art. 1, § 8, cl. 3.

21. Commerce ⚿56

If a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities. U.S.C.A. Const. Art. 1, § 8, cl. 3.

22. Commerce ⚿60(1)

In enacting the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma (Myanmar), Massachusetts has not acted as a mere market participant within exception to Commerce Clause restrictions, but crossed over the to market regulator, as the Burma Law applies to conduct not even remotely linked to Massachusetts, and imposes restrictions on markets other than the market for state procurement contracts. U.S.C.A. Const. Art. 1, § 8, cl. 3.

23. Commerce ⇨56

States may not use the market participant exception to the dormant domestic Commerce Clause to shield otherwise impermissible regulatory behavior that goes beyond ordinary private market conduct. U.S.C.A. Const. Art. 1, § 8, cl. 3.

24. Commerce ⇨60(1)

Under the dormant domestic Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may favor its own citizens over others, but this doctrine does not permit state to pursue goals that are not designed to favor its citizens or to secure local benefits on theory that the effects of its law are not relevant to the inquiry into whether it is acting as a regulator. U.S.C.A. Const. Art. 1, § 8, cl. 3.

25. Commerce ⇨56

The proper inquiry as to the applicability of the market participant exception to the dormant domestic Commerce Clause is whether state is acting as an ordinary market participant would act, not whether any participant has acted in such a fashion. U.S.C.A. Const. Art. 1, § 8, cl. 3.

26. Commerce ⇨56

Fact that state has created a market, through its own procurement contracts, does not mean that, under the market participant exception to the dormant domestic Commerce Clause, it may regulate the market that it has created so as to regulate conduct elsewhere not related to that market. U.S.C.A. Const. Art. 1, § 8, cl. 3.

27. Commerce ⇨1

State actions that affect international commerce receive even greater scrutiny than do actions that affect interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

28. Commerce ⇨56

It is unlikely that the market participation exception, shielding state regulation under the dormant domestic Commerce Clause, applies at all, or without a much higher level of scrutiny, to the Foreign Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

29. Commerce ⇨60(1)

The Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma (Myanmar), violates the Foreign Commerce Clause because: (1) the Law is facially discriminatory, though it does not discriminate between domestic and foreign companies, as it does discriminate against foreign commerce, by discriminating against two subsets of foreign commerce, that involving companies or persons organized or operating in Burma and that involving companies or persons doing business with Burma; (2) it interferes with the federal government's ability to speak with one voice; and (3) Massachusetts is attempting to regulate conduct beyond its borders and beyond the borders of this country. U.S.C.A. Const. Art. 1, § 8, cl. 3; M.G.L.A. c. 7, §§ 22G–22M, 40F 1/2.

30. Commerce ⇨12

The Foreign Commerce Clause not only restricts protectionist policies, but also restrains the states from excessive interference in foreign affairs. U.S.C.A. Const. Art. I, § 8, cl. 3

31. Commerce ⇨12

Under standard Commerce Clause analysis, a statute that facially discriminates against interstate or foreign commerce will, in most cases, be found unconstitutional. U.S.C.A. Const. Art. 1, § 8, cl. 3.

32. Commerce ⇨13.5

Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. U.S.C.A. Const. Art. 1, § 8, cl. 3.

33. Commerce ⚿12

A law need not be designed to further local economic interests in order to run afoul of the Commerce Clause; where discrimination is patent, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown. U.S.C.A. Const. Art. 1, § 8, cl. 3.

34. Commerce ⚿60(1)

State laws that are designed to limit trade with a specific foreign nation are precisely one type of law that the Foreign Commerce Clause is designed to prevent, and such a law's applicability to both foreign and domestic companies does not save it. U.S.C.A. Const. Art. 1, § 8, cl. 3.

35. Commerce ⚿4

When the Constitution speaks of "foreign commerce," it is not referring only to attempts to regulate the conduct of foreign companies; it is also referring to attempts to restrict the actions of American companies overseas. U.S.C.A. Const. Art. 1, § 8, cl. 3.

See publication Words and Phrases for other judicial constructions and definitions.

36. Commerce ⚿12

A state law can violate the dormant Foreign Commerce Clause by impeding the federal government's ability to speak with one voice in foreign affairs. U.S.C.A. Const. Art. 1, § 8, cl. 3.

37. States ⚿7

State may not regulate conduct wholly beyond its borders.

38. Commerce ⚿12

The Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. U.S.C.A. Const. Art. 1, § 8, cl. 3.

39. Commerce ⚿60(1)

The Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, cannot be saved from Commerce Clause violation on ground that a company doing business with Burma can simply forgo contracts with Massachusetts, or simply beat the next highest bidder's price by ten percent, as provided by exception in the law. U.S.C.A. Const. Art. 1, § 8, cl. 3; M.G.L.A. c. 7, §§ 22G–22M, 40F 1/2.

40. Commerce ⚿13.5

Where a state law discriminates on its face against foreign commerce, it can survive Commerce Clause scrutiny only if it is demonstrably justified because it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. U.S.C.A. Const. Art. 1, § 8, cl. 3.

41. Commerce ⚿13.5

A state's expression of moral concerns cannot provide a valid basis for a discriminatory law, otherwise violating the Foreign Commerce Clause, and even if expression of moral outrage about foreign human rights concerns were a valid local purpose, state would need to show that it has no less discriminatory means of expressing its outrage. U.S.C.A. Const. Art. 1, § 8, cl. 3.

42. States ⚿100

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.

43. States ⚿18.43, 100

Federal law imposing sanctions on Burma (Myanmar) preempted the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, and thus the Massachusetts Law was unconstitutional under the Supremacy Clause, even though Congress was fully aware of the Massachusetts law when it considered federal sanctions against Burma, and debated

the appropriateness of state and local actions concerning Burma, but failed explicitly to preempt the state law, though Congress has at times explicitly preempted local sanctions, and though state procurement is a traditional area of state power, since Massachusetts was attempting to regulate the same conduct addressed by the federal law, but was doing so by imposing distinct restrictions different in scope and kind from the federal law. U.S.C.A. Const. Art. 6, cl. 2; Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009–166 to 3009–167; M.G.L.A. c. 7, §§ 22G–22M, 40F 1/2.

44. States ⚿18.5, 18.7

Congressional intent to preempt state law may be found where a federal statute is so pervasive as to occupy the field, where it would be physically impossible to comply with both the federal and the state law, or where enforcement of the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

45. States ⚿18.11, 18.43

If the subject matter of a state law is an area traditionally occupied by the states, congressional intent to preempt must be clear and manifest, but preemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs.

46. States ⚿18.43

When Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern.

47. States ⚿18.5

The fact that state and federal legislation share common goals, either in whole or in part, is not sufficient to preclude a finding of preemption; the crucial inquiry is whether a state law impedes the federal effort.

48. States ⚿18.5

Where the federal government has acted in an area of unique federal concern and has crafted a balanced, tailored approach to an issue, and the state law threatens to upset that balance, the state law is preempted.

Thomas A. Barnico, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, and James A. Sweeney, Assistant Attorney General, were on brief, for appellants.

Timothy B. Dyk, with whom Gregory A. Castanias, Jones, Day, Reavis & Pogue, Michael A. Collora, and Dwyer & Collora were on brief, for appellee.

Jonathan P. Hiatt and Deborah Greenfield on brief for amicus curiae American Federation of Labor and Congress of Industrial Organizations.

Loretta M. Smith, Cynthia L. Amara, and New England Legal Foundation on brief for amici curiae Associated Industries of Massachusetts and Retailers Association of Massachusetts.

Zach Cowan, Acting City Attorney, and Christopher Alonzi, Deputy City Attorney, on brief for amicus curiae City of Berkeley, California.

Martin S. Kaufman, Edwin L. Lewis, III, and Atlantic Legal Foundation, Inc. on brief for amici curiae William E. Brock, Sam M. Gibbons, Alexander M. Haig, Jr., Lee H. Hamilton, Carla A. Hills, George P. Shultz, and Clayton Yeutter.

Deborah E. Anker, Peter Rosenblum, Anusha Rasalingam, and Harvard Law School Immigration and Refugee Clinic on brief for amici curiae Center for Constitutional Rights, Citizens for Participation in Political Action, The International Labor Rights Fund, The New England Burma Roundtable, and The Unitarian Universalist Service Committee.

Daniel M. Price, Powell, Goldstein, Frazer & Murphy LLP, Robin S. Conrad, National Chamber Litigation Center, Inc., Jan Amundson, and Quentin Riegel on brief for amici curiae Chamber of Commerce of the United States of America, Organization for International Investment, National Association of Manufacturers, United States Council for International Business, American Insurance Association, American Petroleum Institute, and American Farm Bureau Federation.

Sara C. Kay, Associate General Counsel, Office of the Comptroller of the City of New York, on brief for amici curiae the Comptroller of the City of New York, the Cities of Los Angeles, California, Philadelphia, Pennsylvania, Oakland, California, Boulder, Colorado, Santa Cruz, California, and Newton, Massachusetts, the Towns of Amherst, Massachusetts and Carrboro, North Carolina, the City and County of San Francisco, California, and the County of Alameda, California.

George A. Hall, Jr. and Anderson & Kreiger LLP on brief for amici curiae Consumer's Choice Council, American Lands Alliance, Preamble Center, Institute for Agriculture and Trade Policy, Friends of the Earth, Humane Society of the United States, Defenders of Wildlife, and Rainforest Relief.

Richard L. Herz and Steven B. Herz on brief for amicus curiae EarthRights International.

Richard L.A. Weiner, David G. Leitch, Gil A. Abramson, and Hogan & Hartson L.L.P. on brief for amici curiae The European Communities and Their Member States.

Robert Stumberg, Matthew Porterfield, and Harrison Institute for Public Law, Georgetown University Law Center on brief for amici curiae Members of Congress Sen. Edward Kennedy, Rep. David Bonior, Rep. Sherrod Brown, Rep. Michael Capuano, Rep. Peter DeFazio, Rep. William Delahunt, Rep. Lane Evans, Rep. Barney Frank, Rep. Marcy Kaptur, Rep. Dennis Kucinich, Rep. Edward Markey, Rep. James McGovern, Rep. Martin Meehan, Rep. Joseph Moakley, Rep. George Miller, Rep. Richard Neal, Rep. Robert Ney, Rep. John Olver, Rep. Ileana Ros–Lehtinen, Rep. Bernard Sanders, Rep. Janice Schakowsky, Rep. Christopher Smith, Rep. Ted Strickland, Rep. John Tierney, Rep. James Traficant, and Rep. Henry Waxman.

Charles Clark, W. Thomas McCraney, III, and Watkins & Eager, PLLC on brief for amici curiae Members of Congress Sen. Richard G. Lugar, Sen. Rod Grams, Sen. Craig Thomas, Sen. Pat Roberts, Rep. Calvin Dooley, Rep. Donald Manzullo, Rep. Amory Houghton, Rep. Michael G. Oxley, Rep. Doug Bereuter, and Rep. David Dreier.

Heidi Heitkamp, Attorney General of North Dakota, Bill Lockyer, Attorney General of California, J. Joseph Curran, Jr., Attorney General of Maryland, Philip T. McLaughlin, Attorney General of New Hampshire, Patricia A. Madrid, Attorney General of New Mexico, Eliot Spitzer, Attorney General of New York, John Cornyn, Attorney General of Texas, Hardy Myers, Attorney General of Oregon, and William H. Sorrell, Attorney General of Vermont, on brief for amici curiae States of North Dakota, California, New York, Texas, Oregon, New Mexico, New Hampshire, Vermont, and Maryland.

Daniel J. Popeo, R. Shawn Gunnarson, Evan Slavitt, and Gadsby & Hannah LLP on brief for amici curiae The Washington Legal Foundation, American Legislative Exchange Council, Rep. George N. Katsakiores, Rep. Howard L. Fargo, and New York State Assemblyman Clifford W. Crouch.

Before LYNCH, Circuit Judge, COFFIN and CYR, Senior Circuit Judges.

LYNCH, Circuit Judge.

The Commonwealth of Massachusetts appeals from an injunction restraining en-

forcement of the Massachusetts Burma Law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma.[1] We affirm the district court's finding that the law interferes with the foreign affairs power of the federal government and is thus unconstitutional. We also find that the Massachusetts Burma Law violates the Foreign Commerce Clause. We further find that the Massachusetts Burma Law violates the Supremacy Clause because it is preempted by federal sanctions against Burma. We affirm the injunction issued by the district court.

There is one matter on which the parties are agreed: human rights conditions in Burma are deplorable. This case requires no inquiry into these conditions.

I

1. *The Massachusetts Burma Law*

In 1996, Massachusetts enacted "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 ch. 7, §§ 22G–22M, 40F½ (West Supp.1998)) ("Massachusetts Burma Law"). The law restricts the ability of Massachusetts and its agencies and authorities[2] to purchase goods or services from individuals or companies that engage in business with Burma. The law requires the Secretary of Administration and Finance to maintain a "restricted purchase list" of all firms engaged in business with Burma. Mass. Gen. Laws ch. 7, § 22J. As the district court explained, companies may challenge inclusion on the list by submitting an affidavit stating that they do no business with Burma, but final determination as to whether a company is in fact "doing business" as defined by the law is made by the Executive Office's Operational Services Division. *See National Foreign Trade Council v. Baker*, 26 F.Supp.2d 287, 289 (D.Mass.1998).

Under the law, Massachusetts and its agencies and authorities may not contract

1. Burma changed its name to Myanmar in 1989. However, because the parties and amici curiae in this case have largely used the name Burma, the statute at issue is known as the Massachusetts Burma Law, and the federal law refers to Burma, we use Burma throughout this opinion. This device is meant only for the ease of the reader and is not intended to express any view regarding the name Myanmar.

2. The law defines ''[s]tate agency'' to include ''all awarding authorities of the commonwealth, including, but not limited to, all executive offices, agencies, departments, commissions, and public institutions of higher education, and any office, department or division of the judiciary.'' Mass. Gen. Laws ch. 7, § 22G. The law defines ''state authorit[ies]'' to ''include, but not be limited to'' the following:

> Bay State Skills Corporation, centers of excellence, Community Economic Development Assistance Corporation, Community Development Finance Corporation, Government Land Bank, Massachusetts Bay Transportation Authority, Massachusetts Business Development Corporation, Massachusetts Capital Resource Company, Massachusetts Convention Center Authority, Massachusetts Corporation for Educational Telecommunications, Massachusetts educational loan authority, Massachusetts Health and Educational Facilities Authority, Massachusetts Higher Education Assistance Corporation, Massachusetts Housing Finance Agency, Massachusetts Horse Racing Authority, Massachusetts Industrial Finance Agency, Massachusetts Industrial Service Program, Massachusetts Legal Assistance Corporation, Massachusetts Port Authority, Massachusetts Product Development Corporation, Massachusetts Technology Development Corporation, Massachusetts Technology Park Corporation, Massachusetts Turnpike Authority, Massachusetts Water Resources Authority, Nantucket Land Bank, New England Loan Marketing Corporation, pension reserves investment management board, State College Building Authority, Southeastern Massachusetts University Building Authority, Thrift Institutions Fund for Economic Development, University of Lowell Building Authority, University of Massachusetts Building Authority, victim and witness board, and the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority.

Id.

with companies on the restricted purchase list except in three situations: when procurement of the bid is essential and there is no other bid or offer, when the Commonwealth is purchasing certain medical supplies, or when there is no "comparable low bid or offer." Mass. Gen. Laws ch. 7, § 22H. The law defines a "[c]omparable low bid or offer" as an offer equal to or less than ten percent above a low bid from a company on the restricted purchase list. *Id.* § 22G. In practice, the law means that in most cases a company on the restricted purchase list can sell to Massachusetts only if the company's bid is for all practical purposes ten percent lower than all bids by companies not on the restricted purchase list. Before a company can bid on a Massachusetts contract, the law requires it to provide a sworn declaration disclosing any business it is doing with Burma. *See id.* § 22H.

The law defines "doing business with Burma" to include:

> (a) having a principal place of business, place of incorporation or ... corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;
>
> (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;
>
> (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);
>
> (d) providing any goods or services to the government of Burma (Myanmar).

Id. § 22G.

The law allows exceptions for entities "with operations in Burma (Myanmar) for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications." *Id.* § 22H(e). The law also exempts firms whose business in Myanmar "is providing only medical supplies." *Id.* § 22I. The law does not impose any explicit limits on the ability of private parties to engage in business in Burma, or on the ability of private parties or local governments to purchase products from firms engaged in business in Burma. It does, however, effectively force businesses to choose between doing business in Burma or with Massachusetts. Massachusetts annually purchases more than $2 billion in goods and services.

The law does not include an express statement of purpose. In introducing the law to the legislature, the bill's sponsor, Rep. Byron Rushing, stated that the law established a selective purchase program because "if you're going to engage in foreign policy, you have to be very specific." Rep. Rushing also stated that the "identifiable goal" of the law was "free democratic elections in Burma." In signing the bill, then-Lieutenant Governor Cellucci stated that "[d]ue to a steady flow of foreign investments, including those of some United States companies, [the] brutal military regime [in Burma] has been able to supply itself with weapons and portray itself as the legitimate government of Burma. Today is the day that we call their bluff." Then–Governor Weld commented that "[o]ne law passed by one state will not end the suffering and oppression of the people of Burma, but it is my hope that other states and the Congress will follow our example, and make a stand for the cause of freedom and democracy around the world."

Massachusetts argued to the district court that the law "expresses the Com-

monwealth's own disapproval of the violations of human rights committed by the Burmese government" and "contributes to the growing effort ... to apply indirect economic pressure against the Burma regime for reform." Massachusetts also argued that the law reflects "the historic concerns of the citizens of Massachusetts" with supporting the rights "of people around the world." Massachusetts does not contend that the law is designed to provide any economic benefit to Massachusetts.

At the time the National Foreign Trade Council ("NFTC") filed its complaint, there were 346 companies on the restricted purchase list. Forty-four of these companies were United States companies. The law has generated protests from a number of this country's trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations ("ASEAN"). A number of companies have withdrawn from Burma in recent years; at least three cited the Massachusetts law as among the reasons for their withdrawal.

At least nineteen municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma. In addition, local jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, and other nations.

2. *Federal Sanctions Against Burma*

Congress imposed sanctions on Burma three months after Massachusetts passed the Massachusetts Burma Law. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009–166 to 3009–167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub.L. No. 104–208, § 101(c), 110 Stat. 3009–121 to 3009–172 (1996)) ("Federal Burma Law").[3] The federal law provides for sanctions to remain in place "[u]ntil 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." *Id.* § 570(a). The federal legislation is divided into five primary parts. First, the statute bars any "United States assistance to the Government of Burma," except for humanitarian assistance, assistance for anti-narcotics efforts, or "assistance promoting human rights and democratic values." *Id.* § 570(a)(1). This first part of the statute also instructs the Secretary of the Treasury to oppose any "loan or other utilization of funds" by international financial institutions and bars most Burmese officials from entering the United States unless required by treaty. *Id.* § 570(a)(2), (3).

Second, the federal law authorizes the President to impose conditional sanctions. The law states:

> 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.

Id. § 570(b). The law defines "new investment" to include a range of activity concerning "the economical development of resources located in Burma." *Id.* § 570(f)(2). However, " 'new investment' does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology." *Id.*

Third, the federal law instructs the President to work with "members of ASEAN and other countries having major trading and investment interests in Burma" to

3. We refer to the federal law as the Federal Burma Law only for the convenience of the reader.

develop "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." *Id.* § 570(c). Fourth, the law instructs the President to report to Congress on conditions in Burma and on progress made in furthering a multilateral strategy. *See id.* § 570(d). Fifth, the law grants the President the power to waive any of the sanctions 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." *Id.* § 570(e).

In May 1997, President Clinton issued an Executive Order pursuant to the Federal Burma Law imposing trade sanctions on Burma. *See* Exec. Order No. 13,047, 62 Fed.Reg. 28,301 (1997); *see also* 31 C.F.R. Pt. 537 (1998) (regulations implementing sanctions authorized by the President's Executive Order). The President determined and certified that

> for purposes of section 570(b) of the [Federal Burma Law], the Government of Burma has committed large-scale repression of the democratic opposition in Burma . . . [and] 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.

62 Fed.Reg. at 28,301. The President declared "a national emergency to deal with [the] threat." *Id.* The Executive Order prohibited new investment, as defined by the Federal Burma Law, by "United States persons" and prohibited United States persons from approving or facilitating new investment in Burma by foreign persons. *Id.* Like the Federal Burma Law, the Executive Order explicitly exempts contracts "to sell or purchase goods, services, or technology," provided such transactions are not to guarantee, support, or make payments related to the development of resources in Burma. *Id.*

3. *District Court Proceedings*

The NFTC, a nonprofit corporation representing member companies that engage in foreign trade, filed suit on April 30, 1998, seeking declaratory and injunctive relief against two Massachusetts officials.[4] The NFTC contended that the Massachusetts Burma Law unconstitutionally interfered with the federal foreign relations power, violated the Foreign Commerce Clause, and was preempted by the Federal Burma Law.

Thirty-four NFTC members are on Massachusetts's most recent restricted purchase list. Three NFTC members withdrew from Burma after the passage of the Massachusetts law, citing the law as the reason for their decision to cease doing business in Burma.[5] One current NFTC member has had a bid for a procurement contract in Massachusetts increased by ten percent pursuant to the law.

The district court found that the Massachusetts Burma Law unconstitutionally infringed on the foreign affairs power of the federal government and thus granted declaratory and injunctive relief.[6] *See National Foreign Trade Council,* 26

4. The NFTC brought suit against Charles D. Baker, then Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, the State Purchasing Agent for the Commonwealth of Massachusetts. Frederick Laskey subsequently replaced Baker as Secretary of Administration and Finance, and was Secretary at the time this appeal was taken. Andrew S. Natsios is currently the Secretary.

5. Two other NFTC members also severed business with Burma, citing human rights concerns as the reason for their decisions.

6. The district court also found that the NFTC had standing to challenge the law. *See National Foreign Trade Council,* 26 F.Supp.2d at 289–90. Massachusetts does not renew its challenge to the NFTC's standing on appeal. We have reviewed the district court's determination on the standing issue and we find that it was correct.

F.Supp.2d at 289; *National Foreign Trade Council v. Baker*, No. 98–10757 (D.Mass. Nov. 17, 1998) (order granting relief). The court also found that the NFTC had not met its burden of showing that the Federal Burma Law preempted the Massachusetts Burma Law. The district court did not consider the NFTC's argument that the Massachusetts law also violates the Foreign Commerce Clause. *See id.* at 293.

4. *Standard of Review*

[1] The district court ruled on cross-motions for summary judgment, on stipulated facts and uncontested affidavits. The decision turned entirely on questions of law. This court thus reviews the district court's determinations de novo. *See Philip Morris Inc. v. Harshbarger*, 122 F.3d 58, 61–62 (1st Cir.1997).

II

1. *The Foreign Affairs Power of the Federal Government*

We begin with a review of the Constitution's grant of power over foreign affairs to the political branches of the federal government. The Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, "[t]o regulate Commerce with foreign Nations," *id.* cl. 3, "[t]o establish an uniform Rule of Naturalization," *id.* cl. 4, "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, and "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11. In addition, "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." *Id.* § 9, cl. 8. Finally, "[t]he Congress shall have Power to declare the Punishment of Treason." *Id.* art. III, § 3, cl. 2.

The Constitution declares that the President shall be Commander in Chief, *id.* art. II, § 2, cl. 1, and, with the advice and consent of the Senate, grants him the power "to make Treaties" and to "appoint Ambassadors," *id.* cl. 2. Additionally, the President "shall receive Ambassadors and other public Ministers." *Id.* § 3.

The states are forbidden to "enter into any Treaty, Alliance, or Confederation" or to "grant Letters of Marque and Reprisal," *id.* art. I, § 10, cl. 1, may not "without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [their] inspection Laws," *id.* cl. 2, and may not, "without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," *id.* cl. 3.

[2] The Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government. James Madison commented 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 302 (James Madison) (B.F. Wright ed., Barnes & Noble Books 1996); *see also id.* at 303 (noting that the Articles of Confederation, by failing to contain any "provision for the case of offences against the law of nations," left "it in the power of any indiscreet member to embroil the Confederacy with foreign nations"). Alexander Hamilton, discussing state regulation of foreign commerce, noted that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended

> till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Id. No. 22, at 192 (Alexander Hamilton); *see also id.* No. 45, at 328 (James Madison) (stating that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined," and "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce").[7] Justice Taney echoed Madison's and Hamilton's views in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 10 L.Ed. 579 (1840), commenting that "[i]t was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation." *Id.*, 39 U.S. (14 Pet.) at 575 (opinion of Taney, J.).

[3] Indeed, the Supreme Court has long held that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942). In *The Chinese Exclusion Case*, for example, the Court commented that "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nationals, we are but one people, one nation, one power." *Chae Chan Ping v. United States*, 130 U.S. 581, 606, 9 S.Ct. 623, 32 L.Ed. 1068 (1889). In *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941), the Court stated that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.* at 63, 61 S.Ct. 399; *see also United States v. Belmont*, 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) ("[I]n respect of our foreign relations generally, state lines disappear."). As the Court explained in *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936), when it comes to foreign affairs, the powers of the federal government are not limited: "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true *only in respect of our internal affairs.*" *Id.* at 315–16, 57 S.Ct. 216 (emphasis added).

[4] Federal dominion over foreign affairs does not mean that there is no role for the states. A limited role is granted by the Constitution, as discussed earlier. *See* Restatement (Third) of Foreign Relations Law of the United States § 201 reporters' note 9 (commenting that "[u]nder the United States Constitution, a State of the United States may make compacts or agreements with a foreign power with the consent of Congress (Article I, Section 10, clause 2), but such agreements are limited in scope and subject matter" and that "[a] State may make some agreements with foreign governments without the consent of Congress so long as they do not impinge upon the authority or the foreign relations of the United States"). Indeed, Massachusetts itself maintains twenty-three "sister state" and other bilateral agreements with sub-national foreign governments and trade promotion organizations. As one learned commentator explains, some degree of state involvement in foreign affairs is inevitable: "[i]n the governance of their affairs, states have variously and inevitably impinged on U.S. foreign relations." L. Henkin, *Foreign Affairs and the United States Constitution* 162 (2d ed.1996).

The central question is whether the state law runs afoul of the federal foreign affairs power as interpreted by the Supreme Court in *Zschernig v. Miller*, 389

7. As the Supreme Court has indicated, *The Federalist* is "usually regarded as indicative of the original understanding of the Constitution." *Printz v. United States*, 521 U.S. 898, 909, 117 S.Ct. 2365, 2372, 138 L.Ed.2d 914 (1997).

U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), the case in which the Supreme Court has most directly considered the boundaries of permissible state activity in the foreign affairs context.

2. *The Decision in Zschernig*

In *Zschernig,* the Supreme Court invalidated an Oregon statute that barred a non-resident alien from taking property by testamentary disposition or succession unless he showed the existence of three conditions: 1) "the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the [alien's] foreign country"; 2) the right of United States citizens to "receive payment here of funds from estates in the foreign country"; and 3) "the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.' " *Id.* at 430–31, 88 S.Ct. 664 (quoting Ore.Rev.Stat. § 111.070 (1957)). If these requirements were not fulfilled and there were no other heirs, the Oregon property would escheat to the state. In *Zschernig,* the sole heirs to the estate of an Oregon resident who had died intestate in 1962 were residents of East Germany, and thus Oregon's State Land Board had petitioned for the escheat of the proceeds of the estate. *See id.* at 430, 88 S.Ct. 664. The Court held that the statute was "an intrusion by [Oregon] into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432, 88 S.Ct. 664.

The *Zschernig* Court distinguished the law at issue from a similar California statute previously upheld in *Clark v. Allen,* 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947). The California statute was upheld against a facial challenge. In contrast, the challenge to the Oregon statute involved "the manner of its application." *Zschernig,* 389 U.S. at 433, 88 S.Ct. 664. The Supreme Court stated in *Zschernig* that "[h]ad [*Clark*] appeared in the posture of the present [case], a different result would have obtained." *Id.* As the Court explained, the problem with the Oregon law was not that it required courts to inquire into foreign law—for "[s]tate courts, of course, must frequently read, construe, and apply laws of foreign nations," *id.,* but was rather that probate courts had used the reciprocity requirement to "launch[ ] inquiries into the type of governments that obtain in particular foreign nations," *id.* at 434, 88 S.Ct. 664. The Oregon statute had "led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should not preclude wonderment as to how many may have been denied the right to receive." *Id.* at 435, 88 S.Ct. 664 (internal quotation marks omitted). Such evaluations "affect[ ] international relations in a persistent and subtle way," the Court found, and thus "may well adversely affect the power of the central government to deal with" problems of international relations. *Id.* at 440–41, 88 S.Ct. 664.

The district court found the Massachusetts Burma Law invalid under *Zschernig.* The court interpreted *Zschernig* to stand for the proposition that "states and municipalities must yield to the federal government when their actions affect significant issues of foreign policy." *National Foreign Trade Council,* 26 F.Supp.2d at 291. The court stated that because the Massachusetts law "has more than an 'indirect or incidental effect in foreign countries,' " and has a " 'great potential for disruption or embarrassment,' " it unconstitutionally infringes on the federal government's foreign affairs power. *Id.* (quoting *Zschernig,* 389 U.S. at 434–35, 88 S.Ct. 664). The district court noted that the law was enacted solely to sanction Burma so as to pressure the Burmese government to change its domestic policies, and that the views of the European Union and ASEAN demonstrated that the law was having a "disruptive impact on foreign relations." *Id.*

[5] The precise boundaries of the Supreme Court's holding in *Zschernig* are

unclear.[8] Nonetheless, we agree with the district court that the Massachusetts Burma Law is unconstitutional under *Zschernig.* Because the parties' arguments raise issues of first impression, we consider these arguments in detail.

Massachusetts's arguments that the district court erred can be divided into two lines of attack. First, Massachusetts attempts to distinguish the facts in *Zschernig* from the facts of this case, and to argue that the *Zschernig* Court recognized the need to balance state interests against possible harm resulting from state intrusion in foreign affairs. This balance, says Massachusetts, weighs in favor of the Massachusetts law being found constitutional. Second, Massachusetts in effect argues that *Zschernig* is weak precedent. In particular, Massachusetts contends that the Supreme Court's decision in *Barclays Bank PLC v. Franchise Tax Board,* 512 U.S. 298, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994), demonstrates that the Supreme Court's holding in *Zschernig* is limited. The NFTC, in turn, contends that the Massachusetts Burma Law constitutes far greater interference in foreign affairs than did the law under attack in *Zschernig,* and argues that Massachusetts is in effect asking this court to overrule *Zschernig.*

First, Massachusetts attempts to distinguish *Zschernig* by arguing that the Court struck down the Oregon law as applied, and did not question the ability of states to enact laws that indirectly affect foreign affairs. Massachusetts argues that its law does not entail nearly the degree of ongoing scrutiny or criticism of foreign government action by the state that the Oregon law entailed. Massachusetts contends that *Zschernig* left intact the holding in *Clark,* although the law there was also designed to influence the behavior of foreign countries. Indeed, *Clark* expressly stated that the fact that a state law has "incidental or indirect effect in foreign countries" does not make the law invalid. *Clark,* 331 U.S. at 517, 67 S.Ct. 1431. According to Massachusetts, the district court incorrectly read *Zschernig* to stand for the proposition that a state law that goes beyond an incidental or indirect effect on foreign affairs is impermissible, and *Zschernig* instead stands for the proposition that courts must weigh the degree of impact against the particular state interest at issue.

Massachusetts further argues that its law is concerned with expressing its moral views regarding conditions in Burma, that its desire to disassociate Massachusetts from Burma's human rights violations is a valid purpose of the law, and that Massachusetts would have enacted the law regardless of whether it believed that the law would result in change in Burma.

[6] Massachusetts's arguments fail under *Zschernig.* The Massachusetts Burma Law clearly has more than an "incidental or indirect effect in foreign countries." We do not read *Zschernig* as instructing courts to balance the nation's interests in a unified foreign policy against the particular interests of an individual state. Instead, *Zschernig* stands for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed. As *Zschernig* stated:

> The several States, of course, have traditionally regulated the descent and distribution of estates. But *those regulations must give way if they impair the effective exercise of the Nation's foreign policy.* Where those laws conflict with a

8. As Professor Henkin comments:

> It may prove that *Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve "sitting in judgment" on them. Even if so limited, the doctrine might cast doubts on the right of the states to apply their own "public policy" in transnational situations. Or was the Court suggesting different lines—between state acts that impinge on foreign relations only "indirectly or incidentally" and those that do so directly or purposefully? Between those that "intrude" on the conduct of foreign relations and those that merely "affect" them?

Henkin, *supra,* at 164 (footnotes omitted).

> treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations.

Id. at 440–41, 88 S.Ct. 664 (emphasis added) (citations omitted). *Zschernig* did not hold, as Massachusetts argues, that a sufficiently strong state interest could make lawful an otherwise impermissible intrusion into the federal government's foreign affairs power.

[7] Massachusetts makes another preliminary argument which we reject. It attempts to distinguish the instant case from *Zschernig* based on the level and frequency of scrutiny that the Massachusetts law entails. This argument is largely beside the point. Further, the argument fails even on its own terms. It is beside the point because the effect of the law is not measured solely by the level or frequency of scrutiny. Every decision by a company to withdraw from or not seek new business in Burma has an ongoing impact every bit as corrosive as scrutiny. Massachusetts correctly notes that its courts are not engaging in ongoing evaluations of the situation in Burma; nor does the law permit or encourage such inquiries. Yet while the statute itself creates no mechanism for the Massachusetts courts or legislature to evaluate conditions in Burma on an ongoing basis, the law quite clearly establishes ongoing scrutiny. The Massachusetts law creates a mechanism for ongoing investigation into whether companies are doing business with Burma: every time a firm bids for a Massachusetts procurement contract, Massachusetts inquires into whether that firm does business in Burma. The scrutiny involved here is not of human rights conditions alone. By investigating whether certain companies are doing business with Burma, Massachusetts is evaluating developments abroad in a manner akin to the Oregon probate courts in *Zschernig.*

[8] The conclusion that the Massachusetts law has more than an incidental or indirect effect on foreign relations is dictated by the combination of factors present here: (1) the design and intent of the law is to affect the affairs of a foreign country; (2) Massachusetts, with its $2 billion in total annual purchasing power by scores of state authorities and agencies, is in a position to effectuate that design and intent and has had an effect; (3) the effects of the law may well be magnified should Massachusetts prove to be a bellwether for other states (and other governments); (4) the law has resulted in serious protests from other countries, ASEAN, and the European Union; and (5) Massachusetts has chosen a course divergent in at least five ways from the federal law, thus raising the prospect of embarrassment for the country.

Our discussion of the facts demonstrates the first two of these factors; the fifth factor is discussed in our preemption analysis later in this opinion. We turn to the third and fourth factors.

[9] The threat to federal foreign affairs power is magnified when Massachusetts is viewed as part of a broader pattern of state and local intrusion. Under *Zschernig,* the effect of state and local laws should not be considered in isolation; rather, courts must consider the combined effects of similar laws in numerous jurisdictions. In determining whether the Oregon law was likely to have a significant effect on the nation's foreign affairs, the Supreme Court noted that "[i]t now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations." *Id.* at 433–34, 88 S.Ct. 664. Massachusetts is not alone in its views regarding Burma and there is great potential for the proliferation of similar statutes. Many municipalities have passed laws akin to the Massachusetts Burma Law, whether targeting Burma or some other country with disfavored policies, and amici inform us that other states and large cities are waiting in the wings.

This country has, we are told, 39,000 governments at levels other than the federal government, some twenty of which have participated in the briefs amici curiae here.

[10] We also consider the protests received from this country's allies and trading partners. A European Union official stated that the Massachusetts Burma Law is "an attack on international law." An ASEAN official commented that ASEAN is "dismayed by this trend [of sub-national laws targeting Burma], because you cannot negotiate with states and provinces." We reject Massachusetts's claim that we should ignore the fact that foreign nations have objected to the Massachusetts Burma Law.[9] In *Zschernig,* the Supreme Court expressly cited Bulgaria's objections to the Oregon law as evidence of the fact that the law was affecting foreign relations. *See id.* at 436–37, 437 n. 7, 88 S.Ct. 664. The *Zschernig* Court also noted the "great potential for disruption or embarrassment" caused by the Oregon law. *Id.* at 435, 88 S.Ct. 664. The protests of America's trading partners are evidence of the great potential for disruption or embarrassment caused by the Massachusetts law.

Massachusetts points to two sources to support its claim that, when examining whether a state or local law intrudes on the federal government's foreign affairs power, United States courts should simply ignore foreign government objections. First, Massachusetts notes that the federal law implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) denies foreign governments and private persons the right to challenge state laws based on the GATT. *See* Uruguay Round Agreements Act, Pub.L. No. 103–465. § 102, 108 Stat. 4809, 4815–19 (1994) (codified at 19 U.S.C. § 3512 (West Supp.1999)). Massachusetts contends that, given this provision, objections from foreign states to the Massachusetts law should not be considered.[10] This argument is inapposite: this action has not been brought pursuant to the GATT or any World Trade Organization agreement, and the NFTC does not argue that the law should be invalidated because of a conflict with any international trade agreement or treaty.

[11] Second, Massachusetts claims that *Barclays* rejected reliance on the views of our trading partners. We disagree with Massachusetts's interpretation of *Barclays.* Setting aside our view, discussed further below, that *Barclays* does not ap-

9. Massachusetts similarly argues that the district court erred in looking to State Department comments regarding the Massachusetts law. As Massachusetts contends, the Supreme Court has at times discounted federal Executive Branch positions. *See Zschernig,* 389 U.S. at 434–35, 88 S.Ct. 664; *see also Container Corp. of Am. v. Franchise Tax Bd.,* 463 U.S. 159, 195–96, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) (stating that an Executive Branch decision not to file an amicus brief opposed to the state tax in question was ''by no means dispositive,'' but that ''when combined with all the other considerations we have discussed, it does suggest that the foreign policy of the United States ... is not seriously threatened'' by the state law in question). Indeed, in *Barclays,* the Supreme Court expressly considered the force of ''Executive Branch actions—press releases, letters, and amicus briefs,'' stating that ''Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting.'' *Barclays,* 512 U.S. at 329–30, 114 S.Ct. 2268. Massachusetts is correct that Executive Branch views are not dispositive. In this case, however, this court's own inquiry leads to the conclusion that the law impermissibly interferes with the federal government's foreign affairs power.

While there have been conflicting Executive Branch statements regarding the effect of the Massachusetts Burma Law and similar laws, the Executive Branch has not taken an official position in this litigation.

10. The NFTC asserts that this argument was not raised below, and that there is nothing in the Agreements Act suggesting that it forecloses constitutional remedies. The NFTC misinterprets Massachusetts's argument, which is that the court should not look to foreign government views of the state law (not that constitutional challenges are per se barred).

ply outside the context of Commerce Clause challenges to laws that do not target specific foreign nations or foreign commerce, *Barclays* does not stand for the proposition that courts should ignore foreign government objections. While the Supreme Court in *Barclays* found foreign government views to be unpersuasive, it did not ignore such views. *See Barclays,* 512 U.S. at 324 n. 22, 327–28, 114 S.Ct. 2268. The message of *Barclays* is thus consistent with *Zschernig:* foreign government views, although not dispositive, are *one factor* to consider in determining whether a law impermissibly interferes with the federal government's foreign affairs power.

The preemption analysis later in this opinion outlines the inconsistencies and conflicts between the Massachusetts Burma Law and the Federal Burma Law. The point for *Zschernig* purposes is distinct. The Massachusetts law presents a threat of embarrassment to the country's conduct of foreign relations regarding Burma, and in particular to the strategy that the Congress and the President have chosen to exercise. That significant potential for embarrassment, together with the other factors listed above, drives the conclusion that the Massachusetts Burma Law has more than an "incidental or indirect effect" and so is an impermissible intrusion into the foreign affairs power of the national government.

3. *Applications of Zschernig*

Our approach to this case is largely consistent with that taken by the few other courts that have considered challenges to state and local laws brought under *Zschernig.* These cases have generally fallen into two categories: challenges to the application of laws targeting specific foreign states, most often South Africa, and challenges to state "buy-American" laws.

In *New York Times Co. v. City of New York Commission on Human Rights,* 41 N.Y.2d 345, 393 N.Y.S.2d 312, 361 N.E.2d 963 (1977), the court found that New York could not apply local anti-discrimination laws to prohibit the *New York Times* from carrying an advertisement for employment opportunities in South Africa. Under *Zschernig,* the court said that "[e]ven longstanding state regulation of traditional fields of law . . . must fall by the wayside if enforcement of State regulations would 'impair the effective exercise of the Nation's foreign policy.' " *Id.* at 968 (quoting *Zschernig,* 389 U.S. at 440, 88 S.Ct. 664). Similarly, in *Springfield Rare Coin Galleries, Inc. v. Johnson,* 115 Ill.2d 221, 104 Ill.Dec. 743, 503 N.E.2d 300 (1986), the Illinois Supreme Court invalidated a state statute that had excluded South African coins from state tax exemptions applying to coins and currency issued by all other nations. The court found that the "sole motivation [for the law] was disapproval of a nation's policies" and that the legislation effectively "impose[d], or at least encourage[d], an economic boycott of the South African Krugerrand," and thus was "outside the realm of permissible state activity." *Id.* at 307; *see also Tayyari v. New Mexico State Univ.,* 495 F.Supp. 1365, 1376–80 (D.N.M.1980) (finding that a state university's decision to bar admission or readmission of Iranian students could affect international relations and thus was impermissible).

In contrast, in *Board of Trustees of the Employees' Retirement System of Baltimore v. Mayor and City Council of Baltimore,* 317 Md. 72, 562 A.2d 720 (1989), *cert. denied,* 493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990), the Maryland Court of Appeals found that Baltimore ordinances requiring city pension funds to divest their holdings from companies engaged in business in South Africa were not unconstitutional under *Zschernig.* The court thought *Zschernig* "circumscribes, but apparently does not eliminate, a state's ability under certain circumstances to take actions involving substantive judgments about foreign nations." *Id.* at 746. Massachusetts relies heavily on the decision in *Board of Trustees,* attempting to distin-

guish between Baltimore's decisions regarding how to invest the city's funds and the laws struck down in *New York Times Co.* and *Springfield Rare Coin Galleries, Inc.,* which were designed to regulate private conduct. The district court correctly distinguished *Board of Trustees* as involving quite different facts, *see National Foreign Trade Council,* 26 F.Supp.2d at 291–92, and the NFTC urges this court to do the same. *Board of Trustees,* whether rightly or wrongly decided, does not alter our decision that the Massachusetts Burma Law, by targeting a foreign country, monitoring investment in that country, and attempting to limit private interactions with that country, goes far beyond the limits of permissible regulation under *Zschernig.*[11]

Courts have also split on whether state buy-American statutes are unconstitutional under *Zschernig.* In *Bethlehem Steel Corp. v. Board of Commissioners,* 276 Cal. App.2d 221, 80 Cal.Rptr. 800 (1969), the court invalidated the California Buy American Act as "an unconstitutional encroachment upon the federal government's exclusive power over foreign affairs," *id.* at 802, and noted that the fact that "there are countervailing state policies which are served by the retention of such an Act is 'wholly irrelevant,' " *id.* at 803 (quoting *Pink,* 315 U.S. at 233, 62 S.Ct. 552). In contrast, in *Trojan Technologies, Inc. v. Pennsylvania,* 916 F.2d 903 (3d Cir.1990), *cert. denied,* 501 U.S. 1212, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991), and *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission,* 75 N.J. 272, 381 A.2d 774 (1977), courts upheld buy-American statutes at least in part because such statutes did not require state governments to evaluate the policies of foreign nations, and because the laws treated all foreign states in the same fashion. *See Trojan Technologies,* 916 F.2d at 913–914; *K.S.B. Technical Sales Corp.,* 381 A.2d at 782–84. Thus, in *Trojan Technologies,* the Third Circuit upheld a Pennsylvania buy-American statute because the law "provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes" and because there was no "indication from the record that the statute [had] been selectively applied according to the foreign policy attitudes of Commonwealth courts or the Commonwealth's Attorney General." *Trojan Technologies,* 916 F.2d at 913.

As the district court correctly noted, *see National Foreign Trade Council,* 26 F.Supp.2d at 292, *K.S.B. Technical Sales Corp.* and *Trojan Technologies* both involved laws that did not single out or evaluate any particular foreign state, and did not involve state evaluations of political conditions abroad. In contrast, the Massachusetts Burma Law is aimed at a specific foreign state and has more than incidental effects.

4. *Subsequent Supreme Court Decisions and Zschernig*

Massachusetts's second line of attack against the district court's ruling is that Supreme Court decisions subsequent to *Zschernig,* in particular the *Barclays* decision, demonstrate that *Zschernig* is so limited as not to invalidate the statute. Massachusetts relies on both the language of *Barclays* and on the views of some academic commentators to argue that *Zschernig* is or should be treated as a highly limited holding.

a. *Subsequent Supreme Court References to Zschernig*

Zschernig remains "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power" of the federal government. *International Ass'n of Independent Tanker Owners v. Locke,* 148 F.3d 1053, 1069

11. Massachusetts may well have tried to insulate itself from attack under *Zschernig* by creating a mechanism that scrutinizes companies doing business in Burma rather than the Burmese government itself, but such scrutiny is similarly intrusive.

(9th Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S. Apr. 23, 1999) (No. 98–1706). Subsequent Supreme Court decisions have done little to clarify the reach of the Court's holding in *Zschernig*. Most often the Court has cited the case for the proposition that the federal government's powers over foreign affairs are plenary, or for the proposition that cases in United States courts that involve foreign sovereigns raise sensitive issues of foreign affairs. *See, e.g., Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."); *see also Dennis v. Higgins*, 498 U.S. 439, 463, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991) (Kennedy, J., dissenting). In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), involving the application of the act of state doctrine, the plurality distinguished *Zschernig* by noting that in *Zschernig* "the Court struck down an Oregon statute that was held to be 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.' " *Id.* at 765, 92 S.Ct. 1808 (plurality opinion of Rehnquist, J.) (quoting *Zschernig*, 389 U.S. at 432, 88 S.Ct. 664). No decision by the Court citing *Zschernig* suggests that it is not binding.

b. *The Effect of Barclays*

Massachusetts argues that this court should nonetheless look to *Barclays*. *Barclays*, however, did not consider the reach of the foreign affairs power and did not cite *Zschernig*. *See Barclays*, 512 U.S. at 301–31, 114 S.Ct. 2268.

In *Barclays*, the Court upheld California's corporate tax system against Commerce Clause and due process challenges to its worldwide combined reporting requirement. Petitioner Barclays had argued that the system burdened foreign-based multinationals; Barclays had also argued that the law impeded the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments." *Id.* at 302–03, 114 S.Ct. 2268 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979)) (internal quotation marks omitted).

The *Barclays* Court reaffirmed that, in addition to the ordinary domestic commerce clause analysis set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), state regulation of foreign commerce raises two additional concerns: first, an "enhanced risk of multiple taxation," *Barclays*, 512 U.S. at 311, 114 S.Ct. 2268 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 185, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983)) (internal quotation marks omitted), and second, the risk of harm to the "Federal Government's capacity to speak with one voice when regulating commercial relations with foreign governments," *id.* (quoting *Japan Line*, 441 U.S. at 449, 99 S.Ct. 1813) (internal quotation marks omitted). In the absence of a congressional or presidential assertion that the challenged California law violated federal policy, however, the Court could not "conclude that 'the foreign policy of the United States—whose nuances . . . are much more the province of the Executive Branch and Congress than of this Court—is [so] seriously threatened' by California's practice as to warrant our intervention." *Barclays*, 512 U.S. at 327, 114 S.Ct. 2268 (alteration in original) (citation omitted) (quoting *Container Corp.*, 463 U.S. at 196, 103 S.Ct. 2933).

Barclays also reaffirmed that recognition of the importance of the federal government's ability to speak with one voice on foreign affairs does not mean that Congress must act, or that the states can never act, in a particular area. *See id.* at

329, 114 S.Ct. 2268. As the Court commented in *Wardair Canada Inc. v. Florida Department of Revenue*, 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986), where it similarly found that a state tax law did not impede the ability of the federal government to speak with one voice,

> [b]y negative implication . . . the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel. . . . [T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority.
>
> . . . . .
>
> [W]e never suggested in [*Japan Line*] or in any other [case] that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.

Id. at 12–13, 106 S.Ct. 2369 (emphasis in original).

[12] Massachusetts contends that *Barclays* means that only Congress, not the courts, should ever determine whether a state law interferes with the foreign affairs power of the federal government.[12] This argument echoes academic debate over whether *Barclays* undercuts *Zschernig* or not.[13]

[13] Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion. We need not delve into the merits of the academic debate[14] over *Barclays* in order

12. Massachusetts also contends that *Barclays* demonstrates that Congress has, via inaction, explicitly permitted the Massachusetts Burma Law. We return to this argument below.

13. One commentator, for example, contends that *Barclays* stands for the proposition that *courts* should not weigh the effects of a state law on foreign relations, that *Barclays* undercuts claims that Massachusetts is interfering with the federal government's ability to speak with one voice, and that *Barclays* indicates that the Court will presume congressional tolerance of laws that touch on foreign affairs issues, in particular if foreign governments object to the state law in question. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L.Rev. 1617, 1700–01 (1997).

Professor Koh contests Professor Goldsmith's interpretation, arguing that it would be a mistake to read too much into the Court's statements in *Barclays*. Koh notes that the Solicitor General backed California's argument that there was no conflict between the state's tax laws and federal policy. "Thus, the case reveals less about the Supreme Court's view of federalism than about the Court's traditional judicial deference to the executive branch in foreign affairs." Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L.Rev. 1824, 1848 (1998).

14. Other academic commentary has also questioned *Zschernig*. We describe the commentary but also note that an alternative view is also quite rational: that in an increasingly interdependent and multilateral world, *Zschernig*'s affirmation of the foreign affairs power of the national government may be all the more significant.

Professor Henkin notes that *Zschernig* marked a significant break from prior Supreme Court jurisprudence. When the Supreme Court imposed limits on state regulation or taxation of foreign commerce prior to *Zschernig*, such limits "were found to be implied in the Commerce Clause." Henkin, *supra*, at 162. *Zschernig*, in contrast, used the dormant foreign affairs power of the federal government. Thus, prior to *Zschernig*, "[t]he Court never asked whether such state actions might run afoul also of some larger principle limiting the states in matters that relate to foreign affairs." *Id.* Hence *Zschernig* "was new constitutional doctrine," because "there was no relevant exercise of federal power and no basis for deriving any prohibition for the states by 'interpretation' of the silence of Congress and the President. The Court told us that the Constitution itself excludes such state intrusions even when the federal branches have not acted." *Id.* at 163–64 (footnote omitted).

Professor Goldsmith makes a related argument in commenting on *Zschernig* and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). In *Sabbatino*, the Court found that the act of state doctrine precluded a challenge to an expropriation decree of the Cuban government. *See id.* at 428, 84 S.Ct. 923. Goldsmith contends that both *Sabbatino* and *Zschernig* marked significant breaks in the Supreme Court's development of the common law of foreign relations. Although the Court

to resolve this case. We do not view *Barclays* as having the impact in the foreign affairs power analysis that Massachusetts contends it has, for at least two reasons. First, *Barclays* did not involve a state law that targeted any foreign nation or nations, and there was no claim in the case that California was engaging in foreign policy via its tax system; the case involved claims only that the California law violated the Commerce and Due Process clauses. *See Barclays,* 512 U.S. at 302–03, 114 S.Ct. 2268. The Court's discussion of congressional inaction came only in the context of an examination of the "speak with one voice" prong of the Foreign Commerce Clause analysis, a prong that the court reached only after concluding that the law was not otherwise unconstitutional. *See id.* at 320–30, 114 S.Ct. 2268. In contrast, the present case involves a law impacting one foreign nation, and a claim that the Massachusetts law violates the foreign affairs power of the federal government. Second, the Supreme Court did not cite to *Zschernig* in *Barclays,* thus keeping separate the analyses that apply when examining laws under the Foreign Commerce Clause and under the foreign affairs power.[15] This is particularly so given that the parties in *Barclays* cited *Zschernig* to the Court in their briefs and at oral argument. In sum, there is simply no indication, in *Barclays* or in any other post-*Zschernig* case, that *Zschernig* is not good law and is not binding on us. As this court explained in *Figueroa v. Rivera,* 147 F.3d 77 (1st Cir.1998), the Supreme Court "has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.' " *Id.* at 81 n. 3 (quoting *Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)).

5. *Additional Arguments Regarding the Foreign Affairs Power*

a. *There is No Market Participant Exception to the Foreign Affairs Power*

[14] Massachusetts suggests that, even if its interpretation of *Barclays* and *Zschernig* is incorrect, the Massachusetts Burma Law can be upheld by applying a market participant exception. This is a novel argument. Massachusetts contends that the market participant exception to the dormant domestic Commerce Clause should be extended both to the Foreign Commerce Clause—an extension that the Supreme Court has never made—and from there to the foreign affairs power. Even assuming that Massachusetts is acting as a market participant (and not exercising its police or regulatory powers) and that the market participant exception applies to the Foreign Commerce Clause, we find no support for Massachusetts's contention that the exception should shield its law from challenges brought under the federal foreign affairs power as interpreted in *Zschernig.*

Massachusetts provides little support for its argument, citing no case which has ever accepted it.[16] Massachusetts contends

had repeatedly found federal exclusivity in foreign relations prior to *Sabbatino,* it had generally done so "by virtue of either (a) the political branches' occupation of the field through treaty and statute, or (b) independent constitutional prohibitions." Goldsmith, *supra,* at 1649–50. Enforcement of federal exclusivity in foreign relations via "a judicially enforced dormant preemption" was a new development. *See id.* at 1649.

15. We consider below the impact of *Barclays* on the NFTC's Commerce Clause and Supremacy Clause challenges.

16. Massachusetts claims that the court in *Trojan Technologies, Inc. v. Pennsylvania,* 742 F.Supp. 900 (M.D.Pa.1990), *aff'd,* 916 F.2d 903 (3d Cir.1990), applied a market participant exception to the foreign affairs power. *See id.* at 903. There, the district court applied a market participant exception to the Foreign Commerce Clause. *See id.* at 902–03. In discussing the foreign affairs power, the court found that "the only impact of the Act on other countries is incidental—i.e., a possible decrease in the total sales of foreign steel in Pennsylvania because public agencies will not buy it." *Id.* at 903. The court traced

that in *The Federalist* the Framers were concerned with state regulatory action that infringed on foreign affairs, not state proprietary action. The same rationales that support the market participant exception in dormant domestic Commerce Clause jurisprudence, Massachusetts insists, support extension of the exception to claims under the foreign affairs power.

[15] Massachusetts also relies on a 1986 Department of Justice advisory opinion concerning the constitutionality of state and local statutes regarding divestment from South Africa. *See* 10 Op. Off. Legal Counsel 49 (1986). The opinion argues that "[t]he historical rationale for the general federal power over foreign affairs does not imply the displacement of state proprietary power," and that "[b]ecause states . . . possessed proprietary powers at the time of the Constitution, these powers should not be displaced unless they are prohibited by a specific limitation imposed by the Constitution or federal legislation passed pursuant to a constitutional grant of power to the federal government." *Id.* at 63–64. This view directly contradicts the Supreme Court's repeated statements that the federal government's foreign affairs power is not limited. *Zschernig* makes clear that, by necessary implication, the federal government's foreign affairs power exceeds the power expressly granted in the text of the Constitution, and that state action, even in traditional areas of state concern, must yield to the federal power when such state action has more than an indirect effect on the nation's own foreign policy. Nothing in *Zschernig* or in the Supreme Court's market participant caselaw supports Massachusetts's argument. The Supreme Court has already rejected one attempt to extend the market participation doctrine to constitutional provisions other than the domestic Commerce Clause. *See United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. 208, 219–20, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) (stating that the "distinction between market participant and market regulator relied upon in [domestic Commerce Clause caselaw] to dispose of the Commerce Clause challenge is not dispositive" of a claim brought under the Privileges and Immunities Clause, because "[t]he two Clauses have different aims and set different standards for state conduct").

b. *The Tenth Amendment Does Not Insulate the Massachusetts Burma Law from Constitutional Scrutiny*

[16, 17] Massachusetts also suggests in passing that its law should be protected by the Tenth Amendment, or that the Tenth Amendment, at the least, indicates that strong state interests are at stake here. To the extent that Massachusetts intended to assert a direct Tenth Amendment claim, that claim is waived.[17] It would not suffice

"[t]his result . . . to participation in the market place and not to any effort to control or regulate commerce with foreign countries." *Id.*

The *Trojan Technologies* opinion does not clarify which of three factors—incidental impact, participation in the marketplace, or lack of effort to control commerce with foreign countries—persuaded the district court to uphold the Pennsylvania law. In affirming, the Third Circuit avoided the subject entirely, grounding its discussion of the foreign affairs power on examination of, and interference with, the internal workings of foreign nations. *See Trojan Technologies,* 916 F.2d at 913–14. At best, the district court decision in *Trojan Technologies* provides Massachusetts with a highly ambiguous holding that was not revisited on appellate review. To the extent that this case supports a market participant exception to the foreign affairs power, however, we disagree.

17. Massachusetts has waived its argument under *Printz* and *New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Massachusetts raises this argument only in a brief footnote. We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived. *See, e.g., Grella v. Salem Five Cent Sav. Bank,* 42 F.3d 26, 36 (1st Cir.1994) (argument raised by way of "cursory footnote" deemed waived); *Rumford Pharmacy, Inc. v. City of East Providence,* 970 F.2d 996, 1000 n. 9 (1st Cir.1992) ("As appellant presents its contention in a cursory and conclusory footnote reference it merits no independent dis-

in any event. Massachusetts suggests that the Tenth Amendment prevents the courts and Congress from imposing regulatory burdens on the states that are not borne by private persons, and that states cannot be compelled to administer a federal regulatory program. *Cf. Printz v. United States,* 521 U.S. 898, 933–35, 117 S.Ct. 2365, 2384, 138 L.Ed.2d 914 (1997); *New York v. United States,* 505 U.S. 144, 178–80, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Massachusetts argues that the effect of the district court decision is to compel Massachusetts to engage in commerce with members of the NFTC. These arguments miss their mark: even if Massachusetts were being compelled to deal with firms that do business in Burma, such compulsion is not similar to the federal government compulsion of states found impermissible in *New York* and *Printz.*

[18] Massachusetts also contends that a state's purchasing decisions "lie[ ] at the core of state sovereignty" and thus fall within the area protected by the Tenth Amendment, and that the Massachusetts law is an "expression of a moral position on an important issue of public policy." We do not view these arguments as distinct from Massachusetts's claim that the law reflects important state interests that, under *Zschernig,* must be balanced against the federal government's foreign affairs power. Even where they exist, strong state interests do not make an otherwise unconstitutional law constitutional.

c. *The Massachusetts Burma Law is Not Shielded by the First Amendment*

[19] Massachusetts also argues that, regardless of the effect of *Zschernig* on the Massachusetts Burma Law, the law is protected by the First Amendment. At oral argument, Massachusetts stated that it is not actually contending that the First Amendment protects its law or that the Commonwealth has First Amendment rights. Instead, Massachusetts argues that First Amendment values should weigh in favor of a finding that Massachusetts has significant interests at stake here, interests that should be considered under *Zschernig.* Although a few district courts in other circuits have found that local governments do have First Amendment rights, *see, e.g., County of Suffolk v. Long Island Lighting Co.,* 710 F.Supp. 1387, 1390 (E.D.N.Y.1989), *aff'd,* 907 F.2d 1295 (2d Cir.1990), the First Circuit has expressed doubt, holding that a legal services office of a state university lacks such rights and saying that "a state entity[ ] itself has no First Amendment rights," *Student Gov't Ass'n v. Board of Trustees,* 868 F.2d 473, 481 (1st Cir.1989). Nothing in *Zschernig* suggests that a state government's First Amendment interests, if any, should weigh into a consideration of whether a state has impermissibly interfered with the federal government's foreign affairs power.[18]

III

[20] The foreign affairs power is, of course, not the only aspect of the Constitution at work in the foreign affairs arena. In addition to the foreign affairs power, the Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "It has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted . . . .' " *Barclays,* 512 U.S. at 310, 114 S.Ct. 2268 (alterations

cussion." (citations omitted)); *Barrett v. United States,* 965 F.2d 1184, 1194 n. 19 (1st Cir.1992) ("Since petitioner merely adverts to the claim in a perfunctory fashion in a footnote, and without developed argumentation, the claim is deemed waived." (internal quotation marks omitted)).

18. We do not consider here whether Massachusetts would be authorized to pass a resolution condemning Burma's human rights record but taking no other action with regard to Burma.

in original) (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)). The NFTC argues that, regardless of whether the Massachusetts Burma Law violates the foreign affairs power, the law violates the dormant Commerce Clause. Massachusetts responds that it is a market participant, and that the market participant exception that the Supreme Court has recognized in its dormant domestic Commerce Clause analysis should be applied to the Foreign Commerce Clause. Even if the exception does not apply, Massachusetts further contends, the law still does not violate the Foreign Commerce Clause. The district court did not reach these arguments. *See National Foreign Trade Council,* 26 F.Supp.2d at 293.

We examine these claims in three stages. First, applying dormant domestic Commerce Clause caselaw, we find that Massachusetts is not a market participant when it acts pursuant to the Massachusetts Burma Law. Second, we examine whether, in any event, the market participant exception should be extended to the Foreign Commerce Clause. Third, we find that the Massachusetts law violates the Foreign Commerce Clause.

1. *Massachusetts is Not Acting as a Market Participant*

[21] Massachusetts says that it is exempt from any Foreign Commerce Clause scrutiny because it is a market participant and not a market regulator. Massachusetts relies on the Supreme Court's domestic Commerce Clause decisions in *White v. Massachusetts Council of Construction Employers, Inc.,* 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), *Reeves, Inc. v. Stake,* 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980), and *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976). These cases establish that "if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *South–Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 93, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984) (plurality opinion of White, J.); *see also White,* 460 U.S. at 214–15, 103 S.Ct. 1042; *Reeves,* 447 U.S. at 436–37, 100 S.Ct. 2271; *Alexandria Scrap,* 426 U.S. at 810, 96 S.Ct. 2488. We will assume arguendo that there is a market participant exception under the Foreign Commerce Clause and test whether Massachusetts is acting as a market participant or as a market regulator.

[22] Even applying domestic market participant doctrine in this context, we hold that Massachusetts has not acted as a mere market participant. The Supreme Court first recognized the domestic market participant exception in *Alexandria Scrap,* upholding a Maryland law that imposed extra documentation requirements on out-of-state processors of scrap metal who sought to receive bounties from the state for converting junk cars into scrap. *See Alexandria Scrap,* 426 U.S. at 800–01, 814, 96 S.Ct. 2488. In *Reeves,* the Court upheld South Dakota's decision to sell cement from a state-owned plant only to state residents during a cement shortage. *See Reeves,* 447 U.S. at 432–34, 446–47, 100 S.Ct. 2271. The cases bearing most directly on the issue here are the Supreme Court's subsequent decisions in *White, South–Central Timber,* and *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997).

In *White,* the Supreme Court upheld against a domestic Commerce Clause challenge a mayoral order that required at least half of the workforce to be Boston residents on projects funded partially or entirely by Boston city funds. The Court commented that there was no evidence that the executive order in question was an " 'attempt to force virtually all businesses that benefit in some way from the economic ripple effect' of the city's decision to enter into contracts for construction projects 'to bias their employment practices in favor of the [city's] residents.' " *White,*

460 U.S. at 211, 103 S.Ct. 1042 (alteration in original) (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 531, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978)).

In *South–Central Timber*, the Supreme Court held that the domestic market participant doctrine has limits. The Court held that the state of Alaska, as a seller of timber, could not require that timber from state lands be processed within the state before being exported, and said that the market participant doctrine does not permit a state to impose extensive conditions on firms with which the state does business: "Although the Court in *Reeves* did strongly endorse the right of a State to deal with whomever it chooses when it participates in the market, it did not—and did not purport to—sanction the imposition of any terms that the State might desire." *South–Central Timber*, 467 U.S. at 95–96, 104 S.Ct. 2237 (plurality opinion of White, J.). The plurality added that the "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, 104 S.Ct. 2237. The plurality noted that Alaska was not just participating in the market, for "the seller usually has no say over, and no interest in, how the product is to be used after sale," *id.* at 96, 104 S.Ct. 2237, and that "[u]nless the 'market' [in the market participation doctrine] is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry," *id.* at 97–98, 104 S.Ct. 2237. "In sum, the State may not avail itself of the market-participant doctrine to immunize its downstream regulation of [a] market in which it is not a participant." *Id.* at 99, 104 S.Ct. 2237.

More recently, in *Camps Newfound/Owatonna*, the Court again rejected an attempt to use the market participant exception to shield state conduct from domestic Commerce Clause scrutiny. The Court said that the market participant exception is a narrow one, noting that *Reeves* and *Alexandria Scrap* both involved "a discrete activity focused on a single industry." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 594, 117 S.Ct. 1590. The Court invalidated a Maine statute that granted more limited tax benefits to non-profit organizations largely serving non-residents than to organizations primarily serving Maine residents. *See id.* at 567–69, 594–95, 117 S.Ct. 1590. The Court warned against an expansion of the market participant exception that "would swallow the rule against discriminatory tax schemes." *Id.* at 594, 117 S.Ct. 1590. Maine's tax exemption, it said, "must be viewed as action taken in the State's sovereign capacity rather than a proprietary decision to make an entry into all of the markets in which the exempted charities function." *Id.*

We find that in enacting the Massachusetts Burma Law the Commonwealth has crossed over the line from market participant to market regulator. Massachusetts contends that its law is akin to the Boston order upheld in *White*. But *White* involved an attempt to dictate the employment of Boston residents in projects funded by the city; it did not involve an attempt by Boston to require all contractors with the city to employ Boston residents in all of their other projects, a situation more akin to this case. Here, Massachusetts is attempting to impose on companies with which it does business conditions that apply to activities not even remotely connected to such companies' interactions with Massachusetts.

[23] Massachusetts attempts to distinguish its law from the controlling Supreme Court precedent. Massachusetts notes that *South–Central Timber* involved an attempt to impose a downstream restriction on timber. Indeed, the Alaska regulation there at issue imposed a "restriction on

private economic activity [that took] place after the completion of the parties' direct commercial obligations, rather than during the course of an ongoing commercial relationship in which the [state actor] retained a continuing proprietary interest in the subject of the contract." *South–Central Timber,* 467 U.S. at 99, 104 S.Ct. 2237 (plurality opinion of White, J.). In contrast, Massachusetts contends, its law does not attempt to impose limits after the completion of a contract. Massachusetts is technically correct that firms are free to engage in business with Burma once their contracts with Massachusetts are completed. But this distinction is hollow: the Massachusetts law, by creating a selective purchasing list, creates a mechanism to monitor the ongoing activities of private actors. This monitoring is not limited to individual purchasing decisions. Further, Massachusetts is attempting to regulate unrelated activities of its contractors once a contract is signed but before its performance is completed. Massachusetts also attempts to regulate unrelated activities of anyone negotiating with the state or responding to a request for bids. Importantly, the Massachusetts Burma Law applies to conduct not even remotely linked to Massachusetts. It imposes restrictions on markets other than the market for state procurement contracts. Under *South–Central Timber,* states may not use the market participant exception to shield otherwise impermissible regulatory behavior that goes beyond ordinary private market conduct.

[24] Massachusetts also argues that the effects of its law are not relevant to the inquiry into whether it is acting as a regulator. Massachusetts notes that the Supreme Court has found that states were acting as market participants even when they pursued goals not directly linked to local economic well-being. Massachusetts is correct that in *Alexandria Scrap* the Supreme Court permitted Maryland to act as a market participant to pursue environmental concerns. *See Alexandria Scrap,* 426 U.S. at 809, 814, 96 S.Ct. 2488; *see also* L. Tribe, *Constitutional Choices* 144 (1985) (noting that *Alexandria Scrap* and *Reeves* involved situations in which states "intended their entrances [into the market] to affect the flow of commerce so as to enhance *public* values" (emphasis in original)). Yet this is not enough to save a law that regulates activity outside of Massachusetts that is not related to the seller's interactions with Massachusetts. As the Supreme Court has explained, *Alexandria Scrap, Reeves,* and *White* stand for the proposition that "under the dormant Commerce Clause, a State acting in its proprietary capacity as a purchaser or seller may 'favor its own citizens over others.' " *Camps Newfound/Owatonna,* 520 U.S. at 592–93, 117 S.Ct. 1590 (quoting *Alexandria Scrap,* 426 U.S. at 810, 96 S.Ct. 2488).[19] But this doctrine does not permit Massachusetts to pursue goals that are not designed to favor its citizens or to secure local benefits. *Cf. Air Transport Ass'n of Am. v. City and County of San Francisco,* 992 F.Supp. 1149, 1163 (N.D.Cal.1998).

Massachusetts's action is also invalid under *Wisconsin Department of Industry, Labor and Human Relations v. Gould Inc.,* 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), in which the Supreme Court held that Wisconsin was not acting as a market participant when it refused to purchase products from repeated violators of the National Labor Relations Act. *See id.* at 289, 106 S.Ct. 1057. The Court found that "Wisconsin's debarment scheme is tantamount to regulation," *id.,* as the law could not "even plausibly be defended as a legitimate response to state procure-

19. Massachusetts contends that *Camps Newfound/Owatonna* actually supports Massachusetts's position. The Court in *Camps Newfound/Owatonna* distinguished between the Maine tax law at issue and laws that involve direct state purchases of goods. *See Camps Newfound/Owatonna,* 520 U.S. at 594, 117 S.Ct. 1590. This reference, however, does not support the contention that all state purchasing decisions are protected by the market participant exception.

ment constraints or to local economic needs, or [as] a law that pursues a task Congress intended to leave to the States," *id.* at 291, 106 S.Ct. 1057. In *Building & Construction Trades Council v. Associated Builders & Contractors,* 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993), the Court stated that "*Gould* makes clear" that "[w]hen the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role." *Id.* at 229, 113 S.Ct. 1190.

Attempting to distinguish *Gould,* Massachusetts argues that *Gould* was concerned primarily with the NLRA's preemption of state law and that *Gould* involved punishment of companies for past actions. Massachusetts protests that under the Massachusetts Burma Law the Commonwealth is imposing conditions on current activities—and thus companies can respond by changing their practices. *Cf. Board of Trustees,* 562 A.2d at 751 (distinguishing *Gould*). Under *Gould* and *South–Central Timber,* however, state regulations that go beyond the scope of normal market participation are not immune from Commerce Clause scrutiny. Massachusetts's desire to eliminate moral taint that it claims it suffers from dealing with firms that do business in Burma does not permit it to act to regulate activities beyond its borders.

[25–27] Massachusetts contends that it acts as private actors do because some companies have ceased doing business with Burma due to human rights concerns. The NFTC, in turn, argues that these companies have not ceased doing business with other *companies* that remain involved in Burma. Even if certain companies ceased purchasing goods from companies that maintain investments in Burma, such a fact would not be sufficient to lead us to consider the Massachusetts Burma Law to be market participation. The proper inquiry is whether Massachusetts is acting as an ordinary market participant would act, not whether any participant has acted in such a fashion. Massachusetts has created a market, but it cannot regulate the market that it has created so as to regulate conduct elsewhere not related to that market. As the NFTC noted at oral argument, Massachusetts's action here is akin to prohibiting purchases from companies that do business in states that have policies with which Massachusetts disagrees. This would plainly be unconstitutional under the domestic Commerce Clause. Massachusetts surely cannot do the same in the international context, as state actions that affect international commerce receive even greater scrutiny than do actions that affect interstate commerce. *See Japan Line,* 441 U.S. at 448, 99 S.Ct. 1813.

2. *It is Unlikely that the Market Participant Exception Applies to the Foreign Commerce Clause*

[28] Our finding that Massachusetts is not acting as a market participant means that the Massachusetts law must be subjected to ordinary Foreign Commerce Clause analysis. Yet there is likely an additional reason that the Massachusetts law is not shielded from Foreign Commerce Clause scrutiny: we are skeptical of whether the market participation exception applies at all (or without a much higher level of scrutiny) to the Foreign Commerce Clause.

The Supreme Court has not resolved this issue. In *Reeves,* the Court commented that "[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause" but added that such "scrutiny may well be more rigorous when a restraint on foreign commerce is alleged." *Reeves,* 447 U.S. at 437 n. 9, 100 S.Ct. 2271; *see also South–Central Timber,* 467 U.S. at 92 n. 7, 104 S.Ct. 2237 (expressing concern about the international ramifications of Alaska's challenged timber policy).

Massachusetts's argument relies on the decisions in *Trojan Technologies, Inc.,* 916 F.2d at 912, *Board of Trustees,* 562 A.2d at 752–53, and *K.S.B. Technical Sales Corp.,* 381 A.2d at 788. *Cf.* Tribe, *American Constitutional Law* § 6–21, at 469 (2d

ed.1988) (noting that while state laws banning private individuals or companies from doing business with South Africa would be invalid under *Zschernig,* "under the Supreme Court's market participant exception to the commerce clause, a state would be free to pass ... rules requiring that purchases of goods and services by and for the state government be made only from companies that have divested themselves of South African commercial involvement" (footnote omitted)). Massachusetts urges us to follow *Trojan Technologies, Board of Trustees,* and *K.S.B. Technical Sales Corp.* We decline to do so.

The Supreme Court has repeatedly suggested that state regulations that touch on foreign commerce receive a greater degree of scrutiny than do regulations that affect only domestic commerce. *See South–Central Timber,* 467 U.S. at 96, 104 S.Ct. 2237; *Reeves,* 447 U.S. at 437 n. 9, 100 S.Ct. 2271; *Japan Line,* 441 U.S. at 448, 99 S.Ct. 1813 (noting that "there is evidence that the Founders intended the scope of the foreign commerce power to be ... greater" than that of the domestic commerce power). Contrary to the Third Circuit's view in *Trojan Technologies,* we believe that the risks inherent in state regulation of foreign commerce—including the risk of retaliation against the nation as a whole and the weakening of the federal government's ability to speak with one voice in foreign affairs, *see Japan Line,* 441 U.S. at 450–51, 99 S.Ct. 1813—weigh against extending the market participation exception to the Foreign Commerce Clause. When it comes to state actions that touch on foreign affairs, "[a] foreign government has little inclination to discern whether a burdensome action taken by a political subdivision of the United States was taken under a proprietary or a regulatory guise," and "the potential for the creation of friction between the United States and a foreign nation is not lessened because the state acts as a proprietor instead of a regulator." K. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation,* 61 Tul.L.Rev. 469, 485 (1987). To extend the market participant doctrine would be to ignore these additional risks that arise in the foreign commerce context. But the issues are complex and we choose to leave their resolution to another day and another case.

3. *The Massachusetts Burma Law Violates the Foreign Commerce Clause*

[29, 30] Because the market participation exception does not shield the Massachusetts Burma Law from Commerce Clause scrutiny, we must turn to whether the law does indeed violate the Foreign Commerce Clause. "Absent a compelling justification ... a State may not advance its legitimate goals by means that facially discriminate against foreign commerce." *Kraft General Foods, Inc. v. Iowa Dept. of Revenue & Finance,* 505 U.S. 71, 81, 112 S.Ct. 2365, 120 L.Ed.2d 59 (1992). Like the dormant domestic Commerce Clause, which has the "core purpose ... [of] prevent[ing] states and their political subdivisions from promulgating protectionist policies," *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178, 188 (1st Cir. 1999), the Foreign Commerce Clause restricts protectionist policies, but it also restrains the states from excessive interference in foreign affairs.

The crucial inquiry in this case is whether the Massachusetts Burma Law is facially discriminatory. The NFTC does not claim that the law is invalid as applied under the balancing test set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

[31, 32] Massachusetts puts forth two arguments to support its claim that its law does not violate the Foreign Commerce Clause. First, Massachusetts contends that the law does not discriminate between domestic and foreign companies. Second, Massachusetts argues that its law does not impair the federal government's ability to speak with one voice regarding foreign commerce. Under standard Commerce

Clause analysis, a statute that facially discriminates against interstate or foreign commerce will, in most cases, be found unconstitutional. *See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) ("If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " (quoting *Pike,* 397 U.S. at 142, 90 S.Ct. 844) (emphasis in original) (citation omitted)). Even under that analysis, we find that the law is discriminatory and violates the Foreign Commerce Clause. Although the law does not discriminate against foreign companies, it does discriminate against foreign commerce. Also, the law impedes the federal government's ability to speak with one voice in foreign affairs, and amounts to an attempt to regulate conduct outside of Massachusetts and outside of this country's borders. For these three reasons, we hold that the Massachusetts law violates the Foreign Commerce Clause.

a. *The Massachusetts Burma Law Facially Discriminates Against Foreign Commerce*

Massachusetts first argues that its law does not actually discriminate against foreign commerce, primarily because the law does not distinguish between foreign and domestic companies. Massachusetts relies on *Oregon Waste Systems* and *Kraft.* In *Oregon Waste Systems,* the Supreme Court said that the domestic Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems,* 511 U.S. at 98, 114 S.Ct. 1345. In *Kraft,* the Supreme Court invalidated as facially discriminatory a state tax scheme that treated dividends from foreign subsidiaries less favorably than dividends from domestic subsidiaries. *See Kraft,* 505 U.S. at 74–77, 82, 112 S.Ct. 2365. Massachusetts contends that these cases support its argument that a law must distinguish between foreign and domestic producers in order to be held facially invalid. That is not the test. Massachusetts also argues that the crucial factor in determining whether a law discriminates is not whether the law singles out a particular foreign state, but rather whether it discriminates "in favor of in-state businesses." *Board of Trustees,* 562 A.2d at 754 n. 56. That is also not the test.

[33] A law need not be designed to further local economic interests in order to run afoul of the Commerce Clause. The Supreme Court has said, "[o]ur cases . . . indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. v. Limbach,* 486 U.S. 269, 276, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). In *Kraft,* the Supreme Court explicitly rejected the argument that local favoritism is crucial to a finding that a law is facially discriminatory, stating that it was "not persuaded . . . that such favoritism is an essential element of a violation of the Foreign Commerce Clause. . . . As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." *Kraft,* 505 U.S. at 79, 112 S.Ct. 2365.

[34] Nor does the law's applicability to both foreign and domestic companies save it. Supreme Court decisions under the Foreign Commerce Clause have made it clear that state laws that are designed to limit trade with a specific foreign nation are precisely one type of law that the Foreign Commerce Clause is designed to prevent. In *Container Corp.,* the Supreme Court stated that state legislation that relates to foreign policy questions violates the Foreign Commerce Clause "if it

either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." *Container Corp.,* 463 U.S. at 194, 103 S.Ct. 2933 (emphasis in original); *see also Japan Line,* 441 U.S. at 448–49, 99 S.Ct. 1813 (stating that "[f]oreign commerce is preeminently a matter of national concern" and noting that "[t]he need for federal uniformity is no less paramount in ascertaining the negative implication of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause"). "If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." Tribe, *American Constitutional Law* § 6–21, at 469. Although the Court in *Container Corp.* stated that a state law would not be held invalid if it had only "foreign resonances," *Container Corp.,* 463 U.S. at 194, 103 S.Ct. 2933, Massachusetts's law clearly has more than just foreign resonances. Indeed, a chief goal of the Massachusetts law is to affect business decisions pertaining to a foreign nation.

[35] The Massachusetts Burma Law discriminates against two subsets of foreign commerce—that involving companies or persons organized or operating in Burma and that involving companies or persons doing business with Burma. The law is thus a direct attempt to regulate the flow of foreign commerce. Massachusetts's arguments miss a crucial point. When the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is *also* referring to attempts to restrict the actions of American companies overseas. Long-standing Supreme Court precedent indicates that the Framers were concerned with "discriminations favorable or adverse to commerce with particular foreign nations [under] state laws." *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 317, 13 L.Ed. 996 (1851).

b. *The Massachusetts Burma Law Interferes with the Ability of the Federal Government to Speak with One Voice*

[36] The NFTC's argument that the Massachusetts Burma Law violates the Commerce Clause because it interferes with the federal government's ability to speak with one voice is similar to, but distinct from, the argument that the law violates the foreign affairs power of the federal government. Independent of any claim under *Zschernig,* the Supreme Court decisions in *Japan Line* and *Container Corp.* make clear that a state law can violate the dormant Foreign Commerce Clause by impeding the federal government's ability to "speak with one voice" in foreign affairs, because such state action harms "federal uniformity in an area where federal uniformity is essential." *Japan Line,* 441 U.S. at 448–49, 99 S.Ct. 1813; *see also Container Corp.,* 463 U.S. at 193, 103 S.Ct. 2933.

Massachusetts contends that *Barclays* "severely undercuts, if not eliminates" the Commerce Clause "one voice" test. Massachusetts also argues that *Barclays* demonstrates that the one voice test has never actually forbidden voices other than that of the federal government, and that while the federal government has the last word on foreign affairs—and thus can preempt the Massachusetts law—it does not have the only word.

Massachusetts misreads *Barclays.* Rather than dismantling the one voice test, *Barclays* applied this test. The Court found, however, that since Congress had effectively condoned the challenged law, the Court could not conclude that the California worldwide reporting requirement impeded the ability of the federal government to speak with one voice. *See Barclays,* 512 U.S. at 328–30, 114 S.Ct. 2268. *Barclays* reached this determination in light of repeated congressional consideration of the precise issue at hand and in light of the fact that the challenged law did

not directly regulate foreign commerce.[20] Nothing in *Barclays* suggests that we should reduce the amount of scrutiny that a state law that directly regulates foreign commerce should receive.

c. *Massachusetts is Attempting to Regulate Conduct Beyond Its Borders*

The Massachusetts Burma Law violates the Foreign Commerce Clause for an additional reason: Massachusetts is attempting to regulate conduct beyond its borders and beyond the borders of this country. In the domestic Commerce Clause arena, the Supreme Court has held that "one State's power to impose burdens on the interstate market ... is not only subordinate to the federal power over interstate commerce but is also constrained by the need to respect the interests of other States," and that "it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing ... lawful conduct in other States." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 571–72, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (citation omitted). In *Brown–Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), the Court invalidated a New York law that required that wholesale prices of alcohol in New York not exceed the lowest price at which the seller would sell the same product in any other state. *See id.* at 575–78, 106 S.Ct. 2080. The Court held that the fact that the law was "addressed only to sales of liquor in New York is irrelevant if the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583, 106 S.Ct. 2080 (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 775, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945)). The Massachusetts statute does not meet even these standards because both the intention and effect of the statute is to change conduct beyond Massachusetts's borders.

[37, 38] Massachusetts is in no better position because it seeks in part to change conduct not only outside Massachusetts, but also outside the United States. *Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 333–34, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964) (equating state attempts to control commerce flowing into foreign countries with attempts to control commerce flowing into a federal enclave). Massachusetts may not regulate conduct wholly beyond its borders. Yet the Massachusetts Burma Law—by conditioning state procurement decisions on conduct that occurs in Burma—does just that. *Cf. Healy v. Beer Institute,* 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) ("The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." (alteration in original) (quoting *Edgar v. MITE Corp.,* 457 U.S. 624, 642–43, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (plurality opinion)) (internal quotation marks omitted)).[21] The "critical inquiry" here is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy,* 491 U.S. at 336, 109 S.Ct. 2491. Because we find that the Massachusetts Burma Law has such an effect, and is not otherwise shielded by the market par-

20. We further discuss the significant factual, procedural, and substantive differences between *Barclays* and this case below in our discussion of Massachusetts's claim that Congress has implicitly permitted the Massachusetts Burma Law.

21. Massachusetts points to *Scariano v. Justices of the Supreme Court of Indiana,* 38 F.3d 920 (7th Cir.1994), to support its argument that where extraterritorial effects are not inevitable, there is no Foreign Commerce Clause violation. That case involved a challenge to Indiana's rules exempting out-of-state practitioners from Indiana's bar exam only if they had practiced predominately in Indiana for five years. The court found that this law had, at most, de minimis extraterritorial effects. *See id.* at 922, 927. That case thus has little relevance to the issues in this case.

ticipant exception, we find that the law violates the Foreign Commerce Clause.

[39] Massachusetts cannot save its law by protesting that a company doing business with Burma can simply forgo contracts with Massachusetts, or simply beat the next highest bidder's price by ten percent. Every discriminatory state law can be avoided by withdrawing from the enacting state. In *Healy,* for example, liquor distributors could have avoided the New York law by staying out of the New York liquor market. To allow state laws to stand on this ground, however, would be to read the Commerce Clause out of the Constitution. Moreover, the relative influence of a state's purchasing power cannot suffice to save discriminatory legislation. If Massachusetts can enact a Burma law, so too can California or Texas. Finally, we have no reason to view a ten-percent bidding penalty as anything other than an effective exclusion from the bidding process.

d. *Massachusetts Has Failed to Put Forth a Legitimate Local Justification in Support of its Law*

[40–42] Given that the Massachusetts Burma Law discriminates on its face against foreign commerce, it can survive Commerce Clause scrutiny only if it is "demonstrably justified" because it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.,* 486 U.S. at 274, 278, 108 S.Ct. 1803. Massachusetts, having made its primary arguments on other grounds, provides no support under either domestic or Foreign Commerce Clause jurisprudence for the proposition that a state's expression of moral concerns can provide a valid basis for a discriminatory law.[22] Even if expression of moral outrage about foreign human rights concerns were a valid *local* purpose, Massachusetts would need to show that it has no less discriminatory means of expressing its outrage. It has not done so, or even attempted to do so.

The NFTC argues that the Supreme Court has made clear that the only facially discriminatory laws that survive domestic Commerce Clause scrutiny are laws designed to protect a state's natural resources or the health and safety of its citizens. *Cf. Maine v. Taylor,* 477 U.S. 131, 151, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986); *Oregon Waste Systems,* 511 U.S. at 101, 114 S.Ct. 1345. Regardless of any such limits in the Commerce Clause context, as discussed above, Massachusetts's attempt to justify this statute as falling within traditional areas of *state* concern is unconvincing. The Supreme Court has recognized a number of disparate topics and fields of law as traditional areas of state concern,[23] but has not suggested that moral concerns regarding human rights

22. Amici curiae Center for Constitutional Rights et al. cite to *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), and *Trap Rock Industries, Inc. v. Kohl,* 59 N.J. 471, 284 A.2d 161 (1971), to support their contention that a state's moral concerns can be a sufficient ground to justify laws such as the Massachusetts Burma Law. Yet neither case addressed a law that facially discriminated against interstate or foreign commerce. *Perkins* dismissed, for lack of standing, a challenge to the Secretary of Labor's determinations of wage localities under a statute requiring federal contractors to pay the prevailing local minimum wage. *See Perkins,* 310 U.S. at 116–17, 125–27, 60 S.Ct. 869. In *Trap Rock,* the New Jersey Supreme Court upheld the New Jersey Commissioner of Transportation's decision to bar firms, including a low bidder, from bidding on state contracts after the firms' principals were indicted on bribery charges. *See Trap Rock,* 284 A.2d at 163–64. Citing *Perkins* and emphasizing the state government's broad discretion in purchasing decisions, the court found that the Commissioner had acted within his statutory discretion. *Id.* at 164, 168, 172. Like *Perkins,* however, *Trap Rock* bears no relation to this case. 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. *See, e.g., Foto USA, Inc. v. Board of Regents of the Univ. Sys. of Florida,* 141 F.3d 1032, 1036–37 (11th Cir.1998).

23. *See, e.g., California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.,* 519 U.S. 316, 330, 334, 117 S.Ct. 832, 136

conditions abroad—though effectuated via state procurement policy—are such an area. The argument that there is a *local* purpose that cannot otherwise be adequately served is very weak and does not suffice.

IV

[43] The NFTC contends that the Massachusetts Burma Law is preempted by the Federal Burma Law, and thus violates the Supremacy Clause. Massachusetts contends both that Congress has implicitly permitted the law and that, in any event, the federal sanctions do not preempt the Massachusetts law. We reject Massachusetts's claim that Congress has permitted the law and find that Congress has preempted the law.

The district court found that the NFTC "failed to carry [its] burden" of showing "that Congress intended to exercise its authority to set aside a state law." *National Foreign Trade Council*, 26 F.Supp.2d at 293. The district court rejected the NFTC's claim that the Massachusetts law reflected a unilateral approach to trade with Burma, one that conflicted with federal law's endorsement of a multilateral strategy. The court based this finding on its determination that the federal statute "actually provides for unilateral sanctions against [Burma]." *Id.* In so doing, the district court misapprehended NFTC's burden and applied an erroneous legal standard to the facts.

1. *Congress Has Not Implicitly Approved of or Permitted the Massachusetts Law*

Massachusetts attempts to preclude an inquiry into whether its law is preempted by the Federal Burma Law by arguing that Congress, fully aware of the Massachusetts law when it considered federal sanctions against Burma, failed explicitly to preempt the state law and thus impliedly permitted it. Massachusetts again relies on the Supreme Court's opinion in *Barclays*, arguing that Congress's failure explicitly to preempt the law shields the law from constitutional scrutiny. We reject Massachusetts's argument.

As it had done in *Container Corp.*, 463 U.S. at 196–97, 103 S.Ct. 2933, and *Wardair*, 477 U.S. at 6–7, 106 S.Ct. 2369, the Supreme Court in *Barclays* looked for indicia that Congress had acted to preempt the state practices in dispute. Noting that Congress was fully aware of foreign government opposition to state combined reporting requirements, *see Barclays*, 512 U.S. at 324, 114 S.Ct. 2268, that the Court itself had ruled favorably to the state on the issue in a previous case, *see id.* at 321–22, 114 S.Ct. 2268, and that Congress had "on many occasions studied state taxation of multinational enterprises," *id.* at 324–25, 114 S.Ct. 2268, including consideration of proposed legislation that would have prohibited California's reporting requirements, *see id.* at 325, 114 S.Ct. 2268, the Court stated that "Congress implicitly has *permitted* the States to use the worldwide combined reporting method," *id.* at 326, 114 S.Ct. 2268 (emphasis in original); *see also id.* at 329, 114 S.Ct. 2268 ("Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting."). *Barclays* made clear

L.Ed.2d 791 (1997) (prevailing-wage law); *General Motors Corp. v. Tracy*, 519 U.S. 278, 294, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (regulation of local gas franchises); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 649–50, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (regulation of hospital billing); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (real property); *Northwest Cent. Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493, 510–12, 514, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989) (natural resources); *Rose v. Rose*, 481 U.S. 619, 626, 628, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987) (domestic relations); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742–44, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) (insurance); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (weights and measures on product packaging).

that determining "whether the national interest is best served by tax uniformity, or state autonomy," was a decision best left to Congress, not the courts. *Id.* at 331, 114 S.Ct. 2268; *see also Container Corp.,* 463 U.S. at 194, 103 S.Ct. 2933 ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please."). The posture of Congress here is nothing like the position of Congress recounted in *Barclays.*

Massachusetts notes that, in addition to failing to indicate a desire to preempt in the Federal Burma Law, Congress has debated the appropriateness of state and local actions concerning Burma, but has not passed legislation explicitly preempting state and local selective purchasing laws. *See* 144 Cong. Rec. H7,277–H7,285 (daily ed. Aug. 5, 1998). Massachusetts's argument is supported by amici curiae members of Congress in support of reversal, who contend that "Congress is well aware of the criticism being directed at the Massachusetts law and other state and local purchasing measures," and who point to repeated testimony regarding the issue before congressional subcommittees. These amici curiae also state that Congress's failure to address state and local measures, either when it enacted the federal sanctions against Burma or when it considered legislation reforming federal sanctions law, *see* H.R. 2708, 105th Cong. (1997), was intentional. Massachusetts's argument is opposed by other amici curiae who are also members of Congress, who say that the Massachusetts law threatens to destroy the carefully crafted federal scheme of sanctions against Burma, and who argue that Congress lacks the ability to monitor the legislative activities of the fifty states and thousands of municipalities in this country to determine whether laws of such jurisdictions are harming the nation's foreign policy.

We do not believe that *Barclays* applies to the facts of this case, for four reasons. First, the discussion of preemption in *Barclays* came as part of a Commerce Clause inquiry into whether the challenged law impaired the federal government's ability to speak with one voice. The California law was not challenged under the Supremacy Clause. *Barclays* commented that "there is no claim here that the federal tax statutes themselves provide the necessary pre-emptive force." *Barclays,* 512 U.S. at 321, 114 S.Ct. 2268 (quoting *Container Corp.,* 463 U.S. at 196, 103 S.Ct. 2933) (internal quotation marks omitted). *Barclays* thus did not discuss how courts should address Supremacy Clause challenges to state laws that impact foreign affairs, such as the Massachusetts Burma Law.

Second, *Barclays* involved an area of traditional state activity: taxation of companies which do business within the state and elsewhere and the appropriate allocation to the state of such companies' income. The California law had few direct foreign policy implications and was not structured so as to affect conduct beyond the borders of the state.

Third, the clarity and frequency in *Barclays* of the refusal of Congress to act, despite a host of bills and a Supreme Court decision, is vastly different than the situation we face in this case. In *Barclays,* Congress had been put on notice by the Court's prior decision in *Container Corp.* and had considered "numerous bills [that] . . . would have prohibited the California reporting requirement." *Id.* at 325, 114 S.Ct. 2268. In contrast, Congress never formally voted on provisions that would have explicitly preempted the Massachusetts law. The *Barclays* discussion of implied permission involved only a Commerce Clause inquiry into whether state laws are preempted by the need for the nation to speak with one voice in foreign affairs. Massachusetts has given us no reason to extend *Barclays* to the different

facts we face here, and we decline to do so.[24]

Fourth, although *Barclays* involved congressional silence, Congress has not been silent about Burma. The real question is not what to infer from congressional inaction, but how to interpret the action that Congress has already taken in enacting sanctions against Burma.

2. *The Massachusetts Burma Law is Preempted by Federal Sanctions Against Burma*

[44] We address the question of whether the Federal Burma Law preempts Massachusetts's law by examining the usual indicia of congressional intent where there is no express preemption statement. Congressional intent to preempt may be found where a federal statute is so pervasive as to occupy the field, *see Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), where it would be physically impossible to comply with both the federal and the state law, *see Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or where enforcement of the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines,* 312 U.S. at 67, 61 S.Ct. 399.

[45] If the subject matter of the law in question is an area traditionally occupied by the states, congressional intent to preempt must be "clear and manifest." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). The district court, relying on a domestic commerce clause case, stated that "[p]laintiff's burden is particularly heavy." *National Foreign Trade Council,* 26 F.Supp.2d at 293. This was error.

Preemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs. The test which should be applied is set forth in *Hines.*

In *Hines,* the Supreme Court found that Pennsylvania's Alien Registration Act was preempted by the federal Alien Registration Act. The Court stated that "[n]o state can add to or take from the force and effect of [a] treaty or statute [regarding aliens]." *Hines,* 312 U.S. at 63, 61 S.Ct. 399. The Court commented:

> [T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, "the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Id. at 66–67, 61 S.Ct. 399 (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824)) (footnote omitted). Likewise, in *Boyle v. United Technologies Corp.,* 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), the Court, considering the liability of an independent contractor who had supplied a military helicopter to the United States, commented that when

24. The fact that *Barclays* looked to congressional inaction only in order to inquire into whether the law impeded the federal government's ability to speak with one voice highlights the weakness in Massachusetts's additional claim that, given the *Barclays* presumption, this court should not even commence an inquiry into the validity of the Massachusetts law under the Commerce Clause. In *Barclays,* as "[i]n both *Wardair* and *Container Corp.,* the Court considered the 'one voice' argument only after determining that the challenged state action was otherwise constitutional." *Barclays,* 512 U.S. at 323, 114 S.Ct. 2268.

considering "an area of uniquely federal interest," a "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied.' " *Id.* at 507, 108 S.Ct. 2510 (quoting *Rice,* 331 U.S. at 230, 67 S.Ct. 1146).[25]

Hines and its progeny establish that preemption is much more easily found when Congress has passed legislation relating to foreign affairs. The Supreme Court has repeatedly cited *Hines* for the proposition that an "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978); *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); *Rice,* 331 U.S. at 230, 67 S.Ct. 1146. Other cases make the same point using similar language. *See, e.g., Hillsborough County,* 471 U.S. at 713, 105 S.Ct. 2371; *Pennsylvania v. Nelson,* 350 U.S. 497, 504, 76 S.Ct. 477, 100 L.Ed. 640 (1956).

The Supreme Court, distinguishing *Hines* in considering a state labor law, explained:

> [In *Hines*] we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any "concurrent state power that may exist is restricted to the narrowest of limits." Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.

Allen–Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749, 62 S.Ct. 820, 86 L.Ed. 1154 (1942) (quoting *Hines,* 312 U.S. at 68, 61 S.Ct. 399) (citation omitted).

Massachusetts argues that the ordinary clear statement rule regarding congressional intent to preempt should apply because state procurement is a traditional area of state power reserved to the states by the Tenth Amendment. *Cf. Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (quoting *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)) (internal quotation marks omitted)). This argument is no more convincing here than it is in the context of Massachusetts's claim that its Tenth Amendment interests shield its law from scrutiny under *Zschernig.* Massachusetts argues that "state procurement is not an area of unique federal interest" (internal quotation marks omitted), but ignores the fact that its law, like the federal sanctions against Burma, is aimed primarily at effecting change in and expressing disapproval of the current regime in Burma. Similarly, the fact that Congress has at times explicitly preempted local sanctions, *see, e.g.,* 50 U.S.C. app. § 2407(c)

25. Professor Tribe makes the same point:

> [I]f the field is one that is traditionally deemed ''national,'' the Court is more vigilant in striking down state incursions into subjects that Congress may have reserved to itself. It was not surprising, therefore, that the Court invalidated the state alien registration law in *Hines v. Davidowitz;* the Court was extremely solicitous of the paramount federal interest in matters germane to foreign affairs.

Tribe, *American Constitutional Law* § 6–27, at 500 (footnote omitted).

(West 1991) (stating that federal provisions prohibiting United States persons from complying with foreign boycotts against nations with which the United States maintains friendly relations preempted state and local laws, regulations, and rules), does not prevent our finding of preemption where Congress has not spoken so directly. To do otherwise would be to ignore *Hines*.

Massachusetts attempts to distinguish this case from *Hines* by relying on *De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). *De Canas* concerned a California law forbidding employers from "knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." *Id.* at 352, 96 S.Ct. 933 (quoting Cal. Labor Code § 2805(a)) (internal quotation marks omitted). The Supreme Court found that the Immigration and Nationality Act, while a "comprehensive federal statutory scheme for regulation of immigration and naturalization," nevertheless did not preempt the California law. *Id.* at 353–54, 96 S.Ct. 933. To reach this conclusion, however, the Court first assumed that the California statute "only applie[d] to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations." *Id.* at 353 n. 2, 96 S.Ct. 933. Thus, the California law simply "adopt[ed] federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country." *Id.* at 355, 96 S.Ct. 933.

In contrast, Massachusetts is attempting to regulate the same conduct—trade with Burma—addressed by the Federal Burma Law, but is doing so by imposing distinct restrictions different in scope and kind from the federal law. Some actions lawful under federal law would be unlawful under the state statute. The Massachusetts law is therefore akin to a hypothetical California statute prohibiting employment of any aliens, even those allowed to work under federal law. The *De Canas* Court considered, and rejected, such laws. *See id.* at 358 n. 6, 96 S.Ct. 933. California acted to regulate employment, an area where states "possess broad authority under their police powers." *Id.* at 356, 96 S.Ct. 933. Massachusetts is not acting under its traditional state police powers.[26]

26. Additionally, the *De Canas* Court considered only whether a state could punish *employers* for hiring employees who were in the country in violation of federal law. California was attempting to regulate different behavior than was regulated under the INA—the hiring of illegal aliens, rather than the illegal entry of aliens into the United States. As *De Canas* noted, "[t]he central concern of the INA [was] with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," not with barring employment of illegal aliens. *De Canas*, 424 U.S. at 359, 96 S.Ct. 933. Unlike in *Hines*, where Congress had acted "in the specific field which the States were attempting to regulate," *id.* at 362, 96 S.Ct. 933, in *De Canas* there was "no indication that Congress intended [the INA] to preclude state law in the area of employment regulation," *id.* The Massachusetts Burma Law, in contrast, clearly lies in the same field and governs the same conduct—investment in and trade with Burma—as the federal sanctions against Burma.

Massachusetts also argues that *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60, 113 S.Ct. 1095, 122 L.Ed.2d 421 (1993), distinguishes this case from *Hines*. The petitioner in *Itel* leased cargo containers that were solely used in international shipping. Tennessee assessed sales tax on containers that Itel delivered to lessees within the state's borders. Itel based its "primary challenge" to the law on the international Container Conventions, which prohibit taxation of cargo containers used in international trade provided such containers spend no more than three months in the country. *Id.* at 64–65, 113 S.Ct. 1095. Itel argued that the Conventions barred taxation of leases involving these containers.

Itel Containers does not support Massachusetts's argument. In *Itel*, as in *De Canas*, the challenged state law fell outside the scope of the federal regulatory scheme. The Conventions were adopted to ensure the free flow of containers, and encouraged more efficient containerization in lieu of other, less efficient transportation techniques. Because the tax did not impede importation of containers into Tennessee, the tax was not barred by the

[46] *Hines* and its progeny mean that when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern. Under this standard we find that Congress has preempted the Massachusetts Burma Law. Congress has constructed a reasonably comprehensive statute covering a field of foreign relations. But even if Congress had not been so comprehensive, the state law would still conflict with the federal law. "The basic subject of the state and federal laws is identical," *Hines,* 312 U.S. at 61, 61 S.Ct. 399, but Massachusetts's law veers from the carefully balanced path that Congress has constructed. Congress is attempting to balance various concerns and is "trying to steer a middle path." *Id.* at 73, 61 S.Ct. 399. In enacting sanctions against Burma, Congress attempted to strike at least two sorts of balances. First, Congress sought to improve human rights in Burma, but did so in the context of this country's overall foreign relations, including, at the least, the United States' experiences with human rights practices elsewhere, this country's relationships with its trading partners, its economic interests, and its interest in forming alliances rather than taking unilateral actions. Second, Congress considered various mechanisms to accomplish and balance this country's various interests and goals and chose a set of carefully calibrated tools. This careful calibration reflects the judgment of the Congress and the President that the federal choice of tools is the most effective means to improve human rights conditions in Burma while safeguarding other national interests. Massachusetts, in contrast, has chosen a blunt instrument to further only a single goal, making judgments different from and contrary to the judgments made by Congress and the President.

Congress considered and rejected barring all United States investment in Burma, *see* S. 1092, 104th Cong. (1995), instead choosing to limit only new investment in the "development of resources." In contrast, the Massachusetts law applies to virtually all investment in Burma. The Federal Burma Law permits some trade with Burma, while the Massachusetts law does not. For example, the Federal Burma Law does not sanction companies for merely having subsidiaries with operations in Burma, having been organized in Burma, being a majority-owned franchise of a company with Burma operations, or being a United States subsidiary or a foreign company that engages in business in Burma. The Massachusetts law does.

The Massachusetts law thus regulates conduct not covered by the federal law and applies to parties, including foreign companies, not covered by the federal law. As in *Hines,* the Massachusetts law therefore has effects more inimical to foreign interests than those of the federal law. The Massachusetts law penalizes the activities of foreign companies which are lawful under the laws of those companies' home countries and are not prohibited by trade agreements with the United States or by United States federal law. In addition, the federal law provides for sanctions to be terminated upon a finding by the President that human rights conditions in Burma have improved; the Massachusetts Burma Law has no such provision. In the Federal Burma Law, Congress has chosen to rely on both carrots and sticks. Massachusetts uses a cudgel. In doing so, Massachusetts risks upsetting Congress's careful choice of tools and strategy.

Additionally, Massachusetts's unilateral strategy toward Burma directly contradicts the federal law's encouragement of a multilateral strategy. That the federal government has itself at times acted uni-

conventions. *See id.* at 66, 113 S.Ct. 1095. Moreover, there was no evidence that Congress intended to displace generally applicable state tax schemes. *See id.* at 70, 113 S.Ct. 1095.

laterally in its approach to Burma, or has created a mechanism that allows the President to fine-tune the federal government's approach, does not eliminate the fact that Massachusetts's unilateral sanctions are inconsistent with the federal regime. *Cf.* 142 Cong. Rec. S8753 (daily ed. July 25, 1996) (stating that the United States "maintain[s] a range of unilateral sanctions [against] Burma"). The Massachusetts law directly conflicts with Congress's instruction that the federal government pursue a multilateral strategy with regard to Burma. It is of little importance that some companies can comply with both federal and state laws regarding Burma. Massachusetts's argument to this effect resembles the argument made by the three dissenters in *Hines*, *see Hines*, 312 U.S. at 81, 61 S.Ct. 399 (Stone, J., dissenting), an argument that the *Hines* majority implicitly rejected, *see Hines*, 312 U.S. at 68, 61 S.Ct. 399 (majority opinion) ("Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax."). Finally, the fact that Congress may have been aware of the Massachusetts law at the time it passed the Federal Burma Law does not lead to a different outcome. In *Hines*, nineteen states had passed alien registration laws prior to Congress's passage of the federal law, *see id.*, at 79, 61 S.Ct. 399 (Stone, J., dissenting), yet the Supreme Court nevertheless did not conclude from earlier congressional inaction that these laws were not preempted.[27]

[47, 48] Massachusetts protests that the goals of its statute—promoting change in Burma and expressing disapproval of conditions in Burma—are the same as those of the federal legislation, and thus that there can be no conflict between the Massachusetts law and federal sanctions. Yet the fact that state and federal legislation share common goals, either in whole or in part, is not sufficient to preclude a finding of preemption. *See Gade*, 505 U.S. at 103, 112 S.Ct. 2374. The crucial inquiry is whether a state law impedes the federal effort. *See Gould*, 475 U.S. at 286, 106 S.Ct. 1057; *International Paper Co. v. Ouellette*, 479 U.S. 481, 494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987). Where, as here, the federal government has acted in an area of unique federal concern and has crafted a balanced, tailored approach to an issue, and the state law threatens to upset that balance, the state law is preempted. Under the Supremacy Clause, the Massachusetts Burma Law is unconstitutional. *Cf. Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

V

The passage of the Massachusetts Burma Law has resulted in significant attention being brought to the Burmese government's human rights record. Indeed, it may be that the Massachusetts law was a catalyst for federal sanctions. Massachusetts also played a role, through its representatives in the House and the Senate, in Congress's decision to impose sanctions on Burma. Nonetheless, the conduct of this nation's foreign affairs cannot be effectively managed on behalf of all of the nation's citizens if each of the many state and local governments pursues its own foreign policy. Absent express congressional authorization, Massachusetts cannot set the nation's foreign policy.[28]

27. Massachusetts argues that the only court to have confronted a similar question, the Maryland court in *Board of Trustees*, found that federal sanctions against South Africa did not preempt local divestment ordinances. The Maryland case is weak precedent here, however, as the Maryland court did not consider *Hines* in its discussion of preemption. *See Board of Trustees*, 562 A.2d at 740–44.

28. We acknowledge with appreciation the able advocacy by counsel for the parties as well as the assistance provided by the fourteen briefs representing more than 100 amici curiae.

The judgment of the district court is *affirmed.*

Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations
326 prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante*, at 2277.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

530 U.S. 363, 147 L.Ed.2d 352

363 **Stephen P. CROSBY, Secretary Of Administration and Finance of Massachusetts, et al., Petitioners,**

v.

NATIONAL FOREIGN TRADE COUNCIL.

No. 99–474.

Argued March 22, 2000.

Decided June 19, 2000.

Nonprofit corporation representing member companies that engaged in foreign trade sought declaratory and injunctive relief against two Massachusetts officials, challenging constitutionality of the Massachusetts Burma Law, which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that did business with Burma (Myanmar). Summary judgment for plaintiff was granted by the United States District Court for the District of Massachusetts, 26 F.Supp.2d 287. The United States Court of Appeals for the First Circuit, 181 F.3d 38, Lynch, Circuit Judge, affirmed, and state petitioned for certiorari. The Supreme Court, Justice Souter, held that Massachusetts law was invalid under the Supremacy Clause.

Affirmed.

Justice Scalia filed opinion concurring in the judgment in which Justice Thomas joined.

1. States ⇐18.3

Congress has the power to preempt state law. U.S.C.A. Const. Art. 6, cl. 2.

2. States ⇐18.5, 18.7

Even without an express preemption provision, state law must yield to a congressional Act if Congress intends to occupy the field, or to the extent of any conflict with a federal statute. U.S.C.A. Const. Art. 6, cl. 2.

3. States ⇐18.5

Court will find preemption where it is impossible for a private party to comply with both state and federal law and where the state law is an obstacle to the accomplishment and execution of Congress's full purposes and objectives; what is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects. U.S.C.A. Const. Art. 6, cl. 2.

4. States ⇐18.43, 100

Massachusetts law restricting authority of its agencies to purchase goods or services from companies doing business with Burma (Myanmar) was invalid under the Supremacy Clause; state law undermined the intended purpose and "natural effect" of provisions of federal Act delegating effective discretion to the President to control economic sanctions against Burma, limiting sanctions solely to United States persons and new investment, and directing

the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma. U.S.C.A. Const. Art. 6, cl. 2; M.G.L.A. c. 7, §§ 22G-22M; Omnibus Consolidated Appropriations Act, 1997, § 101(c), Sec. 570, 110 Stat. 3009.

Syllabus *

In 1996, Massachusetts passed a law barring state entities from buying goods or services from companies doing business with Burma. Subsequently, Congress imposed mandatory and conditional sanctions on Burma. Respondent (hereinafter Council), which has several members affected by the state Act, filed suit against petitioner state officials (hereinafter State) in federal court, claiming that the state Act unconstitutionally infringes on the federal foreign affairs power, violates the Foreign Commerce Clause, and is preempted by the federal Act. The District Court permanently enjoined the state Act's enforcement, and the First Circuit affirmed.

Held: The state Act is preempted, and its application unconstitutional, under the Supremacy Clause. Pp. 2293–2302.

(a) Even without an express preemption provision, state law must yield to a congressional Act if Congress intends to occupy the field, *California v. ARC America Corp.*, 490 U.S. 93, 100, 109 S.Ct. 1661, 104 L.Ed.2d 86, or to the extent of any conflict with a federal statute, *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S.Ct. 399, 85 L.Ed. 581. This Court will find preemption where it is impossible for a private party to comply with both state and federal law and where the state law is an obstacle to the accomplishment and execution of Congress's full purposes and objectives. What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects. Here, the state Act is such an obstacle, for it undermines the intended purpose and natural effect of at least three federal Act provisions. Pp. 2293–2294.

(b) First, the state Act is an obstacle to the federal Act's delegation of discretion to the President to control economic sanctions against Burma. Although Congress put initial sanctions in place, it authorized the President to terminate the measures upon certifying that Burma has made progress in human rights and democracy, to impose new sanctions upon findings of repression, and, most importantly, to suspend sanctions in the interest of national security. Within the sphere defined by Congress, the statute has given the President as much discretion to exercise economic leverage against Burma, with an eye toward national security, | 364 as law permits. The plenitude of Executive authority controls the preemption issue here. The President has the authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is implausible to think that Congress would have gone to such lengths to empower the President had it been willing to compromise his effectiveness by allowing state or local ordinances to blunt the consequences of his actions. Yet this is exactly what the state Act does. Its sanctions are immediate and perpetual, there being no termination provision. This unyielding application undermines the President's authority by leaving him with less economic and diplomatic leverage than the federal Act permits. Pp. 2295–2296.

(c) Second, the state Act interferes with Congress's intention to limit economic pressure against the Burmese Government to a specific range. The state Act stands in clear contrast to the federal Act. It prohibits some contracts permitted by the federal Act, affects more investment than

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

the federal Act, and reaches foreign and domestic companies while the federal Act confines its reach to United States persons. It thus conflicts with the federal law by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. That the two Acts have a common end hardly neutralizes the conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean the state Act is not at odds with achievement of the congressional decision about the right calibration of force. Pp. 2296–2298.

(d) Finally, the state Act is at odds with the President's authority to speak for the United States among the world's nations to develop a comprehensive, multilateral Burma strategy. Congress called for Presidential cooperation with other countries in developing such a strategy, directed the President to encourage a dialogue between the Burmese Government and the democratic opposition, and required him to report to Congress on these efforts. This delegation of power, like that over economic sanctions, invested the President with the maximum authority of the National Government. The state Act undermines the President's capacity for effective diplomacy. In response to its passage, foreign governments have filed formal protests with the National Government and lodged formal complaints against the United States in the World Trade Organization. The Executive has consistently represented that the state Act has complicated its dealing with foreign sovereigns and proven an impediment to accomplishing the objectives assigned it by Congress. In this case, the positions of foreign governments and the Executive are competent and direct evidence of the state Act's frustration[365] of congressional objectives. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 114 S.Ct. 2268, 129 L.Ed.2d 244, distinguished. Pp. 2298–2301.

(e) The State's remaining argument—that Congress's failure to preempt state and local sanctions demonstrates implicit permission—is unavailing. The existence of a conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict, and a failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption that courts will dependably apply. Pp. 2301–2302.

181 F.3d 38, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post,* p. 2302.

Thomas A. Barnico, Boston, MA, for petitioners.

Timothy B. Dyk, Washington, DC, for respondent.

Seth P. Waxman, Washington, DC, for United States as amicus curiae, by special leave of the Court supporting affirmance.

For U.S. Supreme Court briefs, see:

2000 WL 35850 (Pet.Brief)

2000 WL 193325 (Resp.Brief)

2000 WL 272027 (Reply.Brief)

[365] Justice SOUTER delivered the opinion of the Court.

The issue is whether the Burma law of the Commonwealth of Massachusetts, restricting the authority of its agencies to purchase goods or services from companies doing business with Burma,[1] is invalid

1. The Court of Appeals noted that the ruling military government of "Burma changed [the country's] name to Myanmar in 1989," but the court then said it would use the name Burma since both parties and *amici curiae,* the state law, and the federal law all do so. *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 45, n. 1 (C.A.1 1999). We follow suit, noting that our use of this term, like the

under the Supremacy Clause of the National Constitution owing to its threat of frustrating federal statutory objectives. We hold that it is.

I

In June 1996, Massachusetts adopted "An Act Regulating State Contracts with Companies Doing Business with or in [367]Burma (Myanmar)," 1996 Mass. Acts 239, ch. 130 (codified at Mass. Gen. Laws §§ 7:22G–7:22M, 40 F. ½ (1997)). The statute generally bars state entities from buying goods or services from any person (defined to include a business organization) identified on a "restricted purchase list" of those doing business with Burma. §§ 7:22H(a), 7:22J. Although the statute has no general provision for waiver or termination of its ban, it does exempt from boycott any entities present in Burma solely to report the news, § 7:22H(e), or to provide international telecommunication goods or services, *ibid.*, or medical supplies, § 7:22I.

" 'Doing business with Burma' " is defined broadly to cover any person

> "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person;
>
> "(b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;
>
> "(c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);
>
> "(d) providing any goods or services to the government of Burma (Myanmar)." § 7:22G.

There are three exceptions to the ban: (1) if the procurement is essential, and without the restricted bid, there would be no bids or insufficient competition, § 7:22H(b); (2) if the [368]procurement is of medical supplies, § 7:22I; and (3) if the procurement efforts elicit no "comparable low bid or offer" by a person not doing business with Burma, § 7:22H(d), meaning an offer that is no more than 10 percent greater than the restricted bid, § 7:22G. To enforce the ban, the Act requires petitioner Secretary of Administration and Finance to maintain a "restricted purchase list" of all firms "doing business with Burma," [2] § 7:22J.

In September 1996, three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570, 110 Stat. 3009–166 to 3009–167 (enacted by the Omnibus Consolidated Appropriations Act, 1997, § 101(c), 110 Stat. 3009–121 to 3009–172). The federal Act has five basic parts, three substantive and two procedural.

First, it imposes three sanctions directly on Burma. It bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. § 570(a)(1). The statute instructs United

First Circuit's, is not intended to express any political view. See *ibid.*

2. According to the District Court, companies may challenge their inclusion on the list by submitting an affidavit stating that they do no business with Burma. *National Foreign Trade Council v. Baker,* 26 F.Supp.2d 287, 289 (D.Mass.1998). The Massachusetts Executive Office's Operational Services Division makes a final determination. *Ibid.*

States representatives to international financial institutions to vote against loans or other assistance to or for Burma, § 570(a)(2), and it provides that no entry visa shall be issued to any Burmese Government official unless required by treaty or to staff the Burmese mission to the United Nations, § 570(a)(3). These restrictions are to remain in effect "[u]ntil 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." § 570(a).

[369]Second, the federal Act authorizes the President to impose further sanctions subject to certain conditions. He may prohibit "United States persons" from "new investment" in Burma, and shall do so if he determines and certifies to Congress that the Burmese Government has physically harmed, rearrested, or exiled Daw Aung San Suu Kyi (the opposition leader selected to receive the Nobel Peace Prize), or has committed "large-scale repression of or violence against the Democratic opposition." § 570(b). "New investment" is defined as entry into a contract that would favor the "economical development of resources located in Burma," or would provide ownership interests in or benefits from such development, § 570(f)(2), but the term specifically excludes (and thus excludes from any Presidential prohibition) "entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology," *ibid.*

Third, the statute directs the President to work to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c). He is instructed to cooperate with members of the Association of Southeast Asian Nations (ASEAN) and with other countries having major trade and investment interests in Burma to devise such an approach, and to pursue the additional objective of fostering dialogue between the ruling State Law and Order Restoration Council (SLORC) and democratic opposition groups. *Ibid.*

As for the procedural provisions of the federal statute, the fourth section requires the President to report periodically to certain congressional committee chairmen on the progress toward democratization and better living conditions in Burma as well as on the development of the required strategy. § 570(d). And the fifth part of the federal Act authorizes the President "to waive, temporarily or permanently, any sanction [under the federal Act] . . . if he determines and certifies to Congress that the application of such sanction [370]would be contrary to the national security interests of the United States." § 570(e).

On May 20, 1997, the President issued the Burma Executive Order, Exec. Order No. 13047, 3 CFR 202 (1997 Comp.). He certified for purposes of § 570(b) that the Government of Burma had "committed large-scale repression of the democratic opposition in Burma" and found that the Burmese Government's actions and policies constituted "an unusual and extraordinary threat to the national security and foreign policy of the United States," a threat characterized as a national emergency. The President then prohibited new investment in Burma "by United States persons," Exec. Order No. 13047, § 1, any approval or facilitation by a United States person of such new investment by foreign persons, § 2(a), and any transaction meant to evade or avoid the ban, § 2(b). The order generally incorporated the exceptions and exemptions addressed in the statute. §§ 3, 4. Finally, the President delegated to the Secretary of State the tasks of working with ASEAN and other countries to develop a strategy for democracy, human rights, and the quality of life in Burma, and of making the required congressional reports.[3] § 5.

3. The President also delegated authority to implement the policy to the Secretary of the Treasury, in consultation with the Secretary of State. § 6. On May 21, 1998, the Secretary

II

Respondent National Foreign Trade Council (Council) is a nonprofit corporation representing companies engaged in foreign commerce; 34 of its members were on the Massachusetts restricted purchase list in 1998. *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 48 (C.A.1 1999). Three withdrew from Burma after the passage of the state Act, and one member had its bid for a procurement contract increased by 10 percent under the provision of the state law [371] allowing acceptance of a low bid from a listed bidder only if the next-to-lowest bid is more than 10 percent higher. *Ibid.*

In April 1998, the Council filed suit in the United States District Court for the District of Massachusetts, seeking declaratory and injunctive relief against the petitioner state officials charged with administering and enforcing the state Act (whom we will refer to simply as the State).[4] The Council argued that the state law unconstitutionally infringed on the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by the federal Act. After detailed stipulations, briefing, and argument, the District Court permanently enjoined enforcement of the state Act, holding that it "unconstitutionally impinge[d] on the federal government's exclusive authority to regulate foreign affairs." *National Foreign Trade Council v. Baker,* 26 F.Supp.2d 287, 291 (D.Mass. 1998).

The United States Court of Appeals for the First Circuit affirmed on three independent grounds. 181 F.3d, at 45. It found the state Act unconstitutionally interfered with the foreign affairs power of the National Government under *Zschernig v. Miller,* 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), see 181 F.3d, at 52–55; violated the dormant Foreign Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, see 181 F.3d, at 61–71; and was preempted by the congressional Burma Act, see *id.,* at 71–77.

The State's petition for certiorari challenged the decision on all three grounds and asserted interests said to be shared by other state and local governments with similar measures.[5] Though opposing certiorari, the Council acknowledged the [372] significance of the issues and the need to settle the constitutionality of such laws and regulations. Brief in Opposition 18–19. We granted certiorari to resolve these important questions, 528 U.S. 1018, 120 S.Ct. 525, 145 L.Ed.2d 407 (1999), and now affirm.

III

[1–3] A fundamental principle of the Constitution is that Congress has the power to preempt state law. Art. VI, cl. 2; *Gibbons v. Ogden,* 9 Wheat. 1, 211, 6 L.Ed. 23 (1824); *Savage v. Jones,* 225 U.S. 501, 533, 32 S.Ct. 715, 56 L.Ed. 1182 (1912); *California v. ARC America Corp.,* 490 U.S. 93, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. *Id.,* at 100, 109 S.Ct. 1661; cf. *United States v. Locke,* 529 U.S. 89, 115, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (citing

of the Treasury issued federal regulations implementing the President's Executive Order. See 31 CFR pt. 537 (1999) (Burmese Sanctions Regulations).

4. One of the state offices changed incumbents twice during litigation before reaching this Court, see *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 48, n. 4 (C.A.1 1999), and once more after we granted certiorari.

5. "At least nineteen municipal governments have enacted analogous laws restricting purchases from companies that do business in Burma." *Id.,* at 47; Pet. for Cert. 13 (citing N.Y.C. Admin. Code § 6–115 (1999); Los Angeles Admin. Code, Art. 12, § 10.38 *et seq.* (1999); Philadelphia Code § 17–104(b) (1999); Vermont H.J. Res. 157 (1998); 1999 Vt. Laws No. 13).

Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604, 35 S.Ct. 715, 59 L.Ed. 1137 (1915)). And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.[6] *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *ARC America Corp.*, *supra*, at 100–101, 109 S.Ct. 1661; *Locke*, *supra*, at 109, 120 S.Ct. 1135. We will find preemption where it is impossible for a private party to comply with both state and federal law, see, *e.g.*, *Florida Lime & Avocado Growers, Inc. v.* [373] *Paul*, 373 U.S. 132, 142–143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), and where "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, *supra*, at 67, 61 S.Ct. 399. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects:

> "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage*, *supra*, at 533, 32 S.Ct. 715, quoted in *Hines*, *supra*, at 67, n. 20, 61 S.Ct. 399.

[4] Applying this standard, we see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act.[7] We find that the state law undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic [374] sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma.[8]

6. We recognize, of course, that the categories of preemption are not "rigidly distinct." *English v. General Elec. Co.*, 496 U.S. 72, 79, n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, "field pre-emption may be understood as a species of conflict pre-emption," *id.*, at 79–80, n. 5, 110 S.Ct. 2270; see also *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 104, n. 2, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (quoting *English*, *supra*); 505 U.S., at 115–116, 112 S.Ct. 2374 (SOUTER, J., dissenting) (noting similarity between "purpose-conflict pre-emption" and preemption of a field, and citing L. Tribe, American Constitutional Law 486 (2d ed.1988)); 1 L. Tribe, American Constitutional Law 1177 (3d ed.2000) (noting that *"field"* preemption may fall into any of the categories of express, implied, or conflict preemption).

7. The State concedes, as it must, that in addressing the subject of the federal Act, Congress has the power to preempt the state statute. See Reply Brief for Petitioners 2; Tr. of Oral Arg. 5–6.

We add that we have already rejected the argument that a State's "statutory scheme . . . escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 287, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986). In *Gould*, we found that a Wisconsin statute debarring repeat violators of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, from contracting with the State was preempted because the state statute's additional enforcement mechanism conflicted with the federal Act. 475 U.S., at 288–289, 106 S.Ct. 1057. The fact that the State "ha[d] chosen to use its spending power rather than its police power" did not reduce the potential for conflict with the federal statute. *Ibid.*

8. We leave for another day a consideration in this context of a presumption against preemption. See *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). Assuming, *arguendo*, that some presumption

A

First, Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma. Although Congress immediately put in place a set of initial sanctions (prohibiting bilateral aid, § 570(a)(1), support for international financial assistance, § 570(a)(2), and entry by Burmese officials into the United States, § 570(a)(3)), it authorized the President to terminate any and all of those measures upon determining and certifying that there had been progress in human rights and democracy in Burma. § 570(a). It invested the President with the further power to ban new investment by United States persons, dependent only on specific Presidential findings of repression in Burma. § 570(b). And, most significantly, Congress empowered the President "to waive, temporarily or permanently, any sanction [under the federal Act] ... 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).

[375] This express investiture of the President with statutory authority to act for the United States in imposing sanctions with respect to the Government of Burma, augmented by the flexibility [9] to respond to change by suspending sanctions in the interest of national security, recalls Justice Jackson's observation in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 72 S.Ct. 863, 96 L.Ed. 1153 (1952): "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." See also *id.*, at 635–636, n. 2, 72 S.Ct. 863 (noting that the President's power in the area of foreign relations is least restricted by Congress and citing *United States v. Curtiss–Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936)). Within the sphere defined by Congress, then, the statute has placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will [376] admit. And it is just this plenitude of Executive authority that we think controls the issue of preemption

against preemption is appropriate, we conclude, based on our analysis below, that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted. See *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue, see n. 6, *supra*, or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause. See *Ashwander v. TVA*, 297 U.S. 288, 346–347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (concurring opinion).

9. Statements by the sponsors of the federal Act underscore the statute's clarity in providing the President with flexibility in implementing its Burma sanctions policy. See 142 Cong. Rec. 19212 (1996) (statement of principal sponsor Sen. Cohen) (emphasizing importance of providing "the administration flexibility in reacting to changes, both positive and negative, with respect to the behavior of the [Burmese regime]"); *id.*, at 19213; *id.*, at 19221 (statement of cosponsor Sen. McCain) (describing the federal Act as "giv[ing] the President, who, whether Democrat or Republican, is charged with conducting our Nation's foreign policy, some flexibility"); *id.*, at 19220 ("We need to be able to have the flexibility to remove sanctions and provide support for Burma if it reaches a transition stage that is moving toward the restoration of democracy, which all of us support") (statement of cosponsor Sen. Feinstein). These sponsors chose a pliant policy with the explicit support of the Executive. See, *e.g.*, *id.*, at 19219 (letter from Barbara Larkin, Assistant Secretary, Legislative Affairs, U.S. Department of State to Sen. Cohen) (admitted by unanimous consent) ("We believe the current and conditional sanctions which your language proposes are consistent with Administration policy. As we have stated on several occasions in the past, we need to maintain our flexibility to respond to events in Burma and to consult with Congress on appropriate responses to ongoing and future development there").

here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.[10]

And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. As will be seen, the state statute penalizes some private action that the federal Act (as administered by the President) may allow, and pulls levers of influence that the federal Act does not reach. But the point here is that the state sanctions are immediate,[11] see 1996 Mass. Acts 239, ch. 130, § 3 (restricting all contracts after law's effective date); Mass. Gen. Laws § 7:22K (1997) |377(authorizing regulations for timely and effective implementation), and perpetual, there being no termination provision, see, *e.g.*, § 7:22J (restricted companies list to be updated at least every three months). This unyielding application undermines the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he may choose to take the discretionary action open to him, whether he believes that the national interest requires sanctions to be lifted, or believes that the promise of lifting sanctions would move the Burmese regime in the democratic direction. Quite simply, if the Massachusetts law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence. In *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981), we used the metaphor of the bargaining chip to describe the President's control of funds valuable to a hostile country, *id.*, at 673, 101 S.Ct. 2972; here, the state Act reduces the value of the chips created by the federal statute.[12] It thus "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S., at 67, 61 S.Ct. 399.

B

Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range. The federal Act confines its reach to United States persons, § 570(b), imposes limited immediate sanctions, § 570(a), places only a conditional ban on a carefully defined area of "new investment," § 570(f)(2), and pointed-

10. The State makes arguments that could be read to suggest that Congress's objective of Presidential flexibility was limited to discretion solely over the sanctions in the federal Act, and that Congress implicitly left control over state sanctions to the State. Brief for Petitioners 19–24. We reject this cramped view of Congress's intent as against the weight of the evidence. Congress made no explicit statement of such limited objectives. More importantly, the federal Act itself strongly indicates the opposite. For example, under the federal Act, Congress explicitly identified protecting "national security interests" as a ground on which the President could suspend federal sanctions. § 570(e), 110 Stat. 3009–167. We find it unlikely that Congress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President's judgment of what national security requires.

11. These provisions strongly resemble the immediate sanctions on investment that appeared in the proposed section of H.R. 3540 that Congress rejected in favor of the federal Act. See H.R. 3540, 104th Cong., 2d Sess., § 569(1) (1996).

12. The sponsors of the federal Act obviously anticipated this analysis. See, *e.g.*, 142 Cong. Rec., at 19220 (statement of Sen. Feinstein) ("We may be able to have the effect of nudging the SLORC toward an increased dialog with the democratic opposition. That is why we also allow the President to lift sanctions").

ly exempts contracts to sell or purchase goods, services, or technology, § 570(f)(2). These detailed provisions show that Congress's calibrated [378] Burma policy is a deliberate effort "to steer a middle path," *id.*, at 73, 61 S.Ct. 399.[13]

The State has set a different course, and its statute conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions. While the state Act differs from the federal in relying entirely on indirect economic leverage through third parties with Burmese connections, it otherwise stands in clear contrast to the congressional scheme in the scope of subject matter addressed. It restricts all contracts between the State and companies doing business in Burma, § 7:22H(a), except when purchasing medical supplies and other essentials (or when short of comparable bids), § 7:22I. It is specific in targeting contracts to provide [379] financial services, § 7:22G(b), and general goods and services, § 7:22G(d), to the Government of Burma, and thus prohibits contracts between the State and United States persons for goods, services, or technology, even though those transactions are explicitly exempted from the ambit of new investment prohibition when the President exercises his discretionary authority to impose sanctions under the federal Act. § 570(f)(2).

As with the subject of business meant to be affected, so with the class of companies doing it: the state Act's generality stands at odds with the federal discreteness. The Massachusetts law directly and indirectly imposes costs on all companies that do any business in Burma, § 7:22G, save for those reporting news or providing international telecommunications goods or services, or medical supplies, §§ 7:22H(e), 7:22I. It sanctions companies promoting the importation of natural resources controlled by the Government of Burma, or having any operations or affiliates in Burma. § 7:22G. The state Act thus penalizes companies with pre-existing affiliates or investments, all of which lie beyond the reach of the federal Act's restrictions on "new investment" in Burmese economic development. §§ 570(b), 570(f)(2). The state Act, moreover, imposes restrictions on foreign companies as well as domestic, whereas the federal Act limits its reach to United States persons.

The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. See Brief for Petitioners 21–22. The fact of a common end

13. The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view. Most importantly, the federal Act, as passed, replaced the original proposed section of H.R. 3540, which barred "any investment in Burma" by a United States national without exception or limitation. See H.R. 3540, *supra,* § 569(1). Congress also rejected a competing amendment, S. 1511, 104th Cong., 1st Sess. (Dec. 29, 1995), which similarly provided that "United States nationals shall not make any investment in Burma," § 4(b)(1), and would have permitted the President to impose conditional sanctions on the importation of "articles which are produced, manufactured, grown, or extracted in Burma," § 4(c)(1), and would have barred all travel by United States nationals to Burma, § 4(c)(2). Congress had rejected an earlier amendment that would have prohibited all United States investment in Burma, subject to the President's power to lift sanctions. S. 1092, 104th Cong., 1st Sess. (July 28, 1995).

Statements of the sponsors of the federal Act also lend weight to the conclusions that the limits were deliberate. See, *e.g.,* 142 Cong. Rec., at 19279 (statement of Sen. Breaux) (characterizing the federal Act as "strik[ing] a balance between unilateral sanctions against Burma and unfettered United States investment in that country"). The scope of the exemptions was discussed, see *ibid.* (statements of Sens. Nickles and Cohen), and broader sanctions were rejected, see *id.,* at 19212 (statement of Sen. Cohen); *id.,* at 19280 (statement of Sen. Murkowski) ("Instead of the current draconian sanctions proposed in the legislation before us, we should adopt an approach that effectively secures our national interests").

hardly neutralizes conflicting means,[14] see *Gade v. National Solid* 380 *Wastes Management Assn.,* 505 U.S. 88, 103, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992), and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ. See *Hines,* 312 U.S., at 61, 61 S.Ct. 399 ("The basic subject of the state and federal laws is identical"); *id.,* at 67, 61 S.Ct. 399 (finding conflict preemption). " '[C]onflict is imminent' " when " 'two separate remedies are brought to bear on the same activity,' " *Wisconsin Dept. of Industry v. Gould, Inc.,* 475 U.S. 282, 286, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986) (quoting *Garner v. Teamsters,* 346 U.S. 485, 498–499, 74 S.Ct. 161, 98 L.Ed. 228 (1953)). Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.

C

Finally, the state Act is at odds with the President's intended authority to speak for the United States among the world's nations in developing a "comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." § 570(c). Congress called for Presidential cooperation with members of ASEAN and other countries in developing such a strategy, *ibid.,* directed the President to encourage a dialogue between the Government of Burma and the democratic opposition, *ibid.,*[15] and required him to report to the Congress on the progress of his diplomatic efforts, § 570(d). As with Congress's 381 explicit delegation to the President of power over economic sanctions, Congress's express command to the President to take the initiative for the United States among the international community invested him with the maximum authority of the National Government, cf. *Youngstown Sheet & Tube Co.,* 343 U.S., at 635, 72 S.Ct. 863, in harmony with the President's own constitutional powers, U.S. Const., Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties" and "shall appoint Ambassadors, other public Ministers and Consuls"); § 3 ("[The President] shall receive Ambassadors and other public Ministers"). This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action.

Again, the state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests

14. The State's reliance on *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 82–83, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987), for the proposition that "[w]here the state law furthers the purpose of the federal law, the Court should not find conflict" is misplaced. See Brief for Petitioners 21–22. In *CTS Corp.,* we found that an Indiana state securities law "further[ed] the federal policy of investor protection," 481 U.S., at 83, 107 S.Ct. 1637, but we also examined whether the state law conflicted with federal law "[i]n implementing its goal," *ibid.* Identity of ends does not end our analysis of preemption. See *Gould,* 475 U.S., at 286, 106 S.Ct. 1057.

15. The record supports the conclusion that Congress considered the development of a multilateral sanctions strategy to be a central objective of the federal Act. See, *e.g.,* 142 Cong. Rec., at 19212 (remarks of Sen. Cohen) ("[T]o be effective, American policy in Burma has to be coordinated with our Asian friends and allies"); *id.,* at 19219 (remarks of Sen. Feinstein) ("Only a multilateral approach is likely to be successful").

on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.[16] When such [382]exceptions do qualify his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with the Burmese regime, but in working together with other nations in hopes of reaching common policy and "comprehensive" strategy.[17] Cf. *Dames & Moore*, 453 U.S., at 673–674, 101 S.Ct. 2972.

While the threat to the President's power to speak and bargain effectively with other nations seems clear enough, the record is replete with evidence to answer any skeptics. First, in response to the passage of the state Act, a number of this country's allies and trading partners filed formal protests with the National Government, see 181 F.3d, at 47 (noting protests from Japan, the European Union (EU), and ASEAN), including an official *Note Verbale* from the EU to the Department of State protesting the state Act.[18] EU officials have warned that the state Act "could have a damaging effect on bilateral EU–US relations." Letter of Hugo [383]Paemen, Ambassador, European Union, Delegation of the European Commission, to William F. Weld, Governor, State of Massachusetts, Jan. 23, 1997, App. 75.

Second, the EU and Japan have gone a step further in lodging formal complaints against the United States in the World Trade Organization (WTO), claiming that the state Act violates certain provisions of the Agreement on Government Procurement,[19] H.R. Doc. No. 103–316, p. 1719

16. Such concerns have been raised by the President's representatives in the Executive Branch. See Testimony of Under Secretary of State Eizenstat before the Trade Subcommittee of the House Ways and Means Committee (Oct. 23, 1997) (hereinafter Eizenstat testimony), App. 116 (''[U]nless sanctions measures are well conceived and coordinated, so that the United States is speaking with one voice and consistent with our international obligations, such uncoordinated responses can put the U.S. on the political defensive and shift attention away from the problem to the issue of sanctions themselves''). We have expressed similar concerns in our cases on foreign commerce and foreign relations. See, *e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979); *Chy Lung v. Freeman*, 92 U.S. 275, 279, 23 L.Ed. 550 (1876); cf. The Federalist No. 80, pp. 535–536 (J. Cooke ed. 1961) (A.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'').

17. The record reflects that sponsors of the federal Act were well aware of this concern and provided flexibility to the President over sanctions for that very reason. See, *e.g.*, 142 Cong. Rec., at 19214 (statement of Sen. Thomas) (''Although I will readily admit that our present relationship with Burma is not especially deep, the imposition of mandatory economic sanctions would certainly downgrade what little relationship we have. Moreover, it would affect our relations with many of our allies in Asia as we try to corral them into following our lead''); *id.*, at 19219 (statement of Sen. Feinstein) (''It is absolutely essential that any pressure we seek to put on the Government of Burma be coordinated with the nations of ASEAN and our European and Asian allies. If we act unilaterally, we are more likely to have the opposite effect—alienating many of these allies, while having no real impact on the ground'').

18. In *amicus* briefs here and in the courts below, the EU has consistently taken the position that the state Act has created ''an issue of serious concern in EU–U.S. relations.'' Brief for European Communities et al. as *Amici Curiae* 6.

19. Although the WTO dispute proceedings were suspended at the request of Japan and the EU in light of the District Court's ruling below, Letter of Ole Lundby, Chairman of the Panel, to Ambassadors from the European Union, Japan, and the United States (Feb. 10, 1999), and have since automatically lapsed, Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 International Legal Materials 1125, 1234 (1994), neither of those parties is barred from reinstating WTO procedures to challenge the state Act in the future. In fact, the EU, as *amicus* before us, specifically represents that it intends to begin new WTO proceedings should the current injunction on the law be lifted. Brief for European Communities et al.

(1994), and the consequence has been to embroil the National Government for some time now in international dispute proceedings under the auspices of the WTO. In their brief before this Court, EU officials point to the WTO dispute as threatening relations with the United States, Brief for European Communities et al. as *Amici Curiae* 7, and n. 7, and note that the state Act has become the topic of "intensive discussions" with officials of the United States at the highest levels, those discussions including exchanges at the twice yearly EU–U.S. Summit.[20]

Third, the Executive has consistently represented that the state Act has complicated its dealings with foreign sovereigns and proven an impediment to accomplishing objectives assigned it by Congress. Assistant Secretary of State Larson, for example, has directly addressed the mandate of the |384 federal Burma law in saying that the imposition of unilateral state sanctions under the state Act "complicate[s] efforts to build coalitions with our allies" to promote democracy and human rights in Burma. A. Larson, State and Local Sanctions: Remarks to the Council of State Governments 2 (Dec. 8, 1998). "[T]he EU's opposition to the Massachusetts law has meant that US 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 3.[21] This point has been consistently echoed in the State Department:

> "While the [Massachusetts sanctions on Burma] were adopted in pursuit of a noble goal, the restoration of democracy in Burma, these measures also risk shifting the focus of the debate with our European Allies away from the best way to bring pressure against the State Law and Order Restoration Council (SLORC) to a potential WTO dispute over its consistency with our international obligations. Let me be clear. We are working with Massachusetts in the WTO dispute settlement process. But we must be honest in saying that the threatened WTO case risks diverting United States' and Europe's attention from focusing where it should be—on Burma." Eizenstat testimony, App. 115.[22]

|385 This evidence in combination is more than sufficient to show that the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy.

Our discussion in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298, 327–329, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994), of the limited weight of evidence of formal diplomatic protests, risk of foreign retaliation, and statements by the Executive does not undercut the point. In *Barclays,* we had the question of the preemptive effect of federal tax law on state tax law with discriminatory extraterritorial ef-

as *Amici Curiae* 7. We express no opinion on the merits of these proceedings.

20. Senior Level Group Report to the U.S.–EU Summit in Washington 3 (Dec. 17, 1999), http://www.eurunion.org/parner/summit/Summit9912/SLGRept.html.

21. Assistant Secretary Larson also declared that the state law "has hindered our ability to speak with one voice on the grave human rights situation in Burma, become a significant irritant in our relations with the EU and impeded our efforts to build a strong multilateral coalition on Burma where we, Massachusetts and the EU share a common goal." Assistant Secretary of State Alan P. Larson, State and Local Sanctions: Remarks to the Council of State Governments 3 (Dec. 8, 1998).

22. The United States, in its brief as *amicus curiae,* continues to advance this position before us. See Brief for United States as *Amicus Curiae* 8–9, and n. 7, 34–35. This conclusion has been consistently presented by senior United States officials. See also Testimony of Deputy Assistant Secretary of State David Marchick before the California State Assembly, Oct. 28, 1997, App. 137; Testimony of Deputy Assistant Secretary of State David Marchick before the Maryland House of Delegates Committee on Commerce and Government Matters, Mar. 25, 1998, *id.,* at 166 (same).

fects. We found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments, *id.*, at 324–328, 114 S.Ct. 2268, and the Executive, *id.*, at 328–329, 114 S.Ct. 2268. Here, however, Congress has done nothing to render such evidence beside the point. In consequence, statements of foreign powers necessarily involved in the President's efforts to comply with the federal Act, indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act.[23] Although we do not unquestioningly defer to the legal judgments expressed in Executive Branch statements when determining a federal Act's preemptive character,386 *ibid.*, we have never questioned their competence to show the practical difficulty of pursuing a congressional goal requiring multinational agreement. We have, after all, not only recognized the limits of our own capacity to "determin[e] precisely when foreign nations will be offended by particular acts," *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), but consistently acknowledged that the "nuances" of "the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court," *id.*, at 196, 103 S.Ct. 2933; *Barclays*, *supra*, at 327, 114 S.Ct. 2268. In this case, repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes are more than sufficient to demonstrate that the state Act stands in the way of Congress's diplomatic objectives.[24]

IV

The State's remaining argument is unavailing. It contends that the failure of Congress to preempt the state Act 387demonstrates implicit permission. The State points out that Congress has repeatedly declined to enact express preemption provisions aimed at state and local sanctions, and it calls our attention to the large number of such measures passed against South Africa in the 1980's, which various authorities cited have thought were not preempted.[25] The State stresses

23. We find support for this conclusion in the statements of the congressional sponsors of the federal Act, who indicated their opinion that inflexible unilateral action would be likely to cause difficulties in our relations with our allies and in crafting an effective policy toward Burma. See n. 17, *supra*. Moreover, the facts that the Executive specifically called for flexibility prior to the passage of the federal Act, and that the Congress rejected less flexible alternatives and adopted the current law in response to the Executive's communications, bolster the relevance of the Executive's opinion with regard to its ability to accomplish Congress's goals. See n. 9, *supra*.

24. The State appears to argue that we should ignore the evidence of the WTO dispute because under the federal law implementing the General Agreement on Tariffs and Trade (GATT), Congress foreclosed suits by private persons and foreign governments challenging a state law on the basis of GATT in federal or state courts, allowing only the National Government to raise such a challenge. See Uruguay Round Agreements Act (URAA), § 102(c)(1), 108 Stat. 4818, 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1); see also "Statement of Administrative Action" (SAA), reprinted in H.R. Doc. No. 103–216, pp. 656, 675–677 (1994). To consider such evidence, in its view, would effectively violate the ban by allowing private parties and foreign nations to challenge state procurement laws in domestic courts. But the terms of § 102 of the URAA and of the SAA simply do not support this argument. They refer to challenges to state law based on inconsistency with any of the "Uruguay Round Agreements." The challenge here is based on the federal Burma law. We reject the State's argument that the National Government's decisions to bar such WTO suits and to decline to bring its own suit against the Massachusetts Burma law evince its approval. These actions simply do not speak to the preemptive effect of the federal sanctions against Burma.

25. See, *e.g.*, *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 79–98,

that Congress was aware of the state Act in 1996, but did not preempt it explicitly when it adopted its own Burma statute.[26] The State would have us conclude that Congress's continuing failure to enact express preemption implies approval, particularly in light of occasional instances of express preemption of state sanctions in the past.[27]

The argument is unconvincing on more than one level. A failure to provide for preemption expressly may reflect nothing 388 more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict, *Hines*, 312 U.S., at 67, 61 S.Ct. 399. The State's inference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous. Since we never ruled on whether state and local sanctions against South Africa in the 1980's were preempted or otherwise invalid, arguable parallels between the two sets of federal and state Acts do not tell us much about the validity of the latter.

V

Because the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.

The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

It is perfectly obvious on the face of this statute that Congress, with the concurrence of the President, intended to "provid[e] the President with flexibility in implementing its Burma sanctions policy." *Ante*, at 2295, n. 9. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition that "[s]tatements by the sponsors of the federal Act" show that they shared this intent, *ibid.*, and that a statement in a letter from a State Department officer shows that flexibility had "the explicit support of the 389 Executive," *ante*, at 2295, n. 9. This excursus is especially pointless since the immediately succeeding footnote must rely upon the statute itself (devoid of any support in statements by "sponsors" or the "Executive") to refute the quite telling ar-

562 A.2d 720, 744–749 (1989) (holding local divestment ordinance not preempted by Comprehensive Anti–Apartheid Act of 1986 (CAAA)), cert. denied *sub nom. Lubman v. Mayor and City Council of Baltimore*, 493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990); Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 49, 64–66, 1986 WL 213238 (state and local divestment and selective purchasing laws not preempted by pre-CAAA federal law); H.R. Res. Nos. 99–548, 99–549 (1986) (denying preemptive intent of CAAA); 132 Cong. Rec. 23119–23129 (1986) (House debate on resolutions); *id.*, at 23292 (Sen. Kennedy, quoting testimony of Laurence H. Tribe). *Amicus* Members of Congress in support of the State also note that when Congress revoked its federal sanctions in response to the democratic transition in that country, it refused to preempt the state and local measures, merely "urg[ing]" both state and local governments and private boycott participants to rescind their sanctions. Brief for Senator Boxer et al. as *Amici Curiae* 9, citing South African Democratic Transition Support Act of 1993, § 4(c)(1), 107 Stat. 1503.

26. The State also finds significant the fact that Congress did not preempt state and local sanctions in a recent sanctions reform bill, even though its sponsor seemed to be aware of such measures. See H.R.Rep. No. 105–2708 (1997); 143 Cong. Rec. E2080 (Oct. 23, 1997) (Rep.Hamilton).

27. See Export Administration Act of 1979, 50 U.S.C.App. § 2407(c) (1988 ed.) (Anti–Arab boycott of Israel provisions expressly "preempt any law, rule, or regulation").

gument that the statements were addressed only to flexibility in administering the sanctions of the *federal* Act, and said nothing at all about state sanctions. See *ante,* at 2296, n. 10.

It is perfectly obvious on the face of the statute that Congress expected the President to use his discretionary authority over sanctions to "move the Burmese regime in the democratic direction," *ante,* at 2296. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition that "[t]he sponsors of the federal Act" shared this expectation, *ante,* at 2296, n. 12.

It is perfectly obvious on the face of the statute that Congress's Burma policy was a "calibrated" one, which "limit[ed] economic pressure against the Burmese Government to a specific range," *ante,* at 2296. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) proposition that bills imposing greater sanctions were introduced but not adopted, *ante,* at 2297, n. 13, and to the (even less surprising) proposition that the sponsors of the legislation made clear that its "limits were deliberate," *ibid.* And I would feel this way even if I shared the Court's naíve assumption that the failure of a bill to make it out of committee, or to be adopted when reported to the floor, is the same as a congressional "reject[ion]" of what the bill contained, *ibid.* Curiously, the Court later recognizes, in rejecting the argument that Congress's failure to enact express pre-emption implies approval of the state Act, that "the silence of Congress [may be] ambiguous." *Ante,* at 2302. Would that the Court had come to this conclusion *before* it relied (several times) upon the implications of Congress's failure to enact legislation, see *ante,* at 2296, n. 11, 2297, n. 13, 2301, n. 23.

390 It is perfectly obvious on the face of the statute that Congress intended the President to develop a "multilateral strategy" in cooperation with other countries. In fact, the statute says that in so many words, see § 570(c), 110 Stat. 3009–166. I therefore see no point in devoting two footnotes to the interesting (albeit unsurprising) proposition that three Senators *also* favored a multilateral approach, *ante,* at 2298, n. 15, 2299, n. 17.

It is perfectly obvious from the record, as the Court discusses, *ante,* at 2299–2301, that the inflexibility produced by the Massachusetts statute has in fact caused difficulties with our allies and has in fact impeded a "multilateral strategy." And as the Court later says in another context, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict," *ante,* at 2302. I therefore see no point in devoting a footnote to the interesting (albeit unsurprising) fact that the "congressional sponsors" of the Act and "the Executive" actually *predicted* that inflexibility would have the effect of causing difficulties with our allies and impeding a "multilateral strategy," *ante,* at 2301, n. 23.

Of course even if all of the Court's invocations of legislative history were not utterly irrelevant, I would still object to them, since neither the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor),* nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for

* Debate on the bill that became the present Act seems, in this respect, not to have departed from the ordinary. Cf. 142 Cong. Rec. 19263 (1996)(statement of Sen. McConnell) (noting, in debate regarding which amendment to take up next: "I do not see anyone on the Democratic side in the Chamber").

sure can be attributed [391] to *all* of them—is the words of the bill that they voted to make law. In a way, using unreliable legislative history to confirm what the statute plainly says anyway (or what the record plainly shows) is less objectionable since, after all, it has absolutely no effect upon the outcome. But in a way, this utter lack of necessity makes it even worse—calling to mind St. Augustine's enormous remorse at stealing pears when he was not even hungry, and just for the devil of it ("not seeking aught through the shame, but the shame itself!"). The Confessions, Book 2, ¶ 9, in 18 Great Books of the Western World 10–11 (1952) (E. Pusey transl. 1952).

In any case, the portion of the Court's opinion that I consider irrelevant is quite extensive, comprising, in total, about one-tenth of the opinion's size and (since it is in footnote type) even more of the opinion's content. I consider that to be not just wasteful (it was not preordained, after all, that this was to be a 25–page essay) but harmful, since it tells future litigants that, even when a statute is clear on its face, and its effects clear upon the record, statements from the legislative history may help (and presumably harm) the case. If so, they must be researched and discussed by counsel—which makes appellate litigation considerably more time consuming, and hence considerably more expensive, than it need be. This to my mind outweighs the arguable good that may come of such persistent irrelevancy, at least when it is indulged in the margins: that it may encourage readers to ignore our footnotes.

For this reason, I join only the judgment of the Court.

530 U.S. 392, 147 L.Ed.2d 374

[392] **State of ARIZONA, Complainant,**

v.

State of CALIFORNIA, et al.

No. 8 Orig.

Argued April 25, 2000.

Decided June 19, 2000.

State of Arizona brought original action against State of California to determine States' and other parties' rights to waters of Colorado River. United States intervened, seeking water rights on behalf of five Indian reservations. Following determination that United States had reserved water rights for such reservations, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, grant of tribes' motions to intervene, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318, and grant of States' motion to reopen decree, the Supreme Court, Justice Ginsburg, held that: (1) claims of Quechan Tribe for increased rights to water for disputed boundary lands of Fort Yuma Reservation were not precluded by Supreme Court decision finding, inter alia, that United States had reserved water rights for reservations; (2) such claims were not precluded by consent judgment entered in prior Court of Claims proceeding in which Tribe had challenged 1893 Agreement providing for Tribe's cession of such disputed lands; and (3) settlements of claim for additional water for Fort Mojave Reservation and Colorado River Indian Reservation would be approved.

Order accordingly.

Chief Justice Rehnquist concurred in part, dissented in part, and filed opinion in which Justices O'Connor and Thomas joined.

1. Judgment ⚿739

Secretarial Order issued by Department of Interior recognizing Quechan Tribe's beneficial ownership of disputed boundary lands of Fort Yuma Reservation,

STATE HOUSE NEWS SERVICE

ROUNDUP - NOV. 5, 1998

STATE HOUSE NEWS SERVICE

STATE HOUSE, BOSTON, NOVEMBER 5, 1998.....Stealing a slogan from his now-vanquished opponent's tattered playbook, acting Gov. Paul Cellucci vowed Thursday to bring "new ideas" and "new energy" to his first full term in the Corner Office.

For the past six weeks, Democratic gubernatorial candidate Scott Harshbarger charged that Cellucci didn't have any new plans for the office. But voters narrowly sided with Cellucci's call to retain "steady, proven leadership" over Harshbarger's demands for a wholesale change at the helm of state government.

Months of primary and general-election campaigning crammed into a nail-biting finish as Cellucci and Harshbarger tried to reel in every vote they could find on election night. At 8 pm, the polls closed and the pair appeared tied. Harshbarger supporters confidently predicted late-voting union workers would swing the election in his favor. But by 9 pm, the votes were falling in Cellucci's favo and the acting governor from Hudson had won a four-year lease on the office he inherited from his predecessor William Weld.

Cellucci began laying the groundwork for his victory just days after Weld departedOn July 30, 1997, Cellucci filed a bill cutting the state income tax rate to 5 percent from 5.95 percent. The next day, he called for better relationships with unions. And on August 5 and 6, Cellucci urged managed-care reforms and the establishment of school report cards.

Taxes, health care and education played major roles in the gubernatorial campaign, as did unions. Despite support from the Massachusetts AFL-CIO, Harshbarger was unable to prevent several police, fire and transit unions from breaking away and supporting Cellucci. And with a victory margir of just 65,000 votes, those union endorsements may have made the difference.

Throughout the election, Harshbarger promised voters "we can do better." But Cellucci urged voters to look in their wallets and reflect on whether life is better now than in 1990. The best course, he argued, was to stay the course laid out by Weld. Now, facing his first term without the flamboyant Weld, Cellucci must make his own mark, using his formula of fiscal conservatism and social liberalism.

Wednesday, Cellucci indicated that he'll try to take that formula to national party leaders, who are smarting after Republicans lost five seats in the US House and failed to gain any in the Senate. Cellucci said he'll bring his message to a Nov. 18 governor's conference in New Orleans.

"I really do think the Republican Party at the national level should really be looking to governors fo some leadership here," he said. "I think they're going to have to do some soul-searching down in Washington, particularly with our Congressional leadership."

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ROUNDUP.....SHNS.....2.....NOV. 5, 1998

Much of Cellucci's disappointment stems from the crushing defeats suffered in Massachusetts by Republicans at the hands of their Democratic opponents. Aside from the governor/lt. governor slots, Democrats now own every other Constitutional office.

Businessman Robert Maginn lost the race for treasurer to former legislator Shannon O'Brien. Middlesex DA Thomas Reilly hammered former anti-drug czar Brad Bailey in the AG's race. Former state consumer affairs director Michael Duffy was clobbered by incumbent Auditor Joseph DeNucci, and incumbent Secretary of State William Galvin squashed former public safety official Dale Jenkins.

The Bay State's congressional delegation also remains entirely Democratic, as seven House members fought back modest challenges from Republicans.

The new state Legislature retains a similar makeup as the last one. The breakdown in the House come January will be 131 Democrats, 28 Republicans and one Independent. In the 40-member Senate, there will continue to be only seven Republicans.

It will be up to Cellucci and Lt. Gov.-elect Jane Swift to set the Republican agenda in Massachusetts for the next four years. Thursday, he announced that a handful of campaign and administration workers would lead discussions with private-sector experts in education, health care, economics and quality-of-life issues. The transition team will also review personnel appointments.

One of the topics of discussion will likely focus on maintaining the state's overflowing coffers - las
month's revenues totaled $1.01 billion, up 7.3 percent from a year ago, and Cellucci has promised
to lower the income tax rate to 5 percent from 5.95 percent. This year's $1 billion worth of tax cuts
left the income tax rate untouched.

But with the announcement Wednesday that Department of Revenue Commissioner Mitchell
Adams is leaving for a job at Cambridge technology firm, Cellucci will be in need of experienced tax
policy advisors.

On Wednesday, a US District Court judge struck down the state's "Burma Law" as
unconstitutional. Judge Joseph Tauro said the law, which prohibited companies doing business in
Burma from doing business with the state, infringed on the federal government's reserved powers to
set foreign policy. Massachusetts passed the law in June 1996 to punish the Burmese government
for human rights abuses.

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STATE HOUSE NEWS SERVICE

WEEKLY ROUNDUP - (WEEK OF JUNE 21, 1999)

State House News Service

June 24, 1999
www.statehousenews.com

STATE HOUSE, BOSTON... In a non-election year, with the economy humming along, and with most of the two-year session still in front of them, lawmakers were in no rush to make laws this week. At almost every turn, legislative committees shied away from taking bold action on myriad controversial issues, voting instead to give themselves more time to work on major bills.

More than 6,000 bills have been filed for consideration this session. Of those, only 24 have made it onto the lawbooks in nearly six months and most of those bills were local in nature. With the state's most pressing matters being settled privately by legislative leadership in the state budget conference committee, committee chairmen had a singular motto this week: let's study things.

Wednesday's Joint Rule 10 deadline, which requires committees to make recommendations on bills before they, put the heat on State House schedulers. Legislators on Tuesday filled nearly every available hearing room, rushing to make their choices. In most cases, the choice was study.

Lawmakers did their best to explain that they really do intend to study the issues further, but the Beacon Hill diehards who have witnessed session after session know that sending a matter to be studied further is like reading its last rites. Some bills emerge from study, but most never do.

The list of topics sent to study is much longer, but here's a few: casino gambling, expansion of the state Lottery, management of Cape Cod's threatened water supply, a single payer health care system, abortion clinic buffer zones, hundreds of tax policy initiatives, charter schools, bilingual education, construction reform, a partial birth abortion ban and the proposed ban on gay marriages.

The lack of movement on major bills proved a couple of things. It showed why the Legislature in Massachusetts is known for meeting virtually year-round while lawmakers in other states get their business done much more quickly. Secondly, it showed that legislators, perhaps wisely in some cases, are moving cautiously on volatile bills whose consequences are presently unknown.

There's talk of a legislative push this summer on a sex offender registry bill, the minimum wage hike and a $6 billion transportation bond bill, but those items will compete for attention with the main event - the proposed $20.8 billion fiscal 2000 budget. That budget won't be done on time, by July 1, so Lt. Gov. Jane Swift on Tuesday filed a $1.47 billion budget to get state government through the month of July. That budget is expected to win quick approval, taking pressure off of conferees to act too hastily. With a fiscal '99 surplus of between $200 million and $300 million taking shape, legislative leaders don't seem too worried about missing their budget deadline.

The state budget was probably the last thing on the mind of House Speaker Thomas Finneran this week. Finneran, Gov. Paul Cellucci and academic and business leaders toured Ireland, Northern Ireland and France, acting as tourists, invited guests and business brokers. Skeptics

say the trade missions are just power-based perks; Cellucci says 25 administration-led missions since 1991 have created $1 billion in export sales and projected export revenue for Massachusetts firms.

While executive sessions dominated this week's schedule, news broke out all over the place:

* Citizens Bank got the work week started Monday morning by announcing it is acquiring US Trust. The deal creates a number two bank behind the anticipated Fleet-BankBoston giant, and it further consolidates power in the regional banking industry. Consumers advocates are cautiously optimistic that these mega-banks will be fair lenders and good neighbors, but the jury's out. A July 7 hearing on the Fleet-BankBoston deal will feature more public discourse.

* A new policy brief, "Armed and Abusive," concluded that those banned by restraining orders from owning or purchasing guns can easily buy guns in other states because Massachusetts is not yet wired into the National Instant Check System. Senate Post Audit and Oversight Chair Cheryl Jacques (D-Needham) called on the Cellucci administration to make sure information from Massachusetts flows into the system, which is designed to prevent domestic violence.

* With all of its Senate members reserving their rights, the Health Care Committee Wednesday approved a managed care reform bill. The full Senate has already passed its reform plans and it appears that the two branches are further apart on the issue than they were last year. As the 1997- 98 session ended, a conference committee could not reach an accord on how to balance the interests of patients, doctors and insurers without over-regulating an HMO industry built on "managed" care. If the House passes a reform bill again, as expected, the issue will head back to conference this year, giving negotiators another try at settling their many differences.

* House Republicans mounted an effort to give authorities the right to take cigarettes away from minors caught smoking. During debate Wednesday, they said the state sends a mixed messages to kids - you can't buy cigarettes but if you've got 'em, smoke 'em. Their plan died when it was ruled beyond the scope of a bill banning smoking at flea markets. House Democrats advanced the bill, but refused to consider the Republican amendment.

* With Cellucci on another trip, Lt. Gov. Swift served as acting governor this week. She got lots of face time, holding several high-profile events. On Wednesday, Swift unveiled a new piece of legislation. The bill is designed to protect consumers in the information age. It will put checks and balances on retailers and other entities that gather and sell information about consumers, most often without their knowledge.

* Attorney General Thomas Reilly won a battle in a new war pitting the government against teens who buy alcohol over the Internet. Shipping companies that delivered $72 worth of wine and $45 worth of beer to minors who ordered it over the Internet signed an "assurance of discontinuance," avoiding a lawsuit from the state. The evidence was gathered through an Alcoholic Beverages Control Commission sting and presented to Airborne Express and UPS, which agreed to cease all alcohol deliveries and pay $2,500 to the consumer aid fund. The companies also agreed to educate their employees about the state's no-alcohol delivery and transportation policy and to dispose of or return alcohol packages to the shipper. State law prohibits the delivery of alcoholic beverages except by licensed transporters. Both cases involved on-line companies that did not ask for the ages of those purchasing alcohol.

* The New England Patriots reportedly confirmed this week that their vaunted new stadium in Foxborough won't be ready until 2002. After the state passed a $70 million fiscal aid plan to help with the project, the team said the stadium would be done by 2001. But zoning matters, construction timetables, and the relocation of a mobile home park have set the schedule back.

* A KPMG Peat Marwick audit of the state Lottery was expanded this week to cover regional offices. In the wake of the discovery of $24,000 missing from the agency's Boston office, the state Lottery Commission voted to broaden the audit, doubling its cost to $300,000.

* Selective purchasing laws designed to foster socially or environmentally responsible buying and investing by government entities took a hit this week. A ruling in federal Appeals Court declared unconstitutional a 1996 law prohibiting the state from buying from companies that do business in Burma. The law protests the thwarting of pro-democracy forces in Burma. The ruling puts a chill on the ability of state government policies to influence world politics by affirming that regulating foreign commerce is a responsibility of the federal government.

* The crime rate dropped again and no one seemed too surprised. Lt. Gov. Swift announced Monday that the crime rate has dropped every year since 1991, falling by 34 percent over that period. The 4.8 percent annual drop means the state crime rate is "at its lowest level in decades." In general, the crime rate is at about the same level that it was at in the 1960s.

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STATE HOUSE NEWS SERVICE

ADVANCES (WEEK OF NOV. 20, 2000)

STATE HOUSE, BOSTON, NOV. 17, 2000……The 'when' and 'if' questions Gov. Paul Cellucci has sidestepped for the past year will intensify this week if Texas Gov. George W. Bush moves closer to winning the presidential election of two weeks ago. This state's Republican governor has a political and personal bond with the Bush family and there is a widespread belief that if Cellucci wants to leave the State House for an assignment in a possible Bush administration, he would be given that option. All Cellucci himself has ventured is the old saw that: "If the president-elect calls, certainly you have to listen." In addition to his close ties to Bush, Cellucci has also remained close throughout the years with former state Rep. Andrew Card of Holbrook, who is now almost universally mentioned as the likely White House chief of staff if Bush is determined the eventual winner over Democratic Vice President Al Gore. A Bush win and Card appointment would not only increase the odds for Cellucci's own premature departure from state government but also that of Big Dig chief Andrew Natsios. Cellucci, Card and Natsios served together in the Massachusetts House in the 1970s and the trio of young men campaigned for the elder George Bush long before the effort brought him his party's nomination. If George W. Bush is elected and Cellucci steps down after Jan. 20, Lt. Gov. Jane Swift would get almost two years of governing experience under her belt before the 2002 gubernatorial election.

CELLUCCI'S TRAVELS: Lt. Gov. Swift was at the helm of the ship of state for a few days last week but Cellucci will be back at his desk on Monday. On Friday, he leaves town again, this time to lead a long-planned trade mission to Japan and Australia. Ironically, Cellucci spent the latter part of last week in Florida. While thousands of political operatives were also in the Sunshine State, the Massachusetts governor was not there in his capacity as a loyal George W. Bush soldier overseeing happenings in the chaotic aftermath of the unresolved presidential election. Cellucci and the nation's other GOP governors were conveniently in Tampa for a meeting of the Republican Governor's Conference. The governors undoubtedly joined journalists, political activists, lawyers, constitutional scholars and ordinary citizens in the continuing national debate over how to proceed, or not to proceed, with the selection of a president. The controversy will certainly make for interesting Thanksgiving Day dinner banter.

JAPAN AND AUSTRALIA: Gov. Paul Cellucci heads to the Land of the Rising Sun and The Land Down Under this week for a 10-day trade mission. He leaves for Japan Friday, and has five days of press conferences, official receptions and business meetings scheduled. On Thursday, Nov. 29, Cellucci heads to Australia for another five days of receptions, meetings and tours. Japan is the state's second-largest export market, while Australia is 17th. Cellucci aides say 30 Bay State companies have offices in Japan, while 40 have a presence in Australia. One of the biggest focuses of Cellucci's Japan swing will be cranberries, of which there is a glut in the United States. In recent years, the Japanese have taken strongly to blueberries, and Bay State officials hope to tap a new market for cranberries. To help sell the Japanese on the berries, representatives from Decas Cranberry Products, Ocean Spray and the Cape Cod Cranberry Growers' Association are going on the trip. State agriculture officials fear that 25 percent of growers here may have to shut down if the market doesn't improve. Pharmaceutical and high-tech company representatives are also going on the trip. Cellucci plans press conferences in Japan with executives from Sapient and Basis Technology Corp. Australia also has a booming high-tech market, and Cellucci's visit there will feature meetings with business and government leaders, but no press conferences. Cellucci will visit Tokyo, Hokkaido, Sydney and Melbourne before coming home. Former Govs. William Weld and Michael Dukakis also visited Japan. Cellucci's trip is the latest in a series that's placed him in Ireland, Israel and China. Lt. Gov. Swift will be in charge while Cellucci has gone. She has already been to Switzerland and

Germany.

MORE JAPAN AND AUSTRALIA: Swift's planned trip to South America this fall was suspended indefinitely following newspaper reports raising questions about the requested use of an armored car for Swift. Since 1991, Weld, Cellucci and Swift have taken more than 25 international trade missions. Cellucci argues the trips are needed to boost the state's profile and help it compete in the global marketplace. Critics say Cellucci seems more interested in boosting his own profile and uninterested in what's happening here at home. Cellucci aides said a cost for the trip was unavailable. The trip comes at an inopportune time for MassTrade, the state's international trade agency. The office's director position is vacant following the departure of Kathleen Molony; Elizabeth Ames, the state's director of economic development, is essentially running the department, and will be on the trip. Several MassTrade positions are also empty. An indication of how things are going: MassTrade's web site says that workers are "currently in the process of planning the 2000 trade mission schedule."

WHO'S GOING WITH THE GOVERNOR: Slated to accompany the governor to Japan and Australia are: Steve Cohen and Noriko Takezaki of Basis Technology, Jeffrey LeFleur of the Cape Cod Cranberry Growers' Association and Trevor Gray of Corechange (Australia). Also: John Decas and Jeffrey Carlson of Decas Cranberry Products, David Lakness of Eastman Software, Mark Howland of Environmental Research Corps and Jonathan Kutchins of the Exeter Group. Also: John Meldon of JJ Best & Co., John Laronda Jr of Laronda Limited, and Graham West, Daniel Arkema and Akira Nakai of Ocean Spray. Also: William Smith of Pfizer, Bruce Parker of Sapient and Cynthia Fisher of Viacell. Staff aides include: Tobias Stapleton of the International Trade Assistance Center, John Trogolo of Massport and Jason Kauppi of the governor's press office.

A&F BUDGET: Administration personnel are trying not to be too distracted by the potential of any shakeup back in Boston once a new president takes office Jan. 20. They have more immediate concerns. A&F budget analysts are working on the fiscal 2002 state budget proposal Cellucci will file in late January. A&F Secretary Stephen Crosby has already indicated the plan will weigh in at more than $22.5 billion, representing a spending hike of at least 5.4 percent. The increased dollars equate roughly to the eventual $1.2 billion revenue loss that will result in three years when the voter-approved income tax cut is fully phased in. Crosby has said the biggest increases will be in Medicaid, where increases are being driven by health care inflation, and education accounts, which are a top bipartisan policy and political priority. A&F also has another job with a January deadline. That's when the governor must decide what legislators serving for the next two years will be paid.

LEGISLATIVE PAY RAISE: State legislators in January will likely see a 5 or 6 percent increase in their paychecks, but officials in the Executive Office of Administration and Finance still haven't decided just how to crunch the numbers. In 1998, after legislative leaders spent two years prodding a proposed constitutional amendment onto the ballot, the electorate approved a change that took House and Senate members out of the business of setting their own salaries. The constitutional amendment was actually crafted following public outrage over action in late 1994 when the House and Senate hiked their base pay by 55 percent, from $30,000 to $46,410. That outcry continued into 1996, when Citizens for Limited Taxation and other groups launched an unsuccessful bid to rescind the raises and control other legislative perks. In 1996, newly installed Senate President Thomas Birmingham and House Speaker Thomas Finneran proposed the constitutional amendment, arguing that because lawmakers are required to set their own pay, any raise is always controversial.

MORE LEGISLATIVE PAY RAISE: The amendment that cleared two separate sittings of the Legislature and was then ratified by the voters in 1998, states that beginning the first Wednesday in January 2001, legislators' "base compensation shall be increased or decreased at the same rate as increases or decreases in the median household income for the Commonwealth for the preceding two-year period, as ascertained by the governor." Now the governor, by way of the A&F analysts, is trying to determine how to compute the coming raise.

"We want to make sure to follow the letter of the law as well as its spirit," said Cort Boulanger, A&F's director of communications, noting that the voter-approved change is "vague." The words "as ascertained by the governor" give the governor some latitude in determining the new salaries, Boulanger said. Should the median household income of a family of four be used, or that of the general median income of all households? Should A&F use pre-inflation or post-inflation numbers in making its calculation? When will numbers be available for year 2000? The new salaries will most likely reflect an increase of 5 or 6 percent, Boulanger said, although he added that no decisions have been made. Based on a $46,410 base, that would translate into somewhere between $2,300 and $2,800 in added annual pay for the next two years. Regardless of how reasonable the hikes might appear, and the fact that a future recession could even produce a drop in the median family income and therefore their salaries, CLT's Barbara Anderson has not tempered her opposition to enshrining the pay issue into the Constitution. She argued in 1996 and believes today that legislative salaries should not be beyond the reach of voters. It's now part of the Constitution, she said, and the Legislature will never allow it to be changed back again. As to A&F's uncertainty over the methodology that will be used, Anderson isn't surprised that it wasn't spelled out in the amendment. "This was drafted by the same Legislature that wrote the 1998 gun control law," Anderson said, recalling that statute, which initially required trigger locks even on antique muskets displayed at the State House. The difference, she said, is that because they were changing the Constitution, they knew they wouldn't have an opportunity to later change it to accommodate any mistakes. "And there's still nothing to prevent them from raising their pay indirectly," Anderson said, as occurred last year when the House and Senate upped the money in their expense accounts. As to where the governor will ultimately set legislative pay come January, Anderson had only this advice: "I hope he considers their worth based on last year's actions or lack thereof." Or perhaps, she speculated, "He could try to figure out what had been the will of the people when they voted just like they're trying to do in Florida."

MCAS: The second wave of MCAS score disclosures comes this week. Department of Education officials are planning a Tuesday event to release individual school and district results. Local school officials received the results last Wednesday, but were instructed by DOE not to release them to the media or public. Last year, a similar embargo order was virtually leak-proof. Several newspapers went to court last week, arguing that Secretary of State William Galvin had ruled the test results were public records subject to immediate disclosure, but the lawsuits failed. DOE contends that the extra few days give local officials time to check for score reporting discrepancies. Average statewide scores for the third annual round of tests, released last Monday, showed incremental improvement at all grade levels on tests in math and English. Starting with the class of 2003, students will have to pass both tests to graduate. Board of Education Chairman James Peyser has argued that the school and district scores are even more important for policymakers. The school and district results allow lawmakers and education officials to pinpoint particularly troubled areas and target resources more efficiently, Peyser says.

MORE MCAS: DOE does not provide rankings of schools and districts, but in general, the affluent suburban areas score the best and the poor urban areas do the worst. But raw scores are not the only variable that sets state intervention in motion. Improvement, or the lack of it, is what officials are looking for. Under DOE regulations, schools and districts with significant failure rates, which fail to improve or show evidence of backsliding, are subject to state review and, in the worst-case scenario, state takeover. Middle schools in Lawrence and Holyoke have already been declared "under-performing" and are now working with fact-finding teams to develop improvement plans. Details of Tuesday's event had not been released Friday, but the governor's office indicated that it's likely to take place at a Boston school.

BURMA LAW: The US Supreme Court struck down the Bay State's sanctions against Burma earlier this year, but human rights activists have rewritten the law in what they hope is a constitutional manner. The original Burma law sought to help topple the Burmese military junta and prevent human rights abuses by banning state contracts with Massachusetts companies doing business with the regime. The nation's high court invalidated the state law because it

interfered with sanctions already issued by the US Congress, created an obstacle to the president's power to control economic sanctions, and usurped the president's authority to speak for the United States. The Free Burma Coalition has been working with a legal team from Georgetown University to re-write the law, and will announce the details at a press conference Monday. Rep. Byron Rushing (D-Boston), the lead proponent of the original law, says the new legislation he'll introduce for next session relies on a four-prong model. The legislation will include disclosure provisions, in which companies must tell the state whether they do business in Burma before being allowed to bid on state contracts. Rushing said other provisions contemplate divestiture by public investors "to avoid the moral taint of ownership," pension fund shareholder resolutions on "corporate accountability," and petitioning Congress to authorize "selective purchasing." (Monday, 7 pm, 806 Massachusetts Ave., Cambridge)

K-12/HIGHER ED: College and university officials brainstorm ways they can help support K-12 education at a conference Tuesday. Hosted by the Board of Higher Education and the Association of Independent Colleges and Universities of Massachusetts, Lt. Gov. Jane Swift and Tufts University President John DiBiaggio deliver opening remarks beginning at 10 am. Swift has called on the higher education system to provide volunteers to help high school students pass the MCAS tests. Tufts is nationally recognized as a leader in community service learning. At 10:45 am, Education Commissioner David Driscoll introduces a panel discussion on funding, recruitment and coordination of volunteers, with moderator Carole Cowan, president of Middlesex Community College. Panelists include Barbara Canyes, co-director of the Massachusetts Campus Compact; Worcester Public Schools Superintendent James Caradonio; Andre John of Baker House; Eva Kampits, director of the office of school/college relations for New England Association of Schools and Colleges; and Joan Rasool, associate dean of academic affairs at Westfield State College. Gov. Cellucci is scheduled to speak at 12:15 pm. After lunch, the group is slated to break up into 10 regional working groups and develop recommendation for colleges, schools, the Board of Education and the Board of Higher Education. (Tuesday, 10 am-3 pm, College of the Holy Cross, Hogan Center, Worcester)

2001/2002 BILLS: Incumbent legislators and the freshmen who will be seated in January are busy writing bills they will file Dec. 6 for consideration during the 2001/2002 legislative sitting. Thousands will be filed with the House and Senate clerks with most being identical or amended versions of bills that have failed to become law in past years. Many others are filed in reaction to the daily headlines, or to municipal changes that require legislative approval. Bill sponsors will be prowling the State House halls looking for cosponsors to sign onto their bills before the filing deadlines. Executive branch agency managers have already filed their legislative packages.

RETIREES HEALTH CARE COSTS: The Public Service Committee has finished work on a bill to help the town of Bedford. The legislation creates a special health care trust fund to protect town retirees against escalating health care costs. Arlington already has permission to establish such a fund and a statewide plan may be in the cards for the next legislative session. The Bedford bill would allow the town to put money aside in a segregated trust fund and invest it for a period of years. It would then be available to help public retirees with any medical costs for which they are not covered. Next stop for the Bedford bill is the House Steering and Policy Committee.

GOVERNOR'S COUNCIL: Three administrative judges on the Industrial Accidents Board will win new six-year terms if they are confirmed by members of the Governor's Council, who interview them Wednesday. On tap: Douglas McDonald of Dorchester at 11:15 am, Bridget Murphy of Shrewsbury at 12:15 pm, and Dianne L. Solomon of Wayland at 12:45. During their noontime formal session, councilors are expected to confirm the appointments of three other Cellucci nominees who were interviewed last week. One is Dorothy M. Gibson of West Roxbury, a circuit judge on the Probate and Family Court who has been tapped for a seat on the Middlesex County Probate Court. The other two are candidates for administrative judgeships on the Industrial Accident Board where the claims of injured workers are heard and decided. Emogene Johnson would be reappointed to a six-year term. Lynn Coffin Brendemuehle of Natick would be appointed to a six-year term as a newcomer to the board. Since July of 1997, she has been an

attorney advisor in the Boston office of the Social Security Administration. Prior to that, Bredemuehl spent 11 years as an associate in Iannella and Mummolo, a Boston law firm specializing in personal injury litigation. One of the principals, Christopher Iannella (D-oston) is one of the eight governor's councilors who must confirm all judicial and quasi-judicial appointments.

HIV, MEDICAL SERVICES AND CRIMINAL OFFENDERS: Public health officials will discusss the latest HIV data and clean needle access initiatives on Tuesday morning. There are four clean needle exchange programs in Massachusetts, with authorization for six more. Jean Flatley McGuire Ph.D, director of the Department of Public Health's AIDS Bureau, will report the observations. Also on the Public Health Council's agenda Tuesday: final regulations concerning the new coordinated emergency medical services system and a request for approval of emergency regulations regarding criminal offender record checks. The CORI checks, as proposed, would apply to anyone who has a public health contract or who is on DPH staff. Background checks would be applied prospectively and the regulations allow public health officials to deny employment or contracts for specific periods, depending on the seriousness of criminal convictions. Background checks are already conducted on some public health workers, including hospital employees and nurses. (Tuesday, 10 am, 250 Washington St., Boston)

TATTOOS: There is no law affirming the right to administer tattoos in Massachusetts, and yet the Department of Public Health this week is forging ahead with regulations laying out the rules under which tattoo parlor owners must operate. Why? A judge has upheld the arguments of a tattoo supporter who claimed it's unconstitutional to prohibit tattoos because such a ban violates First Amendment rights. State public health officials feel the judge's ruling, the increased popularity of tattoos, and more support for legalization bills on Beacon Hill underscore the need to get regulations on the books to govern conduct in an industry that is regulated in other states. Officials will put emergency regulations before the Public Health Council on Tuesday, unless they can secure a 90-day stay in court on Monday. The stay would give them more time to work on regulations. (Tuesday, 10 am, 250 Washington St., Boston)

DRIVER PROFILING: Sponsors of the state's new driver profiling law are hoping to get the House this week to admit a bill making a pair of key changes to the law. The first change gives state officials an extra three months to implement the plan for collecting data on the race and gender of drivers stopped by police. The bill also contains a measure prohibiting the RMV from suspending a drivers' license for getting too many written warnings. The profiling law gives RMV officials the ability to track written warnings, something they've never done due to the paperwork involved. Sponsors are pushing to get the bill to Cellucci's desk sometime next week, so that the Executive Branch agencies implementing the profiling law will know as early as possible if they still have to meet the original Jan. 1 deadlines.

ZAKIM BRIDGE: The public squabble over the naming of the cable-stayed bridge over the Charles River after Lenny Zakim is nothing new. Ever since Cellucci proposed naming the bridge after the former Anti-Defamation League leader, Charlestown residents have been complaining that they've been left out of the process. In July, a small group of "Townies" told the Transportation Committee that they thought the bridge's name should memorialize the battle of Bunker Hill, fought where the structure's shadow now falls. The governor said that he thought the name of "Leonard P. Zakim Freedom Bridge" did that. The committee chairman said they they would try to figure out a compromise, but they never did. They now expect to approve some version of the plan after Thanksgiving. Committees usually have to act on bills within 10 days of getting them, but Cellucci's bill (H 5303) has languished since that July 25 hearing.

PREDATORY LENDING REGULATIONS: State banking officials say they're about a month away from publishing new regulations cracking down on predatory lending practices. Officials fear that many elderly and low-income homeowners are being stripped of their equity by unscrupulous lenders who charge exorbitant fees, interest rates and mortgage-related points. Bankers say they support the concept of restrictions, but say borrowers with bad credit might actually lose out on options if reputable lenders are also forced to alter their ways because of

the crackdown. Regulators are now poring over the dozens of written comments submitted before the public comment period closed in October. "I don't think we'll be making massive changes," said Steven Antonakes, senior deputy state banking commissioner. "There's not going to be wholesale changes."

HOLIDAY SAFETY: Public safety officials begin their weeklong awareness campaign Monday morning, with an event designed to promote seat belt use and discourage drunk driving during the holiday week. The Governor's Highway Safety Bureau, State Police and local law enforcers will discuss their education and enforcement plans. (Monday, 11 am, State Transportation Building, Conference Room 1, 10 Park Plaza, Boston)

SALMON: State wildlife officials hold a public hearing Monday on amendments to salmon fishing regulations. The US Fish and Wildlife Service last week named the wild Atlantic Salmon to the endangered species list, but that doesn't affect Massachusetts because native salmon were basically wiped out here in the 1800s. State officials have been restocking the Connecticut and Merrimack rivers over the past few years, and those salmon cannot be kept if they are caught. But they are not considered "wild" salmon and therefore not subject to the new federal regulations. There are landlocked salmon living in the Quabbin and Wauchusett reservoirs; they can be kept because they're not Atlantic salmon. Officials run a series of fish hatcheries around the state; they breed salmon in Palmer, and turn the "fry" loose in the Connecticut and Merrimack Rivers. In the wild, once adult parents are done laying and fertilizing their eggs they usually stop eating and die. In Palmer, officials trick them into eating, then turn them loose into 17 lakes and ponds around the state. The changes up for a hearing Monday allow people to catch and keep those salmon. They aren't re-bred because their subsequent batches of hatches are weaker. The changes don't result from any particular problem; someone just noticed that it's technically illegal for people to possess those fish. In the Boston area, those fish are put in Jamaica Pond, Lake Cochichuate in Natick and the Hopkinton Reservoir. (Monday, 3 pm, 1 Rabbit Hill Rd, Westborough)

FISH AND WILDLIFE: The state fisheries and wildlife board meets Monday at 1 pm to hear progress reports from Division of Fisheries and Wildlife managers. This will be the first meeting for new board member Frederic Winthrop, an Ipswich resident who is a director of the Beverly Trustees of Reservations and a general partner of Arbella Land Co. in Ipswich. Cellucci tapped Winthrop for the board Nov. 6. Cellucci's reappointment of three other board members has drawn the ire of some animal rights activists, who say the board is weighted in favor of hunters. (Monday, 1 pm, 1 Rabbit Hill Rd, Westborough)

ABCC: Alcoholic beverage regulators on Tuesday will hear cases involving allegations that a Halifax restaurant sold alcohol to intoxicated persons (10:30 am), a Chicopee club allowed gambling (1:30 pm), an Everett restaurant improperly sold alcoholic beverages, and that a Revere package store improperly acted as a wholesaler. (Tuesday, hearings start at 10:30 am, 239 Causeway St., Boston)

CONVENTION CENTER: The Massachusetts Convention Center Authority's Development Committee meets Tuesday to consider a general project update. (Tuesday, 8 am, Hynes Convention Center, Room 100)

MANAGED CARE: The state Managed Care Oversight Board meets Monday at 1:30 pm in Room 1109 of the McCormack Building.

WOMEN: The State Commission on the Status of Women's executive committee meets Monday at noon on the sixth floor at 19 Staniford St. The commission's education/public relations committee meets at 11 am Monday in the same place.

DANGEROUS TOYS: MASSPIRG releases its annual pre-holiday report on dangerous toys Tuesday. The toys on the dangerous list post choking, strangulation, or chemical hazards. The report is based on compliance with the 1994 federal Child Safety Protection Act. MASSPIRG

says that over the past 14 years, its reports have led to 68 recalls and enforcement actions. (Tuesday, 10 am, Cutie Patootie Day Care Center, 1135 Dorchester Ave., Boston)

TALK: The only state-level news that's been able to break through the never-ending presidential election is the release of the third annual round of MCAS scores. "News Conference" (Sunday, 11 am, Ch. 4) looks at the progress of education reform with Senate President Thomas Birmingham; Dr. Anthony Baxter of the University of Massachusetts, a member of the state's bias review committee charged with making sure MCAS is fair; and Boston Globe education editor Marilyn Garateix. In a later segment, the topic is the implementation and effect of the voter-approved income tax cut. But back to presidential politics. "Five on Five" (Sunday, 11:30 am, Ch. 5) attempts to make sense out of the rapid daily developments out of the Sunshine State. And "Schmoozefest," in addition to its regular show (Saturday, 10 am-1 pm, WRKO 680-AM), is doing a special Sunday show from 1-4 pm - just in case there's a chief executive-elect by then.

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