

June 20, 2000

## SUPREME COURT OVERTURNS STATE SANCTIONS LAW (*Crosby v. National Foreign Trade Council*)

The U.S. Supreme Court yesterday handed down a decision that should halt the growth of state and local sanctions placed on businesses that operate in unpopular foreign countries.

With only minor exceptions, the Massachusetts Burma Law, as the challenged statute was known, prohibited Massachusetts from procuring goods or services from companies doing business in or with the country of Burma (now known as Myanmar). The Court unanimously held that the law is preempted by a federal law that erects a national policy toward Burma.

The Court's decision in *Crosby v. National Foreign Trade Council* was a victory for the Washington Legal Foundation (WLF), which had filed a brief at every stage of the litigation—from the district court to the Supreme Court. Last year the U.S. Court of Appeals for the First Circuit in Boston had ruled in a thoroughly reasoned and unanimous opinion that the law unconstitutionally “interferes with the foreign affairs power of the federal government,” “violates the Foreign Commerce Clause,” and “is preempted by federal sanctions against Burma.” Earlier, in November 1998, the U.S. District Court for the District of Massachusetts also decided that the law is unconstitutional.

In affirming the decision of the U.S. Court of Appeals for the First Circuit, the Court cited three reasons for concluding that the state law was preempted. First, the Massachusetts law undermines the President's flexibility to control the range, timing, and existence of economic sanctions against Burma. Second, the state law expands the range of sanctions beyond what Congress intended by including foreign companies and prior contracts, rather than being limited to domestic companies and new business. And, as the Court pointed out, “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.” Third, the Court found that the Massachusetts law prevents the President from effectively devising a “comprehensive, multilateral strategy” toward Burma. Not only did the state law prompt America's allies and trading partners to file

formal protests, but it provoked Japan and the European Union into filing a formal complaint with the World Trade Organization.

Because the Court rested its holding on preemption, it expressly declined to speak to other issues presented in the case, including the presumption against preemption, the states' power over foreign affairs, or the Foreign Commerce Clause.

In its brief WLF argued for three reasons that the Massachusetts law unconstitutionally encroaches on the federal government's predominant authority over foreign affairs. First, the Constitution delegates predominant authority over foreign affairs to the federal government and denies such authority to state and local governments. Second, although states may exercise their reserved powers in a manner that happens to create an effect abroad, they may not conduct foreign affairs; the Massachusetts Burma Law qualifies as an instrument of foreign affairs. Third, the Court can and should exercise judicial review to strike down this unlawful encroachment on the federal government's authority over the nation's foreign affairs.

“The Constitution gives predominant authority over foreign affairs to the federal government—not to the states,” said WLF's Senior Counsel for Litigation Affairs, Shawn Gunnarson. “States encroach on that authority when they impose trade sanctions on foreign countries. The Supreme Court agreed with the two courts that have already evaluated the Massachusetts Burma Law, declaring that the law is unconstitutional.”

The Washington Legal Foundation is a nonprofit public interest law and policy center with supporters nationwide. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and individual rights.

\* \* \*

For further information, contact WLF Senior Counsel for Litigation Affairs Shawn Gunnarson at (202) 588-0302.