CITY OF SOMERVILLE, MASSACHUSETTS
LAW DEPARTMENT

April 7, 2026

Ben Ewen-Campen
Ward Three City Councilor

Re: Request for Legal Opinion re: S4P Divestment Ordinance

Dear Councilor Ewen-Campen:

We write in response to your email dated March 23, 2026, in connection with Somerville For Palestine's ("S4P") proposed divestment ordinance ("Proposed Ordinance"). On November 5, 2024, the Law Department issued an opinion addressing whether the City may lawfully enact an ordinance prohibiting the City from entering new contracts with organizations doing business with Israel and/or based on their political affiliation with Israel. ("2024 Opinion"). We identified and evaluated potential legal risks under 1) the federal foreign affairs power, 2) the First Amendment and 3) state procurement laws.

We have reviewed the documents you provided to us, including the Proposed Ordinance and a legal memorandum prepared by S4P written in response to the 2024 Opinion.

Our recent review has not materially changed the ultimate conclusion in the 2024 Opinion and has identified additional risks. For the reasons set forth below and in the 2024 Opinion, we conclude the Proposed Ordinance is likely invalid.

The Foreign Affairs Powers

The memorandum provided by S4P acknowledges local laws must yield to federal laws: (1) when Congress has expressly preempted state and local law; (2) when Congress intends federal law to occupy the field; or (3) when state law conflicts with a federal statute. S4P concludes that their proposed ordinance is not preempted by federal law because "there is no existing and conflicting federal law that concerns sanctions or boycotts of the State of Israel." S4P's assessment of existing federal laws is not conclusive as to whether Congress intends federal law to occupy the field, resulting in field preemption.[1] For example, Congressional activity in the

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[1] "A failure to provide for preemption expressly may reflect nothing 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." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 387-388 (2000).

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field suggests that local sanctions are federally preempted unless Congress enacts legislation explicitly authorizing local governments to impose additional local sanctions against certain countries. *See*, e.g., *Sudan Accountability and Divestment Act*,[2] *Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010*,[3] *Combatting BDS Act of 2023*.[4] *See also*, *Export Administration Act of 1979.*[5]

Courts have struck state laws that have more than "some incidental or indirect effect" on foreign relations or with "great potential for disruption or embarrassment."[6] The First Circuit itself has articulated a five factor test for determining whether a state statute's effect on foreign countries is more than "incidental or indirect." This test requires courts to consider: (1) the design and intent of the law; (2) the amount of purchasing power the law affected; (3) the possibility of other states following the example; (4) the protests lodged by other foreign countries; and (5) the differences between the state and federal approaches, thus raising the prospect of embarrassment for the country.[7] ("*Natsios*" decision). Arguably, an ordinance like the one proposed by S4P could adversely impact foreign relations. The *Crosby* and *Zschernig* cases suggest if such restraints against a foreign country are to be imposed, they should be imposed by the federal government.

The majority of law review articles reviewed by our office combined with the logical extrapolations from "*State and Local Economic Sanctions: Constitutional Issues*"[8] and sources reviewed and identified in the article, lead us to conclude that such an ordinance is more likely than not invalid under the federal foreign affairs power.[9]

See also Zschernig v. Miller, 389 U.S. 429, 441 (1968) "Where [State] laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. …If there are to be such restraints, they must be provided by the Federal Government. The [challenged] law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."

[2] P.L. 110-1174 codified as 50 U.S.C. § 1701.

[3] P.L. 111-195 § 202,codified as 22 U.S.C. § 8532.

[4] S.1637 118th Congress.

[5] P.L. 96-72, codified as 50 USC § 2407.

[6] *Zchernig*, *Odebrecht Const., Inc. v. Prasad*, 876 F.Supp. 2d 1305 (2012) cf. *Clark v. Allen*, 331 U.S. 503 (1947)

[7] *Yin v. Diaz*, 773 F.Supp 3d. 1344, summarizing factors in *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 53 (1st Cir. 1999).

[8] U.S. Library of Congress. Congressional Research Service. *State and Local Economic Sanctions: Constitutional Issues*. CRS Report RL33948. Washington, DC: Office of Congressional Information and Publishing, February 20, 2013.

[9] Contra, e.g., *Proactive Procurement: Using New York City's Procurement Rules to Foster Positive Human Services Policies and Serve Public Goals*, 9 N.Y. City L. Rev. 331 New York City Law Review (Summer 2006) Professor states that "[a]bsent a national foreign policy imperative, strong countervailing first amendment and local self-determination values argue in favor of allowing the divestment and debarment measures. Provided that the national government controls the final formulation and communication of external policy, an enhanced role for the people through their state and local governments would not diminish the national government's plenary position and would serve important democratic values. For although it is essential that the nation speak with one voice concerning external relations, in the final analysis, a foreign policy that is "gathered out of a multitude of tongues" is far more likely to reflect the national will."

Although the Law Department believes a good faith reasonable legal argument in support of S4P's foreign policy preemption argument can be made, our opinion remains that such an ordinance would likely be invalidated, if legally challenged.

<u>Federal Foreign Commerce Powers</u>

Article I, § 8 of the United States Constitution, known as the Commerce Clause, provides that "[t]he Congress shall have Power… to regulate Commerce with foreign Nations, and among the several States." It is well established that this affirmative grant may sometimes prohibit state regulatory activity, even absent preemptive federal legislation.[10] This is sometimes referred to as the "dormant Commerce Clause." Courts have recognized an exception to the dormant Commerce Clause permitting a state to discriminate against *interstate* commerce when acting as a market participant rather than as a market regulator. When acting as a market participant, the dormant Commerce Clause places no limitations on state activities.[11] However, 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.[12]

The Supreme Court has not resolved whether the market participant exception applies to *foreign* commerce stating "we have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause" but "scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."[13] Note however, that the 1st Circuit has expressed skepticism as to "whether the market participation exception applies at all (or without a much higher level of scrutiny) to the Foreign Commerce Clause."[14]

If the market-participant exception does not apply, courts will look to whether the law violates the Foreign Commerce Clause.[15] In the *Natsios* decision, the crucial inquiry under the Foreign Commerce Clause was whether the Massachusetts Burma Law was facially discriminatory. A statute that facially discriminates against interstate or foreign commerce will, in most cases, be found unconstitutional.[16] 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."[17] A law that discriminates on its face against foreign commerce survives 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."[18]

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[10] *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995).
[11] *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).
[12] *Id*. at 99.
[13] *Reeves, Inc. v. Stake*, 447 U.S. 429, 438, ft. 9 (1980), ref *Japan Line, Ltd., v. County of Los Angeles*, 441 U.S. 434 (1979).
[14] *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 65 (1999).
[15] *Id*. at 66.
[16] *Id.* at 67.
[17] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[18] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988).

It is our opinion that the proposed ordinance faces a moderate risk of invalidation based on the Foreign Commerce Clause.

First Amendment

With respect to First Amendment implications, at the time we released the 2024 Opinion, our research revealed the majority of reviewing courts viewed the act of doing business or not doing business as "expressive conduct" protected by the First Amendment. *See*, *Israel and the Boycott, Divestment, and Sanctions (BDS) Movement*, page 21 (attached). However, S4P's most recent letter points to additional court decisions that could impact the resolution of the issue. Additionally, it appears the proposed ordinance introduces language which potentially compels a vendor to submit a sworn statement to the City, which triggers a compelled speech issue that would need to be fully researched. Given our conclusion that the ordinance otherwise is likely invalid, further First Amendment research and analysis is inconsequential at this time.

As to the actual text of the recently provided draft ordinance, there appear to be practical and operational implications that we recommend be fully considered, including, but not limited to, whether the language captures your objective or is otherwise overly broad. As written, for example, the ordinance appears to require divestment from certain humanitarian organizations such as the International Committee of the Red Cross.[19] We have also not yet vetted the proposed ordinance with impacted City departments, which we would ultimately need to do to fully advise as to any practical and operational implications of the draft ordinance.

If you would like to discuss other options, please notify either of us of any alternative goal and we can provide additional legal guidance. Currently, we are unaware of any alternative ordinances that would lead to a different conclusion as to likely invalidity. Despite a diligent search, the Law Department has been unable to locate another municipality in the United States that has passed a similar ordinance, as opposed to a resolution, that explicitly calls for divestment and sanctions in this manner.[20]

I hope this information is helpful. Let us know if you have any additional questions.

Sincerely,

David P. Shapiro
Deputy City Attorney

Cynthia Amara
City Attorney

cc: Ben Wheeler, City Councilor At Large

[19] https://www.icrc.org/en/document/FAQ-misconceptions-false-information-icrc-work-israel-and-occupied-territories.

[20] Although Medford has adopted a divestment ordinance, it has been challenged, and it is our opinion the same legal principles in our previously written legal opinion, as supplemented by the above, apply to it.