IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15647-E

---

FACULTY SENATE OF FLORIDA
INTERNATIONAL UNIVERSITY, et al.,
Plaintiffs/Appellees,

vs.

JOHN WINN, et al.,
Defendants/Appellees,

and

STATE OF FLORIDA,
Intervenor-Defendant/Appellant.

---

Appeal from the United States District Court
for the Southern District of Florida

---

# MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL AND USA*ENGAGE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES

---

PAUL D. CLEMENT
*Counsel of Record*
Zachary D. Tripp
King & Spalding LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006
Tel: (202) 662-5540

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, *Amici* hereby submit their Certificate of Interested Persons, incorporating the Certificate of Interested Persons submitted by the Parties and adding the following:

*Amici Curiae*
The National Foreign Trade Council
1625 K Street N.W., Suite 200
Washington, D.C. 20006

USA*Engage
1625 K Street N.W., Suite 200
Washington, D.C. 20006

Counsel for *Amici Curiae*:
PAUL D. CLEMENT
*Counsel of Record*
Zachary D. Tripp
King & Spalding LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006

## CORPORATE DISCLOSURE STATEMENT

The National Foreign Trade Council ("NFTC") is a nonprofit corporation organized under the laws of New York. It has no parent company. USA*Engage is a division of NFTC. Neither has issued any stock.

## TABLE OF CONTENTS

Table of Authorities ..... iv
*Amici*'s Identity, Interest, and Source of Authority ..... vi
Statement of the Issues ..... 1
Summary of the Argument ..... 2
Argument ..... 5
I. The Florida Travel Act is preempted by the comprehensive and carefully calibrated federal statutory scheme regulating sanctions on state sponsors of terrorism. ..... 5
A. Congress has carefully calibrated a flexible scheme for sanctioning nations that sponsor terrorism, but Congress has chosen not to prohibit travel to or academic exchange with these nations. ..... 8
B. Florida's Travel Act is preempted because the President cannot adjust its force, it reaches conduct Congress determined should not be sanctioned or hamstrung, and it undermines the President's ability to speak for the Nation with one voice. ..... 15
II. The Florida Travel Act is invalid because it has greater than incidental effect in conflict with express national foreign policy. ..... 22
Conclusion ..... 27

## TABLE OF AUTHORITIES

### Cases

*American Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003) ..... 22, 24
*City of New York v. FCC*, 486 U.S. 57 (1988) ..... 5
*Crosby v. NFTC*, 530 U.S. 363 (2000) ..... passim
*Hines v. Davidowitz*, 312 U.S. 52 (1941) ..... 5
*Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332 (11th Cir. 1999) ..... 21
*Morrison v. Olson*, 487 U.S. 654 (1988) ..... 23
*Natsios v. NFTC*, 181 F.3d 38 (1st Cir. 1999) ..... 22
*United States v. Pink*, 315 U.S. 203 (1942) ..... 24
*Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282 (1986) ..... 17, 20, 21
*Zschernig v. Miller*, 389 U.S. 429 (1968) ..... 22

### Federal Statutes

18 U.S.C. §1956(c)(4) ..... 13
22 U.S.C. §2371 ..... 1, 9, 10
22 U.S.C. §2780 ..... 1, 9
22 U.S.C. §6001 ..... 1
50 U.S.C. §1701 ..... 12
50 U.S.C. §1702 ..... 12, 18
50 U.S.C. App. §2402 ..... 10, 17
50 U.S.C. App. §2403 ..... 11
50 U.S.C. App. §2405(j) ..... 1, 9
50 U.S.C. App. §5 ..... 1, 12, 17
Pub. L. 109–344, 120 Stat. 1869 ..... 13

### Federal Regulations

28 Fed. Reg. 6974 (July 9, 1963) ..... 13, 17
31 C.F.R. §515.420 ..... 14, 17
31 C.F.R. §515.564 ..... 14, 17
31 C.F.R. §537.210 ..... 14
31 C.F.R. §538.212 ..... 14
31 C.F.R. §541.206 ..... 14
31 C.F.R. §542.206 ..... 14
31 C.F.R. §560.210 ..... 14
31 C.F.R. §560.507 ..... 14
31 C.F.R. §595.206 ..... 14
31 C.F.R. §596.201 ..... 13
31 C.F.R. Part 515 ..... 1, 13
31 C.F.R. Part 535 ..... 13
31 C.F.R. Part 538 ..... 13
31 C.F.R. Part 542 ..... 13

31 C.F.R. Part 560 ..... 13
31 C.F.R. Part 596 ..... 13
64 Fed. Reg. 25809 (May 13, 1999) ..... 14, 17, 24

**State Statutes**

Fla. Stat. §1011.90(6) ..... 16, 17, 24, 26

**Other Authorities**

Congressional Research Service, Report, Cuba: U.S. Restrictions on Travel and Legislative Initiatives (Apr. 22, 2003), available at http://fpc.state.gov/documents/organization/20244.pdf ..... 13
J. Marshall, Annals, 6th Cong., 1st Sess., col. 613 (Mar. 7, 1800) ..... 11
State University System of Florida, Facts and Figures (2007), available at http://www.flbog.org/resources/_doc/factbooks/ quickfacts/SUSQuickFacts.xls ..... 27
U.S. Bureau of the Census, Population Estimates Program (PEP), available at http://www.census.gov/ popest/states/tables/NST-EST2008-01.xls ..... 27
U.S. State Dep't, Cuba Country Report (Nov. 7, 2008), available at http://travel.state.gov/travel/cis_pa_tw/cis/ cis_1097.html ..... 25
U.S. State Dep't, Democratic Republic of the Congo Travel Warning (Oct. 30, 2008), available at http://travel.state.gov/travel/ cis_pa_tw/tw/tw_2198.html ..... 25
V. Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085, 2107 (2000) ..... 5

## *AMICI*'S IDENTITY, INTEREST, AND SOURCE OF AUTHORITY

**Identity**: *Amici* are the National Foreign Trade Council ("NFTC") and USA*Engage.

**Interest**: The NFTC is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve more than 300 member companies. USA*Engage is a broad-based coalition representing organizations, companies and individuals from all regions, sectors and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state and local level.

The NFTC and USA*Engage have substantial shared interests in the creation and maintenance of clear and fair legal regimes affecting international trade and investment, and in policies that secure for their members and the Nation the benefits of a global economy. The NFTC and USA*Engage have participated as parties or *amici curiae* in numerous court cases relating to international trade, including *Sinaltrainal v. Coca-Cola Co.*, No. 06-15851 (11th Cir.) (pending), and the seminal Supreme Court case addressing the preemptive effect of federal trade sanctions, *Crosby v. NFTC*, 530 U.S. 363 (2000).

**Source of Authority**: Counsel for the parties have consented to the filing of this brief.

## STATEMENT OF THE ISSUES

*Amici* generally agree with Appellees' statement of the issues. For the reasons set forth by Appellees, the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §5, the Cuban Democracy Act ("CDA"), 22 U.S.C. §6001, and the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. Part 515, preempt the Florida Travel Act in its entirety. *Amici* also agree that the Florida Travel Act, even if not statutorily preempted, is nonetheless an invalid intrusion by Florida into the Nation's foreign affairs.

This brief seeks to emphasize, however, that the TWEA, CDA, and the CACR represent only the tip of the federal statutory and regulatory iceberg. The TWEA grants the President certain emergency powers during times of war, and the CDA and CACR relate specifically to Cuba. However, the Florida Travel Act, while evidently motivated primarily by Cuba-related foreign-policy concerns, applies to any country listed by the Secretary of State as a sponsor of international terrorism. When assessing whether the Florida Travel Act is preempted or otherwise invalid, therefore, the federal statutes and regulations that define the consequences of placement on the terrorism list are highly relevant to the preemption and broader foreign affairs analyses. *Amici* thus seek to draw the Court's attention to the federal Antiterrorism and Effective Death Penalty Act ("AEDPA"), 18 U.S.C. §2332d, the Export Administration Act ("EAA"), 50 U.S.C. App. §2405(j), the Arms Export Control Act ("AECA"), 22 U.S.C. §2780, and the Foreign Assistance Act ("FAA"), 22 U.S.C.

§2371. This comprehensive statutory scheme governs which economic penalties are imposed upon a country (and which are not) when the Secretary of State determines that it is a sponsor of international terrorism.

## SUMMARY OF THE ARGUMENT

As recent events have made painfully clear, state-sponsored terrorism is among the leading national security threats facing the Nation in the Twenty-First Century. This threat to the Nation has prompted a national response: Congress has determined that, when the Secretary of State finds that a country has repeatedly sponsored acts of international terrorism, economic sanctions should be imposed on that country. These sanctions are carefully crafted and strike a delicate balance. They sever significant economic ties between nations in an effort to dissuade and deter states from sponsoring terrorist activities. At the same time, however, the sanctions leave other ties intact, in an effort to ease détente and rapprochement. As our most recent experience with Libya demonstrates, designation of a nation as a state sponsor of terrorism is not irrevocable. In particular, Congress has determined that the listing of a country as a sponsor of terrorism, *vel non*, does not cause travel to that country or academic exchanges with that country to cease. Congress instead views such travel and academic exchanges to have a potentially ameliorative influence. International travel promotes one-on-one contact between U.S. and foreign nationals, fostering growth of civil society in the sanctioned country, and American academic study of the

sanctioned country strengthens the United States' role as the leading academic center in the world.

Integral to Congress's plan, moreover, is its reliance on the President's unique role in conducting the Nation's foreign affairs. Congress has given the President the flexibility to tune the economic sanctions even more finely, to ratchet them up to increase pressure on the listed country, or to tone them down to promote dialogue. The President has exercised this authority, issuing detailed regulations governing United States' policy towards listed countries. Congress and the President, acting jointly, have thus carefully calibrated the United States' flexible response towards countries that decide to sponsor international terrorism.

The Florida Travel Act would disrupt the national government's considered response to a serious international threat. The Travel Act imposes a significant burden on academic travel from Florida to listed countries, undermining Congress's decision that travel to and study of these countries serves the national interest and thus should proceed without additional restriction. And the Travel Act operates beyond the President's ability to control, even though Congress has decided that the President should have the ability to modify the sanctions against listed countries if national security needs dictate. Florida's rigid and unilateral approach to an important foreign policy issue must yield to the carefully calibrated and designedly flexible national regime.

Even beyond the preemptive effect of the existing federal statutory and regulatory regime, the Florida Travel Act represents an impermissible effort by Florida to adopt its own distinct foreign policy. The Constitution leaves little doubt as to which level of government is to address issues of ingress and egress with respect to our national borders. While states have the authority to adopt policies with incidental effects on foreign travel, there is nothing indirect or incidental about the Florida Travel Ban. It is an avowed effort to do the federal government one better when it comes to travel to state sponsors of terrorism. Under the constitutional scheme, Florida's rejection of the national policy is plainly impermissible. States cannot veto the Nation's foreign policy because they perceive it to adopt an insufficiently hard line.

The state suggests that the Travel Act is an effort to control the spending of its own funds. But that modest interest is belied by the Travel Act's broad scope. First, the Travel Act's restrictions are not limited to the state's own funds; they expressly encompass "nonstate" funds as well. Second, even as to state funds, the statute prohibits their use on administrative expenses for arranging academic travel paid for by others. This prohibition produces *de minimis* savings for the state, but imposes significant practical burdens on state university professors who seek to travel to listed countries for study. The dominant character of the Travel Act, therefore, is not to protect Florida's fisc, but to obstruct Florida professors who seek to travel to listed

countries to study them. And because the national foreign policy is to leave unfettered that which Florida seeks to burden, Florida's obstruction must be set aside.

## ARGUMENT

### I. The Florida Travel Act is preempted by the comprehensive and carefully calibrated federal statutory scheme regulating sanctions on state sponsors of terrorism.

The basic principles of statutory preemption are familiar and undisputed. A state law is preempted by a federal statute, treaty, or regulation, if federal law occupies the field, if "it is impossible for a private party to comply with both state and federal law," or if the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. NFTC*, 530 U.S. 363, 372–73 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also City of New York v. FCC*, 486 U.S. 57, 64 (1988). Moreover, field and conflict preemption are not mutually exclusive concepts or hermetically sealed compartments. *See Hines*, 312 U.S. at 67. In an area of pervasive federal responsibility and involvement, such as foreign affairs in general and travel to state sponsors of terrorism in particular, courts should find conflict preemption more readily than in an area of traditional state concern. *See id.* at 67–68; *see generally* V. Dinh, Reassessing the Law of Preemption, 88 Geo. L.J. 2085, 2107 (2000). It is clear that the extent to which travel will be permitted to state sponsors of terrorism is an area of pervasive federal control. And it is obvious that a state seeking to adopt a more permissive travel policy—purporting to allow its citizens

to travel freely to Cuba, for example—would run afoul of the conflicting national policy. Florida's effort to adopt a more restrictive foreign policy fares no better.

With the AEDPA, EAA, AECA, and FAA, Congress has carefully calibrated a scheme for sanctioning nations that sponsor terrorism and has granted the President discretion to modify the force of the sanctions. Although Congress has decided to impose serious economic penalties on countries who grossly violate the international order by sponsoring terrorism, Congress has determined that it is in the Nation's interest not to burden academic exchange with or travel to these nations. Adopting more substantial restrictions on such academic exchanges would be a perfectly valid foreign policy, but it is not the foreign policy the United States has chosen to pursue. Florida's Travel Act is preempted because, by burdening academic travel to listed countries, it runs directly counter to Congress's considered judgment on these matters of international concern.

This case is substantially similar to—and controlled by—*Crosby*, a landmark Supreme Court case litigated and won by *amicus* NFTC. In *Crosby*, both Massachusetts and the federal government had enacted laws in reaction to Burma's deplorable human rights record. 530 U.S. at 366–68. *Amicus* NFTC brought suit, contending that the Massachusetts Burma Act was preempted. The Supreme Court unanimously agreed, concluding that the state law was infirm for three reasons.[1] First, the

[1] Justices Scalia and Thomas concurred in judgment, but they disagreed only with the majority's reliance on legislative history. *See* 530 U.S. at 388–91 (Scalia, J., concurring in judgment).

Massachusetts law was preempted because Congress had created a regime under which the President had "flexible and effective authority" to modify the economic sanctions in response to changing world conditions, but the Massachusetts regime was rigid: the President could not modify the force of the Massachusetts law; it had "immediate" and "perpetual" effect. *Id.* at 374, 376–77. Second, the Massachusetts Act conflicted with the federal sanctions by going further and prohibiting conduct that the federal law permitted. Congress had "manifestly intended to limit economic pressure against the Burmese Government to a specific range," halting foreign aid and prohibiting "new investment," but allowing pre-existing investment to continue and permitting trade in goods, services, and technology. *Id.* at 377–78. The Massachusetts Act, by contrast, made no exception for pre-existing investment, nor did it exempt trade in goods or services. *See id.* at 378–70. This inconsistency, the Court concluded, "undermine[d] the congressional calibration of force." *Id.* at 380. Third, by contributing to a patchwork of state and national regulations vis-à-vis Burma, the Massachusetts law "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* at 381. *Crosby* thus makes clear that when Congress imposes sanctions upon another nation, carefully calibrating penalties and vesting the President with discretion to alter their force, States are without power to upset the federally-struck balance by imposing their own more rigid and severe burdens. Just as states are not free to ignore federal statutes in an effort to adopt a more permissive foreign policy, *Crosby* underscores that states

cannot undermine the federal government's carefully calibrated scheme in favor of a more restrictive position.

The Florida Travel Act is precisely the kind of state interference in international affairs that the Supreme Court determined in *Crosby* was impermissible. The Act is, quite plainly, an attempt by Florida adopt a harder line and to impose burdens on listed countries—and in particular on Cuba—beyond those established by the federal government. Its effect is to deprive the President of the authority fully to control national policy towards state sponsors of terrorism, or to speak with one voice on these sensitive matters of such great importance to our national security. Under *Crosby*, the Florida Travel Act is preempted.

### A. Congress has carefully calibrated a flexible scheme for sanctioning nations that sponsor terrorism, but Congress has chosen not to prohibit travel to or academic exchange with these nations.

The primary economic consequences of a country's placement on the State Department's terrorism list are governed by four statutes: the AEDPA, EAA, AECA, and FAA. Under these statutes, significant *economic* sanctions are imposed on a country when it is listed by the State Department. First, AEDPA largely cuts off the governments of listed countries from access to the United States' financial system, as it imposes criminal penalties on any United States citizen, resident alien, or any person in the United States, who knowingly "engages in a financial transaction with the government" of a listed country. 18 U.S.C. §2332d. Second, the EAA imposes a partial trade embargo, prohibiting the export of "goods or technology" absent a

"validated license" issued by the Executive. 50 U.S.C. App. §2405(j)(1). Third, the AECA imposes an arms embargo, prohibiting both individuals within the United States' jurisdiction and the federal government itself from providing certain munitions to any listed country. *See* 22 U.S.C. §§2780(a)(1), 2780(b), 2780(d), 2780(l)(3). Fourth, the FAA terminates foreign aid to a listed country. This encompasses agricultural aid, aid under the Export-Import Bank, and assistance under the Peace Corps Act. *See* 22 U.S.C. §2371(a). Foreign aid ordinarily cannot be resumed unless the country is removed from the State Department's list. *See* §2371(c).

Although each of these statutes imposes significant economic penalties on listed countries, these "[s]anctions are drawn not only to bar what they prohibit but to allow what they permit." *Crosby*, 530 U.S. at 380. The "validated license" required by the EAA, for example, is required only for the export of goods and technology, and thus does not apply to services; the AECA applies only to the munitions trade; the FAA applies only to foreign assistance; and AEDPA restricts only financial transactions with the target government. Crucially, none of the statutes restricts travel or academic exchanges simply because a country is listed.

These omissions are no accident. When Congress has addressed an issue as important as the Nation's policy towards states that sponsor international terrorism so many times and in such detail, the decision not to prohibit travel to or academic exchange with listed countries cannot be attributed to inadvertence. The EAA

supports this view by explicitly stating a policy of sustaining—not limiting—open academic interchange between the United States and sanctioned countries:

> "It is the policy of the United States to sustain vigorous scientific enterprise. To do so involves sustaining the ability of scientists and other scholars freely to communicate research findings, in accordance with applicable provisions of law, by means of publication, teaching, conferences, and other forms of scholarly exchange." 50 U.S.C. App. §2402(13).

Thus, the express policy of the United States is to sustain scholarly exchange with other nations, even when those nations are subject to severe economic sanctions.

An equally integral aspect of Congress's plan for responding to state sponsorship of terrorism is the degree of flexibility the President enjoys to adjust the force of the sanctions in response to national security needs. AEDPA grants the Secretary of the Treasury broad discretion to make exceptions to its prohibitions relating to financial transactions by issuing regulations "in consultation with the Secretary of State." 18 U.S.C. §2332d(a). Congress also vested the President with discretion to waive aspects of the arms embargo set forth in the AECA, for example, "to the extent that the Secretary determines, after consultation with the Congress, that unusual and compelling circumstances [so] require." 22 U.S.C. §2780(a). Similarly, the President may make exceptions to the FAA's prohibition on foreign assistance if the President determines, after consultation with Congress, that "national security interests or humanitarian reasons justify" it. §2371(d). And although the EAA does not authorize the President to suspend its licensing requirement, that Act confers

discretion on the President through the licensing process itself, which, for example, gives the President the authority to grant a general license to export without need for further approval. *See* 50 U.S.C. App. §2403(a).[2] Congress thus repeatedly and clearly expressed its intention to allow the President the flexibility to ratchet up—or tone down—economic sanctions against listed countries, depending ultimately on the President's judgment as to the Nation's security and interests. This discretion and flexibility reflects at least two realities. The first, as recognized by the Court in *Crosby*, 530 U.S. at 377, is that an effective sanctions policy requires both carrots and sticks, and an ability to adjust the mix in response to changing conditions. The second, as recognized since the earliest days of the Republic, *see, e.g.,* J. Marshall, Annals, 6th Cong., 1st Sess., col. 613 (Mar. 7, 1800), is that the President—not Congress, and certainly not individual states—is best situated to make these adjustments when it comes to foreign policy.

In sum, with the AEDPA, EAA, AECA, and FAA, Congress has crafted a finely reticulated scheme for regulating the effects of a country's placement on the State Department's list. Each of these statutes vests the President with flexible and effective authority to implement the economic sanctions against the listed countries. But each of these statutes also contains limitations on the extent of the sanctions that

[2] Under §906(a) of the Trade Sanctions Reform and Export Enhancement Act of 2000, licenses for the export of agricultural commodities, medicine, or medical devices to Cuba and other state sponsors of terrorism (other than Syria) may be for no longer than one year. *See* Pub. L. 106-387, 114 Stat. 1549A-69.

may be imposed. And, in particular, none of the statutes authorizes the President to prohibit travel to, or academic exchange with, a country simply because it is placed on the State Department's list.

Congress also evidenced its intention to give the President final control over economic sanctions against other nations, and its intention for academic travel ordinarily to fall outside the realm of sanctioned conduct, in several other statutes. The International Emergency Economic Powers Act ("IEEPA") applies during times of declared national emergency, and it provides the President with authority to impose extensive economic sanctions on another country. *See* 50 U.S.C. §1701(a). But the grant in IEEPA contains a significant express limitation: Its grant of authority

> "does not include the authority to regulate or prohibit, directly or indirectly . . . any transactions ordinarily incident to travel to or from any country, [or] maintenance within any country including payment of living expenses and acquisition of goods or services for personal use." §1702(b)(4).

Thus, even in response to a declared national emergency, the President may not prohibit "transactions ordinarily incident to travel" to, from, or within another country. There is no parallel limitation on travel sanctions in the Trading With the Enemy Act ("TWEA"), however, which provides the President the sweeping economic authority to prohibit "any . . . transactions involving, any property in which any foreign country or a national thereof has any interest." 50 U.S.C. App. §5(b)(1). But the TWEA and its more sweeping restrictions are triggered only "during time of

war." *Id.*[3] Filling the federal landscape even more fully, Congress has also enacted several acts that impose economic penalties on individual countries currently on the State Department's List, such as the Cuban Democracy Act ("CDA"), and the Darfur Peace & Accountability Act ("DPAA"), Pub. L. 109–344, 120 Stat. 1869.

In regulations implementing these statutes, the President also has expressed a judgment that listing should not automatically trigger restrictions on travel or academic study. The Terrorism List Governments Sanctions Regulations ("TLGSR") are of foremost relevance, as they detail the consequences of placement on the Secretary's list. *See* 31 C.F.R. Part 596. These regulations do not impose restrictions on purchases of ordinary goods or services that would be incident to travel to a country; they reach only financial transactions with the listed governments themselves. *See* 31 C.F.R. §596.201; 18 U.S.C. §1956(c)(4) (defining "financial transaction"). The President has also issued regulations defining the economic sanctions that are particular to the four countries currently on the State Department's list. *See id.* at Part 515 (Cuban Assets Control Regulations ("CACR")), Part 535 (Iranian Assets Control Regulations ("IACR")), Part 560 (Iranian Transactions Regulations ("ITR")), Part 538 (Sudanese Sanctions Regulations ("SUSR")), and Part 542 (Syrian Sanctions

[3] The TWEA provided President Kennedy with the statutory authority to enact the Cuba travel ban set forth in the Cuban Assets Control Regulations, 31 C.F.R. Part 515, which were enacted in the wake of the Cuban Missile Crisis. *See* 28 Fed. Reg. 6974 (July 9, 1963). The exact contours of the travel ban and other aspects of the CACR have varied significantly over time. *See* Congressional Research Service, Report, Cuba: U.S. Restrictions on Travel and Legislative Initiatives at CRS-1 to -5 (Apr. 22, 2003), available at http://fpc.state.gov/documents/organization/20244.pdf (chronicling the "numerous policy changes to restrictions on travel to Cuba").

Regulations ("SYSR")). Transactions "ordinarily incident to travel" are expressly exempt from the economic sanctions imposed specifically upon Iran, the Sudan and Syria. *See* 31 C.F.R. §§560.210(d), 538.212(d), 542.206(c); *cf. id.* §537.210(d) (same for Burma); *id.* §541.206(c) (same for Zimbabwe).[4]

The lone exception, of course, is the travel embargo to Cuba, imposed under the CACR, pursuant to the TWEA. But, as the District Court recognized and as Appellees discuss, even under the CACR—the most severe economic blockade imposed by the United States—academic travel is left relatively unfettered. *See* 574 F.Supp.2d 1331, 1353 (decision below); *see also* 31 C.F.R. §§515.420, 515.564(a)(1), 515.564(b). The decision to permit academic travel furthered the President's express policy to "strengthen independent civil society in that country" through "expansion of people-to-people contact through two-way exchanges among academics, athletes, scientists, and others." 64 Fed. Reg. 25809 (May 13, 1999). The allowance for academic travel to Cuba thus "evidences the role that permitting academic and cultural exchange plays in the broader foreign policy landscape." 574 F.Supp.2d at 1353. A complete ban on such exchanges was a foreign policy option available to the United States, but it is quite consciously not the policy the United States has adopted.

[4] The blocking regime established for "specially designated terrorists" similarly exempts "transactions ordinarily incident to travel." 31 C.F.R. §595.206(c). The strict trade sanctions imposed upon Iran permit travelers to bring to and from Iran baggage "normally incident to travel." 31 C.F.R. §560.507.

In sum, Congress and the President have enacted a veritable alphabet soup of statutes and regulations—the AEDPA, EAA, AECA, FAA, IEEPA, TWEA, CDA, DPAA, TLGSR, CACR, IACR, IATR, SUSR, and SYSR—governing the economic sanctions that are imposed when a country is listed as a sponsor of terrorism, governing the President's extraordinary powers or when national emergencies arise, and detailing federal policy towards the four currently listed countries. Congress's clear intention is to give the President substantial authority to modify the Nation's economic policy towards these countries in response to national security needs. Furthermore, the clear collective judgment of Congress and the President is that some economic ties should be cut off, but others should be left intact. In particular, Congress and the President have determined that travel to, and academic study of, a country should not be restricted as an automatic consequence of placement on the Secretary's list. Indeed, the national government has determined that travel should be restricted only in the most extreme circumstances—under the President's wartime powers under the TWEA—and even then, academic travel should be permitted.

### B. Florida's Travel Act is preempted because the President cannot adjust its force, it reaches conduct Congress determined should not be sanctioned or hamstrung, and it undermines the President's ability to speak for the Nation with one voice.

The Florida Travel Act shares all of the defects of the law struck down in *Crosby* and should suffer the same fate. First, like the Massachusetts Burma law and unlike the relevant provisions of federal law, the Travel Act contains no provision or

procedure to enable the President to alter, adjust, or terminate its prohibitions. *See* Fla. Stat. §1011.90(6); *Crosby*, 530 U.S. at 376–77. Thus when a country is placed on the State Department's list, Florida's spending restriction is triggered automatically, permanently, and inflexibly. This stands in stark contrast to the regime established by Congress in the AEDPA, EAA, AECA, and FAA (and in the IEEPA and the TWEA, for that matter), which clearly reflect Congress's intent to give the President "flexible and effective authority" over sanctions upon state sponsors of terrorism. *Id.* at 374. Indeed, the inflexibility of Florida's approach is illustrated by the fact that it treats Cuba and the other countries on the list identically, while the federal regime singles out Cuba for distinct treatment because of the additional authority invoked under the TWEA.

Second, although "Congress manifestly intended to limit economic pressure against [state sponsors of terrorism] to a specific range," the Travel Act "undermines th[at] congressional calibration of force." *Id.* at 377, 380. The AEDPA, EAA, AECA, and FAA together form a detailed scheme for cutting state sponsors of terrorism off from financial transactions, exports, the arms trade, and foreign aid. But these "[s]anctions are drawn not only to bar what they prohibit but to allow what they permit," *Crosby*, 530 U.S. at 380, and these statutes contain no restriction on travel to or academic study of these countries. To the contrary, the EAA, which sanctions exports to listed countries, expressly states that national policy is to promote "vigorous scientific enterprise" by means of "scholarly exchange." 50 U.S.C. App.

§2402(13). In calibrating the economic sanctions, Congress has thus clearly decided that the Nation's interest would be furthered by permitting travel and study of countries on the State Department's list. Florida has just as clearly made a different judgment, concluding that academic travel to listed countries should be curtailed categorically. *See* Fla. Stat. §1011.90(6). In the realm of foreign affairs, "[c]onflict is imminent' when 'two separate remedies are brought to bear on the same activity.'" *Crosby*, 530 U.S. at 380 (*quoting Wisconsin Dep't of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986)).

The fact that the President has imposed a travel embargo on Cuba does not harmonize the Travel Act with federal policy. Although the CACR generally prohibit travel to Cuba, *see* 31 C.F.R. §515.420, a broad exception is made for travel for "research . . . of a noncommercial, academic nature." *See id.* §515.564(1). This exception furthers an express national policy to "strengthen independent civil society" in Cuba through "expansion of people-to-people contact through two-way exchanges among academics, athletes, scientists, and others." 64 Fed. Reg. 25809 (May 13, 1999).[5] Congress echoed that policy judgment in the IEEPA by granting the

[5] Furthermore, the Cuban travel embargo was not imposed because the State Department found Cuba to be a state sponsor of terrorism, it was established under the President's extraordinary wartime powers set forth in the TWEA. *See* 28 Fed. Reg. 6974 (July 9, 1963); 50 U.S.C. App. §5. Indeed, the Cuba travel embargo was established in 1963, long before the relevant sections of the EAA, AECA, FAA, or AEDPA were enacted. Moreover, the fact that Cuba is treated differently from the other state sponsors of terrorism for purposes of non-academic travel, by virtue of power exercised under the TWEA, only underscores the conflict with the Florida Travel Act, which treats all countries on the state-sponsor list the same as an automatic consequence of their placement on the list.

President extensive powers during declared national emergencies, but expressly declining to authorize the President power to sanction travel. *See* 50 U.S.C. §1702(b)(4).

Florida's Travel Act flies in the face of this national policy. The Travel Act prohibits spending on travel to listed countries, even though Congress has decided that the "proper calibration of force" for these countries allows for travel. Even worse, the Travel Act targets *academic* travel, notwithstanding the express federal policies of encouraging scholarly exchange in general and of permitting academic travel to Cuba in particular. And the Travel Act imposes an inflexible regime in an area where Congress has granted the President substantial discretion and Presidents have exercised that discretion by, *inter alia*, modifying the contours of the CACR over time. *See supra* at 13 n.3. In short, the Travel Act disturbs the joint judgment of Congress and the President as to how best to respond to the grave threat of state sponsorship of terrorism. If there is any area where state interference with international affairs is both unwelcome and impermissible, this is it.

Third, like the Massachusetts Burma Act, the Travel Act, by imposing a state-level sanction on travel to listed countries, threatens "the very capacity of the President to speak for the Nation with one voice" and "to bargain effectively with other nations." *Crosby*, 530 U.S. at 381, 382. In establishing a comprehensive statutory scheme for sanctioning state sponsors of terrorism, and in vesting the President with extensive discretion to modify those sanctions, Congress's clear intent

was for the President to be able to establish nationwide policy towards these countries. "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." *Id.* at 381.

Florida seeks to distinguish *Crosby*, arguing that the Massachusetts Burma Act "imposed a costly penalty (no state business) for doing lawful business with Burma," while the Travel Act "is a simple travel funding restriction" that "imposes no penalty or prohibition" of any kind. Florida Brief on Appeal at 31. Florida's distinction is merely semantic and belied by both the scope of the Travel Act and the state's own proffered justifications for the law. From the perspective of the affected academics, the law imposes a costly penalty (withdrawal of state funds and limits on nonstate funds) for having a lawful academic exchange with Cuba. Moreover, Florida's effort to characterize the Travel Act as a mere funding restriction obviously fails to account for the Act's coverage of nonstate funds. In addition, if the Act does not amount to a "penalty or prohibition," then the Act will not achieve the objectives that the State itself has identified for the law. Downplaying the law's apparent purpose of adopting a more restrictive position toward Cuba and other state sponsors of terrorism, the State suggests the law's objectives include ensuring the safety of state employees and precluding international espionage. *See* Florida Brief on Appeal at 11, 15. But the law will only succeed in meeting these objectives to the extent it penalizes and ultimately eliminates academic travel to Cuba. If the Travel Act only resulted in travel occurring

with alternative funding, exposure to unsafe travel and espionage would continue unabated.

Finally, Florida's effort to characterize the Travel Act as a mere funding restriction echoes Massachusetts' unsuccessful effort in *Crosby*. The Massachusetts Burma Act at issue in *Crosby* also was framed as a spending prohibition. *See* 530 U.S. at 367 ("The statute generally bars state entities from buying goods or services from any person . . . doing business with Burma."). But the Supreme Court squarely rejected Massachusetts' argument that the Act was therefore insulated from preemption. However the Act was characterized, the Court concluded, it imposed a burden on conduct that the federal government, in carefully crafting the Nation's foreign policy, had chosen to permit. *Id.* at 378; *cf. Gould*, 475 U.S. at 287. The Act thus stood "in clear contrast to the congressional scheme in the scope of subject matter addressed." *Crosby*, 530 U.S. at 378. Precisely the same is true of Florida's Travel Act.[6]

[6] Florida also argues that the Travel Act does not conflict with the federal sanctions against listed countries (or against Cuba in particular) because it is possible to comply with both the federal and state rules. *See* Florida Brief on Appeal at 20. But the principal means of complying with both laws is to refrain from activity that the federal regime expressly permits. And that is precisely the kind of conflict that *Crosby* found to be fatal. The fact that some parties "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." *Crosby*, 530 U.S. at 380.

Florida also points out that the friction between Florida's law and the Cuban travel sanctions would disappear if the federal government would just ease its licensing rules. *See* Florida Brief on Appeal at 23. But this argument turns the Supremacy Clause on its head. When there is conflict between state law and federal law, the Supremacy Clause commands that the state law must give way—not the other way around.

In sum, Florida's Travel Act shares the three same flaws as the Massachusetts Burma Act struck down by the Court in *Crosby*, and accordingly it should suffer the same fate. In contravention of Congress's clear purpose, the Florida Travel Act grants the President no authority to adjust its prohibitions; the Travel Act sweeps more broadly than the federal sanctions, restricting academic travel to countries on the State Department's list even though Congress and the President have intentionally left such travel unfettered to sustain open scholarly exchange; and the Travel Act undermines the President's ability to set a unified foreign policy for the Nation. In regulating this area so completely, Congress and the President surely did not intend for states to add their own, conflicting voices to the mix.

To the extent Florida defends the "state funds" portion of the Travel Act, as distinct from the "nonstate funds" provision, its arguments are unavailing. As previously noted, the Supreme Court already rejected the argument that funding decisions or "spending laws" are exempt from the normal rules of federal preemption. *E.g.*, *Crosby*, 530 U.S. at 372; *Gould*, 475 U.S. at 287 (in preemption analysis, the distinction between a state's spending power" and "regulatory power" "seems to us a distinction without a difference").[7] Thus the critical question is not whether the state has chosen to regulate using a direct prohibition or a "spending law," but whether

[7] The District Court stated that although "a state's spending or funding decision is not insulated from constitutional scrutiny, such decision is entitled to deference," citing *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332, 1337 (11th Cir. 1999). *See* 574 F.Supp.2d at 1346. But *Lyes* did not address preemption or foreign affairs, it addressed whether a city and a community redevelopment agency should be deemed the same "employer" under Title VII. *See* 166 F.3d at 1341. Whatever deference was applied in *Lyes* has no bearing on this case. The apposite precedent is clearly *Crosby*.

state law conflicts with or "stands as an obstacle" to the federal scheme. And here, Florida advances no explanation as to why the "state funds" restrictions are any less of an obstacle to the national policy set by Congress than the "nonstate funds" restrictions. Accordingly, the "state" and "nonstate" fund restrictions are equally invalid.

## II. The Florida Travel Act is invalid because it has greater than incidental effect in conflict with express national foreign policy.

Because the Florida Travel Act is preempted, this Court may follow the Supreme Court's lead in *Crosby* and not address the Act's validity in light of the foreign policy expressly set by the President. Nonetheless, the Florida Travel Act is also unlawful because there is a "likelihood that [it] will produce something more than incidental effect in conflict with express foreign policy of the National Government." *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 420 (2003); *see also Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., concurring in judgment). The District Court correctly recognized that federal policy trumps state policy in the realm of foreign affairs, but to determine whether Florida had gone too far into the exclusively national sphere, the District Court applied the five-factor test set forth in *Natsios v. NFTC*, 181 F.3d 38 (1st Cir. 1999). *See* 574 F.Supp.2d 1331, 1347.[8] There is little need to rely on a five-factor test to determine whether this Act is unlawful. The Florida Act is not

[8] It is not obvious that the First Circuit's five-factor inquiry should drive the analysis outside the First Circuit. *Crosby* affirmed *Natsios* on other grounds, *see* 530 U.S. at 388, and in *Garamendi* the Supreme Court evaluated a state's power with respect to foreign affairs not by employing a five-factor test, but by balancing the federal interest against the state's interest "judged by standards of traditional practice," 539 U.S. at 420.

facially neutral statute or a provision involving an area of traditional state concern. Instead, the Florida Act is an express and unabashed effort to adopt a different foreign policy toward state sponsors of terrorism. "[T]his wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

The conflict between the Florida Travel Act and express federal foreign policy is not "incidental" in any sense; it is purposeful and significant. This is not a statute that eliminates all state travel funding across the board, which might have an incidental impact on travel to certain foreign nations. The Travel Act expressly burdens academic travel only to countries on the State Department's terrorism list. The international character of this restriction is manifest. Moreover, the practical and intended impact of the Travel Act is to constrain the ability of state university professors to travel to countries on the State Department's list to study them: These professors may not use any funds—whether state or nonstate—even "to support the . . . administration of . . . activities related to or involving travel" to these countries. This practical burden stands in opposition to the national policy of allowing travel to countries on the State Department's list, it undermines the national policy to promote vigorous academic exchange in general, and because Florida is the national center for academic study of Cuba, it hamstrings the national policy to promote academic exchange with Cuba. *See supra* at 15–21. The Travel Act "amounts in substance to a rejection of a part of the policy underlying" federal sanctions on state sponsors of

terrorism and sanctions towards Cuba. *United States v. Pink*, 315 U.S. 203, 233 (1942). "Such power is not accorded a State in our constitutional system." *Id.*

Florida asserts it is justified in interfering with the Nation's conduct of its foreign affairs because the Travel Act furthers three state interests: preventing international espionage, protecting "professors and students from potentially dangerous settings," and protecting the state fisc. *See* Florida Brief on Appeal at 11, 14–17. These interests cannot excuse Florida's encroachment into the federal domain. First, preventing international espionage is by definition a national concern, not a concern for individual states.[9] Second, although Florida would justify the Travel Act as protecting its employees from dangers abroad, the Travel Act is not a generally applicable travel safety law encompassing all state employees. Instead, it applies only "to state universities." Fla. Stat. §1011.90(6). Moreover, if Florida were focused on keeping its employees safe while they travel abroad, the rational path would have been to restrict travel to countries where the State Department has issued a Travel Warning. Florida has done no such thing. Instead, Florida has burdened travel to states found to sponsor terrorism—even though some of these countries, such as Cuba, are reasonably safe travel destinations, while Florida has left unrestricted travel

[9] Moreover, Florida has no legitimate interest in limiting academic travel to prevent international espionage, as the Federal Government has judged that academic travel is in the national interest and thus should be permitted—even to Cuba. *Cf.* 64 Fed. Reg. 25809 (May 13, 1999) (academic travel to Cuba "strengthen[s] independent civil society in that country" through "expansion of people-to-people contact through two-way exchanges among academics, athletes, scientists, and others."). This express national foreign policy judgment plainly trumps Florida's parochial judgment to the contrary. *See Garamendi*, 539 U.S. at 425.

to places, like the Congo, that are extremely unsafe. *Compare* U.S. State Dep't, Cuba Country Report (Nov. 7, 2008), available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_1097.html ("crime against . . . travelers in Cuba has generally been limited to pick-pocketing, purse snatching, or the taking of unattended items"), *with* U.S. State Dep't, Democratic Republic of the Congo Travel Warning (Oct. 30, 2008), available at http://travel.state.gov/travel/ cis_pa_tw/tw/tw_2198.html ("Armed groups . . . are known to pillage, carjack, and steal vehicles, kill extra-judicially, rape, kidnap, and carry out military or paramilitary operations.").

Florida more plausibly contends that the Travel Act is designed to protect the state fisc.[10] To be sure, a state has a significant interest in protecting its own purse. But the Travel Act restricts the use of both state and nonstate funds. Whatever interest Florida has in protecting its own money, it cannot be used to justify this latter prohibition. The nonstate funds portion of the statute, therefore, is unwarranted and, as the District Court rightly concluded, unenforceable.

The District Court erred, however, to the extent that it concluded that the "state funds" provision fares any better. The Travel Act's prohibitions are far-reaching, barring the use of funds to "coordinate, or administer, or to support the implementation, organization, direction, coordination, or administration of, activities

[10] Florida also intimates that holding the Travel Act invalid would violate federalism principles by forcing the State to subsidize travel to Cuba and other countries. *See* Florida Brief on Appeal at 11, 23 27. This is hyperbole. Florida could cease funding all academic travel; it could close its international studies departments; indeed, it could shutter its entire state university system. What Florida cannot do, however, is use state funding to obstruct the fulfillment of the Nation's express foreign policy.

related to or involving travel to a terrorist state." Fla. Stat. §1011.90(6). Thus, even if the Act applied only to "state funds," it would still have the practical effect of greatly burdening professors who seek to use federal or private funds for travel to listed countries. A professor who used her state university computer, office, or telephone to arrange for federally funded travel to Iran to meet fellow academics, would be using state funds "to support the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state." Indeed, Florida confirms that the legislative intent was to ensnare administrative expenses. *See* Florida Brief on Appeal at 13 ("If the Act had restricted only state funds, grant-funded trips would continue to use state administrative resources in accord with prior practice that the Legislature no longer wishes to supply."). The Act is not designed as a cost-saving measure, but rather intended to send a message that not a "threepence" will go to academic exchanges with certain disfavored nations. But control over that message belongs to the federal government, and it has decided to send a different message.

Florida surely has a legitimate interest in controlling administrative overhead expenses relating to travel to the listed countries, but the magnitude of this interest pales in comparison to the negative effect its "state funds" prohibition has on express national foreign policy. Florida's fiscal interest in reducing administrative expenses tangentially related to travel to a few select countries is negligible, as the marginal cost of providing these services is near zero. The effect of the "state funds" prohibition

on national policy is substantial, however. The Travel Act's restriction makes it extremely difficult for a Florida state university professor to use federal or private funds to arrange travel to one of the countries on the State Department's list. Florida is the fourth largest state in the Union, with a public university system consisting of 301,135 students, 63,337 employees, and 16,643 faculty. See U.S. Bureau of the Census, Population Estimates Program (PEP), available at http://www.census.gov/popest/states/tables/NST-EST2008-01.xls; State University System of Florida, Facts and Figures (2007), available at http://www.flbog.org/resources/_doc/factbooks/quickfacts/SUSQuickFacts.xls. Moreover, by virtue of its proximity to Cuba and its large Cuban population, Florida is among the Nation's leading centers for academic study of Cuba. *See* Brief of Appellees at 21–22. Perhaps a professor could comply with Travel Act by establishing rigorous Chinese walls, hermetically sealing off state funds from being used to "support the . . . administration of, activities related to or involving travel" to a listed country, but this obviously would be a substantial undertaking. The effect of the "state funds" restriction alone, therefore, is to impose a substantial burden on United States academic study of Iran, Syria, and the Sudan, and to hamstring the study of Cuba. The "state funds" restriction thus stands in the way of the federal government's diplomatic objectives, and is accordingly invalid.

## CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed with respect to nonstate funds, but should be reversed with respect to state funds.

Respectfully submitted,

PAUL D. CLEMENT
*Counsel of Record*
Zachary D. Tripp
King & Spalding LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006
Tel: (202) 662-5540

January 26, 2009

## CERTIFICATE OF COMPLIANCE

I, Zachary D. Tripp, counsel for *amici curiae* and a member of this Court's bar, herewith certify that this brief complies with:

> the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,478 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii);
>
> the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Garamond font.

_____

Zachary D. Tripp
Attorney for *Amici Curiae*

January 26, 2009
Date

## CERTIFICATE OF SERVICE

I, Zachary D. Tripp, counsel for *amici curiae* and a member of this Court's bar, do hereby certify that true and accurate copies of the foregoing document have been furnished by UPS overnight delivery, this 26th day of January, 2009, to:

*Counsel for State of Florida*
Louis F. Hubener, Esq.
Chief Deputy Solicitor General
Timothy D. Osterhaus, Esq.
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

*Counsel for Faculty Senate of Florida International University*
Paul F. Brinkman, Esq.
Alston & Bird, LLP
The Atlantic Building
950 F Street NW
Washington, DC 20004
(202) 756-3300

Randall C. Marshall, Esq. (FBN 181765)
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd., Suite 340
Miami, FL 33137-3227
(786) 363-2700

Pursuant to Eleventh Circuit Rules, service also occurred via electronic transmission.

_____
Zachary D. Tripp
King & Spalding LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006
Tel: (202) 626-9234

January 26, 2009