No. 10-1139

In the Supreme Court of the United States

FACULTY SENATE OF FLORIDA INTERNATIONAL UNIVERSITY, et al.,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Restated)

I. Whether the decision of the Court of Appeals that Florida's prohibition on state universities' use of state or non-state funds to support travel to terrorist states conflicts with the decision of this Court in Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000)?

II. Whether Florida is compelled to support academic travel to states that sponsor terrorism by federal laws that do not prohibit travel to such states?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed on the cover page of the Petition.

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JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). Petitioners' motion for rehearing en banc in the Court of Appeals was denied on October 28, 2010. The Court granted petitioners' timely motion for extension of time to file their Petition until March 11, 2011.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, cls. 2, of the United States Constitution, the Supremacy Clause, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Chapter 2006-54, Laws of Florida, entitled "An Act Relating to Travel to Terrorist States," is codified in relevant part in sections 112.061(3)(e) and 1011.90(6), Florida Statutes. These statutes provide:

> None of the state or nonstate funds made available to state universities may be used to implement, organize, direct, coordinate,

> or administer, or to support the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state. For purposes of this section, "terrorist state" is defined as any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism.

§ 1011.90(6), Fla. Stat.

> Travel expenses of public officers or employees for the purpose of implementing, organizing, directing, coordinating, or administering, or supporting the implementation, organization, direction, coordination, or administration of, activities related to or involving travel to a terrorist state shall not be allowed under any circumstances. For purposes of this section, "terrorist state" is a defined as any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism.

§ 112.061(3)(e), Fla. Stat.

STATEMENT OF THE CASE

In 2006 the Florida Legislature enacted Chapter 2006-54, Laws of Florida, entitled "An Act Relating to Travel to Terrorist States" (the "Travel Act"). The Travel Act is codified in sections 112.061(3)(e) and 1011.90(6), Florida Statutes. These provisions prohibit state universities from using state or non-state funds to support travel to any "terrorist state," which is defined as a state designated by the United States Department of State as a sponsor of terrorism. They also prohibit reimbursement of travel expenses of state officers and employees who may travel to such places.

The petitioners (plaintiffs in the district court) are the Faculty Senate of Florida International University and several professors and educational researchers who filed suit under 42 U.S.C. § 1983 challenging the Travel Act on various constitutional grounds. Their amended complaint alleged the Travel Act violated the Supremacy Clause of the Constitution, the Foreign Affairs Power, the Foreign Commerce Clause, and the First Amendment. Petitioners sought a preliminary injunction, which, following a hearing, the district court denied. In his analysis of the Travel Act, Judge Adalberto Jordan concluded:

> The Travel Act stands on a different footing than the law at issue in *Crosby*, as it does not diminish the President's (or Congress') flexibility or authority in the relations the United States has with the designated countries. Florida has not banned travel to or from the designated countries, or imposed sanctions on those

> who do business with or travel to or from the designated countries. It has only legislated that its funds will not be used for travel to (or activities related to travel to) the designated countries. Individuals may still travel to the designated countries as permitted by the federal government, but will simply have to pay their own way. As the defendants point out, accepting the plaintiffs' conflict preemption argument would require me to adopt the theory that "because federal law *does not prohibit* all travel to the listed countries, states like Florida *must subsidize* this travel to avoid impermissible interference with federal law." I am not aware of one case suggesting that, in order to avoid conflict preemption, a state must pay for an activity that the federal government does not bar.

Pet. App. at 76a. Judge Jordan subsequently recused himself from the case and Judge Patricia A. Seitz undertook further proceedings.[1]

Petitioners then moved for summary judgment. At the conclusion of the hearing, the district court, unpersuaded by petitioners' presentation, allowed them to present additional evidence and argument in posthearing submissions. Considering the additional evidence and its impact on petitioners, Pet. App. 26a-

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[1] Both Judge Jordan and Judge Seitz invited the United States to file a statement of interest. The United States declined to do so.

30a, the court found that petitioners would not be able to use grants from private sources for travel to Cuba. Pet. App. 47a. The court also found that state universities would not assist petitioners in obtaining a federal license or by providing letters of introduction, although there was no evidence that any university had been asked to do so or had refused to do so. Pet. App. 45a-49a, 57a. The court concluded that the restriction on use of non-state funds was an obstacle to attainment of the full objectives of various federal laws and regulations governing travel and providing for sanctions on Cuba, Iran, Syria, and Sudan. Pet. App. 54a. The court further asserted that the Travel Act "by *prohibiting* travel to the designated countries has barred something that the federal government expressly permits." Pet. App. 57a (emphasis added).

The district court granted in part the motion for summary judgment, holding that the Travel Act's restriction on use of *non-state* funds—those university-administered funds from outside grantors—and *any state resources needed to administer non-state funds* was an "impermissible sanction" and "an obstacle to the objectives of the federal government." Pet. App. 69a-70a. Accordingly, Judge Seitz found this restriction violated the foreign affairs power and was preempted by federal law. Judge Seitz recognized, however, that a State's decision on expenditure of its own funds was entitled to deference, and so upheld the restriction on the use of state funds. Pet. App. 43a-59a.

The State and the petitioners appealed. Prefacing its analysis, the Court of Appeals stated that it agreed with Florida that "the distinction between state-contributed funds and other funds administered

by the State is one without a meaningful difference. The key point is this one: the use of both kinds of funds results in an expense to the State." Pet. App. 5a-6a & n.5. Avoiding the Tenth Amendment implications that would arise if federal laws were found to mandate state support, the Court of Appeals rejected the argument that the Travel Act clashed with federal law or policy:

> No federal statute or regulation expressly requires States to pay for foreign travel for state university employees. No federal law says States cannot differentiate among foreign nations when it comes to spending for academic travel. And Plaintiffs do not contend that the Act has been expressly preempted by a federal statute.

Pet. App. 7a.

Because no petitioner had shown a present need for a federal license for travel to Cuba, or for university assistance in procuring a license, the Court of Appeals rejected as not ripe the as-applied claim that the Travel Act barred universities from providing information to assist an application for a license. Pet. App. 8a-9a, n.8. Petitioners no longer advance these as-applied constitutional challenges.[2]

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[2] Petitioners now argue the Act is facially invalid, contrary to their insistence in the Court of Appeals that their challenge was as-applied. They argued in the Court of Appeals that "Appellant State of Florida misunderstands this case as a facial challenge to the Travel Act, while the District Court's extensive examination of the record and affidavits proffered by Plaintiffs-Appellees makes this (Continued ...)

Addressing petitioners' reliance on Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000), the Court of Appeals reasoned:

> *Crosby* is a case in which a state statute conflicted with definite and identifiable federal laws on the same subject. . . .
>
> We think this case is different. Florida has not unilaterally selected by name a foreign country on which it has declared, in effect, some kind of economic war. Florida's Act does not prohibit—as a matter of law—anyone from traveling any place. And especially unlike *Crosby*, it does not penalize anyone for aiding or otherwise paying for someone else's travel. It does not prohibit travel—as a matter of state law—where federal law allows travel. It does not attempt to prohibit, or even to obstruct, trading broadly by anyone with anyone. Florida's law is narrow. Nothing in the record shows that its practical impact, in reality, can be economically great on other countries. It only prohibits spending Florida's money to facilitate travel to countries determined by the federal government (not especially selected by Florida) to sponsor terrorism.

Pet. App. 10a-11a (footnote omitted).

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quite clearly an as-applied challenge." Brief of Appellees at 11.

The Court of Appeals acknowledged that States traditionally have had great control over spending, especially for education; that State resources are limited; that concerns about faculty and student safety are legitimate; that avoiding entanglement with foreign espionage is an appropriate consideration in financing foreign travel; and that a decision to fund academic work in Country "A" but not "B" is not beyond a State's valid powers. Pet. App. 11a-12a. It also observed that grantors of non-state funds were free to modify their grant requirements to avoid university management of those funds. Pet. App. 10a, n.9.[3]

The Court of Appeals concluded that Florida's "traditional state interest in managing its own spending and the scope of its academic programs" was sufficient to overcome "some indistinct desire on the part of the

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[3] Petitioners make light of any concern Florida has for its university faculty and students who might travel to countries sponsoring terrorism. But as Florida pointed out early in the course of this case, the United States does not have normal diplomatic relations with any country listed as a sponsor of terrorism. The detainment or disappearance of faculty and students in these countries could cause a university numerous difficulties. This Court might take judicial notice of the fact that Iran has, since 2009, held captive two young Americans accused of straying across the Iraq-Iran border. See Ramin Mostaghim, 2 American hikers in Iranian prison plead not guilty, L.A. Times, Feb. 7, 2011, http://articles.latimes.com/2011/feb/07/world/la-fg-iran-trial-20110207 (last visited Mar. 28, 2011) (reporting first official court hearing after 18-month imprisonment). Cuba recently sentenced to 15 years imprisonment a contractor working in Cuba on behalf of the United States Agency for International Development. See Randal C. Archibold, Cuba Gives 15-year Prison Term to American, N.Y. Times, Mar. 12, 2011, http://www.nytimes.com/2011/03/13/world/americas/13cuba.html (last visited Mar. 28, 2011).

Executive Branch or Congress to encourage generally academic travel," assuming that had been shown. Pet. App. 14a. The Travel Act, therefore, was not preempted by federal law or violative of the foreign affairs powers. Pet. App. 14a-15a. Accordingly, the Court of Appeals affirmed the district court's ruling with regard to state funds and reversed the judgment "with regard to non-state funds administered at state expense." Pet. App. 15a.

Petitioners now seek review by this Court contending that Florida is constitutionally obligated to use its own resources both to fund travel to terrorist states and to administer non-state funds granted to support such travel.

REASONS FOR DENYING REVIEW

Petitioners have now abandoned the as-applied challenge to the Travel Act they pursued in the district court and Court of Appeals. Their entire argument, rooted in repeated mischaracterization of Florida's Travel Act, is based on purported conflict between the decision of the Court of Appeals and this Court's decision in Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). No conflict exists between these decisions, nor does the Travel Act impose a penalty or sanction on anyone, prohibit travel, or usurp federal authority. Indeed, a State's decision to support academic travel to one country rather than another, and to take into consideration the safety of its faculty and students in making such decisions, does not present an

important federal question that should be settled by this Court. See Supreme Court Rule 10(c).

Petitioners' argument is fatally flawed for another reason. It advances the unacceptable proposition that federal law and regulations—what petitioners call the calibrated system of "sticks and carrots" intended to govern relationships with Cuba, Iran, Syria, and Sudan—*compels* the States to support academic travel to these regimes both with state funds and with state resources needed to administer grant funds. Such an application of federal law would plainly violate the Tenth Amendment as construed by this Court in Printz v. United States, 521 U.S. 898 (1997), and New York v. United States, 505 U.S. 144 (1992). While federal law may permit travel to terrorist states, and might even encourage academic travel, it cannot mandate the use of state resources to implement such a program. Printz, 521 U.S. at 935. Petitioners are not constitutionally entitled to demand state support for their academic travel simply because federal law permits such travel.

The petition should be denied.

I. The Decision of the Court of Appeals Does Not Conflict With the Law of Preemption or this Court's Decision in Crosby.

Petitioners now assert Florida's Travel Act is facially unconstitutional because it is preempted by federal law and Presidential authority over foreign affairs. State law may be preempted where it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Crosby v. Nat'l

Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting Hines v. Davidowitz), 312 U.S. 52, 67 (1941)). Petitioners contend the Travel Act stands as an obstacle to the fulfillment of a host of federal laws and regulations that control relations with terrorist states.[4] Contrary to the findings of the Court of Appeals, they insist the Act prohibits travel to terrorist states, penalizes individuals, usurps Presidential authority, singles out the listed states for disparate economic treatment, and implements a sanction that has no point of termination. In matters relating to support of academic travel, petitioners even assert that the decision in Crosby means that States have no power to control their own fiscs. Pet. at 17.

Petitioners are wrong on all counts. Their argument not only ignores, where it does not misstate, the plain language of the Travel Act and its effect, but suggests an interpretation and application of the Crosby decision and federal law that is plainly unconstitutional.

The Travel Act does nothing more than withhold state support for academic travel to countries listed by the State Department as sponsors of terrorism.

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[4] Including, but not limited to, the International Security and Development Act of 1985, 22 U.S.C. § 2349aa-9, the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a), the Arms Export Control Act, 22 U.S.C. § 2780(f), the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707, the Trading with the Enemy Act, 50 U.S.C. App. §§ 1-47, the Export Administration Act, 50 U.S.C. App. § 2402(13), the Iran and Libya Sanctions Act, Pub. L. 104-172, 110 Stat. 1541 (1996), and 31 C.F.R. parts 515 (Cuban Assets Control Regulations), 535 (Iranian Assets Control Regulations, 542 (Syrian Sanctions Regulations).

§§112.061(3)(e) and 1011.90(6), Fla. Stat. The decision of the Court of Appeals (as well as Judge Jordan's order denying a preliminary injunction) correctly found the Act does not prohibit anyone's travel where federal law allows travel, does not attempt to prohibit or obstruct trade by anyone with anyone, and imposes no sanction or penalty. Pet. App. 7a, 10a-11a, 76a. As the decision further found, no federal law or regulation requires States to pay for foreign travel for their university employees. Nor does any federal law cited prohibit states from differentiating among foreign nations with respect to spending for academic travel. Pet. App. 7a, 10a-11a. In fact, none says a word about the States' management of their universities. The Travel Act cannot be an obstacle to the fulfillment of federal laws that do not—and cannot—mandate States' support of academic travel.

Petitioners' reliance on Crosby is misplaced because Florida's Travel Act bears no resemblance in purpose or effect to the Massachusetts law there at issue. While the Florida law withholds support for travel from state employees, the Massachusetts law, with minor exceptions, barred state entities from purchasing goods and services from anyone doing business with Burma. The obvious intent was to force such persons to choose between doing business with Massachusetts or with Burma. This Court rightly viewed the law as penalizing those persons doing business with Burma and imposing a "state system of economic pressure against the Burma political regime" that differed from the highly detailed sanctions that Congress had enacted. Id. at 376, 378. The Massachusetts law clashed with federal law because it

undermined the discretion conferred upon the President to control sanctions, penalized those whom federal law did not penalize, and interfered with Congress' directive to the President to use diplomatic means to craft an appropriate policy and strategy. Id. at 373-383. The decision also took note of numerous foreign objections, including protests from Japan and the European Union, as well as the opposition of the Executive Branch to the Massachusetts law. Id. at 383-386 and n.n. 21, 22.

In contrast, the Florida law penalizes no one doing business in a terrorist state, interferes with no discretion conferred upon the President, and has elicited no protest from any foreign government or the United States. As pointed out, the United States has twice declined to file a statement of interest in this case.

Petitioners also argue that Florida's "sanction" has no point of termination. This doubly misreads the law. The Travel Act sanctions no one, and the withholding of support for travel terminates once a foreign state is removed from the State Department's list. If Cuba or another of the listed states were removed tomorrow, petitioners would be able to arrange their travel using any available state or non-state funds.

II. The Federal Government May Not Compel States to Support a Federal Regulatory Program, Whether Domestic or Foreign.

The contention that the Travel Act is not a proper exercise of Florida's authority over its own budget is without merit. What petitioners seek here is not the invalidation of a state sanction as in Crosby, but affirmative—that is, monetary—support from the State,

which they contend is mandated by federal law. Assuming the United States has a finely tuned set of laws and regulations imposing various sanctions upon terrorist states—in effect, a regulatory program governing relations with such states that does not forbid travel—petitioners may not demand that Florida use its resources to support such a program. This Court has squarely rejected as violative of the Tenth Amendment the proposition that the federal government may compel States to support federal regulatory programs:

> We held in *New York* [*v. United States*] that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Printz v. United States, 521 U.S. 898, 935 (2000). The Supremacy Clause does not confer any authority on the federal government that would trump the Tenth Amendment and allow the government to conscript state legislatures and universities. In this respect, there is no constitutional difference between a domestic

regulatory program and one that regulates foreign interests. Nor do petitioners so argue.

Moreover, while the President may to a degree act independently of Congress in the conduct of foreign affairs, see Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414-415 (2005), the Constitution confers no authority on the President to coerce the States in the manner petitioners demand. The President has no more authority than Congress to institute a program requiring that States support travel to terrorist states, or any foreign nation for that matter. See Printz, 521 U.S. at 925 ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). And contrary to petitioners' hyperbole, no President has tried to do so.

Petitioners have never in the course of this litigation addressed the decisions in Printz and New York v. United States, 505 U.S. 898 (1992), and they do not do so now. They have obliquely sought to avoid these decisions by arguing that they do not seek monetary support for their travels but merely to invalidate an impermissible state sanction. But that is wordplay. Their claim from the very beginning (which Judge Jordan aptly perceived, see pp. 3-4, supra) has been that because federal law permits travel to terrorist states, Florida *must subsidize* that travel. They do in fact contend that Florida's resources may be conscripted for that purpose.

But even setting aside the constitutional defect in their argument, petitioners vastly overstate their case. State laws may touch upon foreign interests and foreign affairs in numerous and largely innocuous ways. This

Court has long recognized that state laws are not preempted merely because they have an "incidental or indirect" effect on foreign affairs. See Zschernig v. Miller, 389 U.S. 429, 434-435 (1968), and Clark v. Allen, 331 U.S. 503, 517 (1947). The more recent decision in Garamendi did not foreclose consideration of the strength of a state interest when the State is legislating within an area of traditional competence. 539 U.S. at 419-420 & n.11, 425-426. In Garamendi, California's attempt to insinuate itself into a delicate foreign relations problem—settlement of Holocaust era insurance claims—clearly warranted the finding of preemption because it trespassed on federal efforts to resolve those claims and had a significant impact on foreign relations. The Travel Act has no comparable effect.

Further, under our federal system the allocation of public funds for education is a basic attribute of state sovereignty. As this Court has acknowledged, "by and large, public education . . . is committed to the control of state and local authorities." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). This Court has not sanctioned judicial review of state funding decisions for education. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (["F]ederalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action; it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in nearly every state."); see also Dekalb County Sch. Dist. v. Schrenko, 109 F.3d 680, 689-690

(11th Cir. 1997) (state's power to determine level of education funding is an element of sovereignty); Stanley v. Darlington County Sch. Dist. 84 F.3d 707, 716 (4th Cir. 1996) (it would violate the most basic motions of federalism for a federal court to determine the allocation of a state's financial resources). Florida's decision to reserve its resources for the support of academic travel to countries that do not sponsor terrorism is an exercise of its sovereign legislative power and it does not contravene any provision of the Constitution or federal law.

While it is true that a state law may not escape preemption simply on the claim that it is an exercise of a State's spending power, what constitutes a sufficient obstacle to federal purposes is still a matter of informed judgment. Crosby, 530 U.S. at 373 & n.7. If the Travel Act has any effect at all on foreign relations, petitioners certainly have not proved it. They have abandoned the as-applied claims pressed in the district court and Court of Appeals that the Travel Act, apart from withdrawing funding and administrative support, prevented their travel to Cuba. The fact that the Florida law may not be consistent with some imagined federal policy that encourages travel to terrorist states presents no basis for preemption:

> Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such peripheral concern . . . or that implicates interests so deeply rooted in local feeling and responsibility, that preemption should not be inferred.

Wis. Dep't of Industry, Labor & Human Relations v. Gould, 475 U.S. 282, 291 (1986) (internal quotation marks omitted). Whether Florida supports academic travel to countries sponsoring terrorism can hardly be of more than peripheral concern to the federal government, if that. And Florida's interest in protecting its faculty, student, and administrative resources remains a deeply rooted, indeed a sovereign, state interest.

III. The Travel Act's Restriction on the Use of Non-State Funds is Not Preempted Under Crosby.

In closing, petitioners argue that Crosby demands the invalidation of the Travel Act as it applies to non-state funds because "state restrictions on private spending are even less within the state's fiscal purview," and Florida "has no legitimate interest in managing the private and federal grants that the Travel Act now restricts." Pet. at 32, 33. The expense to the State of administering non-state funds is, they suggest, minimal.

This argument, too, ignores the Tenth Amendment and Printz's bright line. The federal government may not compel States, *by legislation or executive action*, to implement federal regulatory programs. 521 U.S. at 925. That the costs to a State may be slight, or even nonexistent, makes no difference. "[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." Id. at 935.

Petitioners are free to make other arrangements for use of non-state funds that do not involve university management, just as the Court of Appeals found. Pet. App. 10a, n. 9. The Travel Act does nothing to impede such arrangements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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