No. 11-____ 101139 MAR 11 2011

IN THE

Supreme Court of the United States

FACULTY SENATE OF FLORIDA INTERNATIONAL UNIVERSITY, LISANDRO PEREZ, CARMEN DIANA DEERE, HOUMAN A. SADRI, JOSE ALVAREZ, NOEL SMITH, JUAN MARTINEZ, BRETT JESTROW, VANESSA HARPER,

Petitioners,

—v.—

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 11, 2011

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QUESTIONS PRESENTED

I. Whether the court of appeals' decision that Florida's prohibition on universities' use of state or private funds to support academic travel to Cuba and other disfavored nations was a permissible spending measure rather than a sanction preempted by federal law must be reversed to preserve this Court's unanimous holding in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), and to close the loophole created by the court of appeals that would permit broad state legislative exercises of foreign policy?

II. Whether *Crosby*'s holding that a state may not restrict the use of public funds through economic sanctions against disfavored nations in the face of overlapping federal sanctions also compels the preemption of state-enacted economic sanctions that restrict the use of both public and private funds?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, a list of all parties to this proceeding appears on the cover page of this Petition.[i]

CORPORATE DISCLOSURE STATEMENT

Because Petitioners are individuals and a non-corporate organization representing the interests of the faculty of Florida International University, no Petitioner has any parent company or stock.

[i] Petitioners initially filed suit at the district court against various individual members of Florida's Board of Governors and other state executives in their official capacities, but the State intervened and was the sole participant in support of the challenged state law before the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Faculty Senate of Florida International University, Lisandro Perez, Carmen Diana Deere, Houman A. Sadri, Jose Alvarez, Noel Smith, Juan Martinez, Brett Jestrow and Vanessa Harper respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 31, 2010 and for which the Eleventh Circuit denied a timely petition for rehearing *en banc* on October 28, 2010.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Eleventh Circuit denying *en banc* review, reprinted in the Appendix to this Petition ("App.") at 1a, is not yet reported.

The Eleventh Circuit's panel decision reversing the judgment of the district court (App. at 3a) is reported as *Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010).

The decision of the United States District Court for the Southern District of Florida granting Petitioners' motion for summary judgment and permanently enjoining enforcement of the challenged state law (App. at 16a) is reported as *Faculty Senate of Fla. Int'l Univ. v. Winn*, 574 F. Supp. 2d 1331 (S.D. Fla. 2008) (Seitz, J.).

The decision of the United States District Court for the Southern District of Florida denying

Petitioners' motion for a preliminary injunction (App. at 71a) is reported as *Faculty Senate of Fla. Int'l Univ. v. Winn*, 477 F. Supp. 2d 1198 (S.D. Fla. 2007) (Jordan, J.).

JURISDICTION

This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1). Petitioners filed a timely petition for rehearing *en banc* with the Eleventh Circuit, which was denied on October 28, 2010. On January 19, 2011, this Court granted Petitioners' timely motion for an extension of time to file this Petition until March 11, 2011.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the U.S. Constitution, U.S. CONST. art. VI, cls. 2, provides, *inter alia*:

> 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.

The Florida Travel to Terrorist States Act, FLA. STAT. §§ 112.061(3)(e), 1011.90(6), provides, *inter alia*:

> 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 defined as any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism.

FLA. STAT. § 112.061(3)(e).

> 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.

FLA. STAT. § 1011.90(6).

STATEMENT OF THE CASE

In its unanimous decision in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), this Court quelled a rising tide of state activism in foreign affairs in the 1990s by denying Massachusetts' economic sanction on businesses that traded with Burma. In a brief *per curiam* opinion, the Eleventh Circuit has deeply eroded *Crosby*'s message at a time when diplomatic uniformity – particularly in dealing with state sponsors of terrorism – is of critical national importance.

In 2006, the State of Florida enacted a measure (the "Travel Act")[1] barring state colleges and universities from using federal, state, and even private grant monies for academic and cultural "activities relating to or involving travel" to Cuba and other nations on the State Department's list of "sponsors of terrorism." The Travel Act's complete prohibition on Florida universities' use of such outside funding for academic and educational travel to selectively disfavored countries effectively ends Petitioners' academic research in and exchanges with Cuba and the targeted nations, despite federal encouragement and licensing of such activities.

As Congress and the President work to develop a response to current global events that harmonizes the Nation's self-interest with the democratic ideals it promotes, the treatment of

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[1] The challenged portions of the Travel Act are codified at FLA. STAT. § 112.061(3)(e) and § 1011.90(6).

terrorism and the individuals and nations sponsoring it is at the core of America's foreign policy. The President's flexibility to reward disfavored nations' progress with carrots and to penalize their setbacks with sticks allows the United States to speak with one voice, unfettered by state and local interference. That the Florida legislature passed the Travel Act to take a harder line against Cuba, Iran, Sudan and Syria than the President or Congress have taken impermissibly "blunt[s] the consequences" of the President's discretionary authority to manage relations with the listed states. *Crosby*, 530 U.S. at 376.

The district court found that at least the portion of the Travel Act that restricts the use of private funds and the state funds required to administer those private funds for academic and educational travel and travel-related activities must yield under this Court's unanimous decision in *Crosby*. The court of appeals, however, characterized the Travel Act as a budget measure reflecting the state's educational priorities, thereby opening up a loophole in *Crosby*'s holding through which even the original Massachusetts law could escape. This Court should grant the Petition in order to restore the scope of its ruling in *Crosby* before other states create further disunity at this grave moment in our foreign relations.

I. The Petitioners

The individual Petitioners are professors and educational researchers at state universities in

Florida whose work relates to certain nations, particularly Cuba, with which Florida scholars have long-standing and very close ties. Petitioner Faculty Senate of Florida International University ("FIU") is an organization that represents the interests of the FIU faculty. Funds earmarked for travel related to this work by the state, as well as federal and private grantors, and provided to organizations such as the Cuban Research Institute ("CRI") at FIU are administered through university accounts and allow the individual Petitioners' research to continue. The Travel Act has denied Petitioners' access to these federal, state, and even private funds and has barred Petitioners' ability to attend major scholarly conferences, organize trans-cultural collaborative events and exchanges and conduct research in the disfavored nations sanctioned by the Travel Act, most of all Cuba, even though this travel and research is permitted under a complex and often-changing federal regulatory regime.

II. Procedural History

On June 13, 2006, Petitioners filed a complaint in the U.S. District Court for the Southern District of Florida alleging, *inter alia*, that the Travel Act was preempted by federal law and infringed the Foreign Affairs Power of the U.S. Constitution. The district court granted in part Petitioners' motion for summary judgment on August 28th, 2008 and found that the Travel Act, as applied to Petitioners and to the extent that it bans expenditures of private funds and the nominal state funds necessary to administer

private funds, offends the Foreign Affairs Power and is preempted by federal law. The district court enjoined enforcement of the Travel Act in relevant part. App. at 16a.

Respondent intervened and appealed the district court's grant of injunctive relief, while Petitioners cross-appealed the injunction's failure to reach the Travel Act's ban on the use of state funds for travel proscribed by the Act. Fourteen months after the June 17, 2009 oral argument, the court of appeals issued a twelve-page *per curiam* decision on August 31, 2010 reversing the district court's judgment with regard to the ban on non-state funds and state funds used to administer non-state funds and vacated the injunction. App. at 3a. The court of appeals denied a timely petition for rehearing *en banc* on October 28, 2010. App. at 1a.

III. Factual Background

A. The Travel To Terrorist States Act: Florida's Sanction Against Cuba

Then-Florida Governor Jeb Bush signed the Travel Act into law on May 30, 2006 after it passed the Florida legislature unanimously. *See* 2006 Fla. Sess. Law. Serv. Ch. 2006-54. The operative portions of the Travel Act read as follows:

> 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.

FLA. STAT. § 1011.90(6).

> 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 defined as any state, country, or nation designated by the United States Department of State as a state sponsor of terrorism.

FLA. STAT. § 112.061(3)(e).

The Travel Act restricts Florida's public colleges and universities from expending state, federal or private funds, or performing administrative tasks related to the disbursement of any funds, for "activities related to or involving *travel to*" any *nation* listed as a "*state sponsor of* terrorism" by the U.S. Department of State (the

"listed states").[2] FLA. STAT. § 1011.90(6). The Act also bars the reimbursement of state employees and officers for activities "related to or involving travel" to such countries. FLA. STAT. § 112.061(3)(e).

By singling out a class of disfavored countries for punitive treatment, the Travel Act is an economic sanction against them. For example, the Travel Act's principal sponsor and chief proponent boasted that he conceived of the Act to prevent Florida's tax dollars and private dollars administered by Florida's educational institutions from "underwriting Fidel Castro's regime."[3] And in the course of defending the Act against the instant challenge, the State has acquiesced that the Travel Act exists because the United States "does not have normal and amicable relations" with the listed states. App. at 21a.

In practice, the Travel Act prevents state universities from funding academic and educational activities in the listed states or from administering federal or private grants intended to permit such

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[2] The listed states are currently Cuba, Iran, Sudan and Syria. *See* U.S. Dep't of State, "State Sponsors of Terrorism," http://www.state.gov/s/ct/c14151.htm (last visited Mar. 6, 2011).

[3] *See* Marc Caputo & Oscar Corral, *Law Bans Travel to "Terrorist States,"* THE MIAMI HERALD, May 31, 2006, at 5B; *see also* Warren Richey, *No Travel to "Terrorist" Countries for Florida State Universities: Court*, CHRISTIAN SCIENCE MONITOR, Sept. 1, 2010 (noting that "analysts" see the Act "as an effort to shut down the Cuban Research Institute"). Because the Travel Act targets Cuba through the State Department's state sponsors of terrorism list, which has included Cuba for the last three decades, the Act also restricts travel to Iran, Sudan and Syria.

activities. App. at 47a-48a. The Act stops the distribution of grants provided by respected private patrons like the Ford Foundation, the MacArthur Foundation and the Rockefeller Foundation from reaching respected scholarly organizations like the CRI to support academic travel to and cultural exchanges with the listed states. App. at 47a-48a. In addition to paralyzing funds already intended for use in activities related to travel to the listed states, the Travel Act has also chilled Petitioners' efforts to obtain new grants. App. at 48a.

B. The Travel Act Conflicts with Federal Sanctions Against Cuba and the Other Listed States

Congress has carefully crafted the carrot-and-stick arsenal of federal sanctions directed toward the listed states and other disfavored nations primarily around two complementary statutes, the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1-47, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707. TWEA, which empowers the U.S. embargo of Cuba, allows the President unfettered discretion to "investigate, regulate or prohibit" certain activities "through any agency he may designate, and under such rules and regulations he may proscribe . . . ." 50 U.S.C. App. § 5(b)(1). IEEPA delegates nearly unlimited authority to the President to manage relations with the listed states, as it provides that the "President may issue such regulations . . . as may be necessary for the exercise of the authorities

granted by this chapter." 50 U.S.C. § 1704; *see also id.* at § 1702(a)(1) (permitting the President to "investigate, regulate, or prohibit . . . any transactions in foreign exchange"). Congress intended for the President to have both flexible and controlled authority in the field of relations with the listed states, and did not contemplate individual local or state involvement in foreign affairs untethered by TWEA's and IEEPA's limitations.

Congress' intent to provide executive flexibility in managing foreign relations appears more recently in the Iran and Libya Sanctions Act of 1996 ("ILSA"), Pub. L. 104-172, 110 Stat. 1541 (1996).[4] In response to Libya's failure to comply with United Nations Security Council Resolutions related to the Lockerbie bombing, ILSA required the President to choose from a list of sanctions but also authorized the President to waive these sanctions if such a waiver would further the national interest. *See id.* at §§ 4-6, 8-9. By allowing the President to determine how sanctions would best achieve foreign policy goals, Congress indicated the importance of flexibility in managing U.S. relations with the listed states.

Pursuant to these broad grants of authority to the President by Congress, the federal government has shaped the contours of America's policy toward Cuba – the primary target of the Travel Act – for nearly fifty years. The federal sanctions against

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[4] ILSA appeared in the U.S. Code as a note to IEEPA at 50 U.S.C. § 1701 until it expired in 2006 and reappeared as the Iran Sanctions Act. When Congress passed ILSA, Libya and Iran were both listed states.

Cuba grew out of the politics of the Cold War and Cuba's political alliance with the Soviet Union. On February 3, 1962, pursuant to the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2370(a)(1)-(2), President Kennedy imposed a comprehensive trade embargo against Cuba. *See* Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962) ("[R]esolv[ing] that the present Government of Cuba is incompatible with the principles and objectives of the Inter-American system . . . ."). The embargo of Cuba has remained in place ever since. It has been and is enforced through TWEA, as implemented by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC").

Under this comprehensive federal legislative and regulatory umbrella, Cuba and each of the other listed states has its own full Part of the Code of Federal Regulations devoted to the specific sanctions levied – and not levied – against it. *See generally* 31 C.F.R. Parts 515 (Cuba),[5] 538 (Sudan), 542 (Syria), 560 (Iran). Despite their breadth, each set of sanctions contemplates permissive academic and educational travel to each listed state. *See* 31 C.F.R. §§ 515.564-65, 538.211-12, 542.206(c), 560.507(b)-(c). IEEPA prohibits sanctioning activities "ordinarily incident to travel." 50 U.S.C. § 1702(b)(4). And TWEA carves out from the permissible range of sanctions "the importation from any country . . . regardless of format or medium of transmission, of any information or informational materials,

[5] These regulations, promulgated under TWEA, are commonly known as the Cuban Assets Control Regulations ("CACR").

including but not limited to, publications, films, posters, phonograph records, microfilms, microfiche, tapes . . . artworks, and news wire feeds." 50 U.S.C. App. § 5(b)(4). The Export Administration Act ("EAA"), which implements a partial trade embargo on the listed states, declares that:

> [i]t is the policy of the United States to sustain . . . 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). The Terrorism List Governments Sanction Regulations ("TLGSR"), which detail the consequences of membership among the listed states, do not ban or restrict transactions incident to or involving travel. *See* 31 C.F.R. § 596.201. And the federal policy toward Cuba is explicit that "strengthen[ing] independent civil society" requires "expansion of people-to-people contact through two-way exchanges among academics, athletes, scientists, and others." 64 Fed. Reg. 25809 (May 13, 1999).

The federal sanctions laws and regulations borne out of national emergencies and diplomatic crises do not enable, and in some cases do not even permit, restrictions on academic, cultural and educational travel. Instead, the exhaustive congressional and executive action in this field has resulted in permissible but regulated travel to and research in the listed states. Petitioners carried out

their research through travel in accordance with these regulations long before the Travel Act extinguished their ability to do so.

REASONS FOR GRANTING THE WRIT

The decision below erodes this Court's unanimous decision in *Crosby* by creating a loophole that swallows its holding. The Travel Act mirrors the Massachusetts law struck down in *Crosby* in every material respect, and the district court's injunction should have been summarily affirmed. Indeed, where the Travel Act differs from Massachusetts' Burma Law, it goes even further against the rising tide of federal policy that increasingly favors permitting the academic and educational travel to Cuba, Iran, Sudan and Syria that the Travel Act prohibits. The Eleventh Circuit's reinterpretation of *Crosby* now welcomes states to create their own foreign policies under the guise of setting budgetary priorities. This Court should review the decision below to prevent state interference at a critical juncture in our Nation's foreign relations.

While the United States' history is defined and enriched by important contributions derived from the leadership and independence of its state governments, the power to set and maintain a foreign policy is the federal government's alone. The states are extremely limited in the field of foreign affairs. "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." James Madison, *The Federalist No. 42* 302 (E.H.

Scott ed., 1894); *cf.* Alexander Hamilton, *The Federalist No. 80* 476 (Clinton Rossiter ed., 1961) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." (emphasis in original)).[6]

The balance of power between the states and the federal government on matters of economic and diplomatic relations with other nations makes any state incursion into foreign affairs suspect. *See, e.g.*, *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *see also id.* at 242 (Frankfurter, J., concurring) ("In our dealings with the outside world, the United States speaks with one voice."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system . . . requires that the federal power in the field affecting foreign relations be left entirely free from local interference."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear."); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) ("For local

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[6] The Constitution balances the inherent rights of the states to conduct state business with deference to the federal government on matters of the common defense and foreign affairs. Congress alone has the power to declare war, to raise and support armies and to provide and maintain a navy. U.S. CONST. art. I, § 8, cls. 11-13. The President alone serves as Commander in Chief of the armed forces and holds the power to make treaties. *See id.* at art. II, § 2, cls. 1-2. Individual states may not wage wars, make treaties, or tax imports or exports. *See id.* at art. I, § 10, cls. 1-3.

interests the several States of the Union exist, but for . . . relations with foreign nationals, we are but one people, one nation, one power."). This Court's decisions in cases implicating this balance of power have made the balancing between federal and state interests in this area clear and predictable. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy."); *Chae Chan Ping*, 130 U.S. at 606 ("[The Federal government] is invested with power over . . . war, peace, negotiations and intercourse with other nations; all of which are forbidden to state governments."); *Holmes v. Jennison*, 39 U.S. 540, 577 (1840) ("The whole subject of the foreign relations of the country [is] placed under the exclusive jurisdiction of the government of the Union.").

Given the backdrop of federal exclusivity in the field of foreign affairs and economic sanctions against disfavored nations, this Court's unanimous decision in *Crosby* confirmed the unremarkable principle that state funding decisions targeting disfavored countries deserve special scrutiny – particularly when they have the potential to interfere with federal law and policy. The *Crosby* Court found a Massachusetts law barring state entities from buying goods or services from companies conducting business in Burma preempted by federal sanctions against Burma because: (1) Congress delegated exclusive authority to the President to impose economic sanctions against

disfavored nations; (2) Congress limited the scope of sanctions such that they allowed what Massachusetts' law prohibited; and (3) Congress intended that the President have control to develop a flexible strategy with respect to Burma. *See generally Crosby*, 530 U.S. at 374.

The court of appeals attempted to avoid *Crosby* by declaring that the Travel Act is not a sanction. Even though the Travel Act singles out certain nations for disparate economic treatment based on the nations' strained relations with the United States and sanctions conduct that federal regulations permit and encourage, the circuit court accepted the State's assertions that the State enjoyed inherent and plenary power to manage its own fisc – the same argument rejected by this Court in *Crosby*. But the panoply of congressional and executive action towards the listed states should have preempted the Travel Act for at least the same reasons that this Court found the Massachusetts Burma law at issue in *Crosby* preempted by the smaller family of federal sanctions towards Burma. Review of the decision below is required to restore and protect the critical balance of federal supremacy in foreign relations.

I. The Panel Decision Below Conflicts With The Law Of Preemption In General And *Crosby* In Particular In An Area And At A Time Where Uniformity Is Of Particular National Importance

Crosby reaffirmed and clarified that, in the context of foreign relations where federal interests are at their apex, a state law must yield to a federal law or regulation when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 530 U.S. at 372-373 (citing *Hines*, 312 U.S. at 67). The objectives of Congress there, as here, are to allow the President to exercise the full coercive power of the nation over the same listed states that Florida has singled out to levy its own punishment. Among those coercive powers is the regulation of travel. While denying Americans the ability to import, export and transfer funds to the listed countries, the President has affirmatively authorized travel, particularly travel by scholars. With respect to Cuba, Congress and the President have developed a carefully-proscribed travel licensing scheme. The Travel Act not only interferes with federal sanctions against the listed states, but also it "penalizes individuals and conduct that Congress has explicitly exempted or excluded from sanctions." *Id.* at 378-80.

Congress has the inherent power to preempt state law. *See* U.S. Const. art. VI, cls. 2; *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Federal law preempts state

law if: (1) state law intrudes in an area where Congress has occupied the field; (2) state law and federal law conflict; or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *E.g.*, *Crosby*, 530 U.S. at 372-73 (quoting *Hines*, 312 U.S. at 67). "'Conflict is imminent' when 'two separate remedies are brought to bear on the same activity.'" *Id.* at 379-80. The decision below inflexibly departs from *Crosby* much like the Travel Act expresses the Florida legislature's dissatisfaction with Congress' and the Executive's refusal to take a satisfactorily hard line against travel to the listed states. But this dissatisfaction is not Florida's to express through legislation, and the Travel Act must fall as preempted under the unanimous holding in *Crosby*.

A. The Travel Act Mirrors Massachusetts' Preempted Burma Law In All Material Respects

Crosby invalidated as preempted a Massachusetts law that barred state entities from expending state funds on vendors and companies with ties to Burma, even though the thrust of the law generally paralleled the objectives of the federal sanctions. Because the law deprived the President of the "flexible and effective authority" to manage foreign affairs and modify sanctions, it prohibited conduct that the federal sanctions permitted, thus "undermin[ing] the congressional calibration of force." *Id.* at 380. Additionally, it interfered with the federal regulations governing sanctions for Burma

and "compromise[d] the very capacity of the President to speak for the Nation with one voice." *Id.* at 381.

The Travel Act shares the fatal flaws of inflexibility, perpetuity and overbreadth with the Massachusetts Burma law unanimously struck down in *Crosby*. The Travel Act contains no provision for terminating or adjusting its funding bans, despite *Crosby*'s criticism of state laws taking "immediate" and "perpetual" effect. *Id.* at 374, 376-77. The Act disavows the federal policy to permit academic travel to the listed states in many circumstances, even though *Crosby* made clear that a state may not "penalize individuals and conduct that Congress has explicitly exempted or excluded from sanctions" because "sanctions are drawn not only to bar what they prohibit but to allow what they permit." *Id.* at 378-80. And the Act inserts itself into the foreign policy conversation by targeting the same conduct addressed by federal sanctions – communism in Cuba and human rights abuses and support of terror in Iran, Sudan and Syria – in the face of *Crosby*'s warning that the President must "speak for the Nation with one voice in dealing with other governments." *Id.* at 381.

B. Congress Has Left No Room For State Or Local Sanctions Against The Listed States

"When Congress intends federal law to 'occupy the field,' state law in that area is preempted." *Id.* at 372. Congress' intent to "occupy the field" is inferred if "[t]he scheme of federal regulation [is] so pervasive

to make reasonable the inference that Congress left no room for the states to supplement it," or if a law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption comes more easily when the legislation at issue relates to foreign affairs. *See Hines*, 312 U.S. at 63. In *Hines*, this Court found Pennsylvania's Alien Registration Act preempted by Congress' Alien Registration Act because the regulation of aliens so "intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme.'" *Id.* at 66 (quoting *Gibbons*, 22 U.S. at 211).

The patchwork quilt of federal legislation and regulation concerning economic and personal relations with the listed states confirms Congress' desire to leave such matters to the sole purview of the federal government. Congress has spoken on the issue of foreign sanctions in IEEPA, TWEA and ILSA, discussed *supra*, and other laws such as the International Security and Development Cooperation Act of 1985, 22 U.S.C. § 2349aa-9, the Foreign Assistance Act of 1961 ("FAA"), 22 U.S.C. § 2371(c), and the Arms Export Control Act ("AECA"), 22 U.S.C. § 2780(f). The listed states are themselves designated in the first instance by the State

Department pursuant to the EAA, AECA and the FAA.[7]

The field of travel and educational exchange with the listed states is subject to even more detailed regulation than the general Parts of the Code of Federal Regulations dedicated to each listed state. *See, e.g.*, 31 C.F.R. §§ 515.561-67 (regulating travel to Cuba, including granting a "general license" for academic and educational travel), 560.507(b)-(c) (regulating the export of personal belongings to Iran), 538.211(d) (same for Sudan), 542.206(c) (same for Syria). The extent and specificity of federal regulation in this area is conclusive evidence that Congress intended to regulate foreign policy with regard to the listed states. Because federal regulation fully occupies this field, Florida's local legislation restricting travel to the listed states is necessarily preempted.

C. The Travel Act Conflicts With Federal Sanctions Directed Toward the Listed States

The Travel Act conflicts with a substantial number of "definite and identifiable federal laws on the same subject" that regulate transactions and activities involving the listed states and that apply to each listed state individually and to all of the listed states in general. *Crosby* clarified that the existence of even one federal sanctions regime against a nation or group of nations expresses a "clear mandate and invocation of exclusively national power" putting to

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[7] *See* U.S. Dep't of State, *supra* note 2.

rest "any suggestion that Congress intended the President's effective voice to be obscured by state or local action." 530 U.S. at 381. Even in light of the ubiquity of federal laws and regulations governing relations with the listed states, not one bans expenditures "relating to or involving" travel. Instead, federal policy *promotes* travel to the listed states. The Travel Act, which inflexibly bans all spending on activities "related to or involving travel" to the listed states, unconstitutionally "penalizes individuals and conduct that Congress has explicitly exempted or excluded from sanctions," bringing "two separate remedies . . . to bear on the same activity." *Id.* at 378-80.

1. The Travel Act codifies the Florida legislature's desire to take a harder line against the listed states than the federal government has taken

"[S]anctions are drawn not only to bar what they prohibit but to allow what they permit." *Crosby*, 530 U.S. at 380. Where a state law "penalize[s] individuals and conduct that Congress has explicitly exempted or excluded from sanctions," it will be struck down as preempted by federal law. *Id.* at 378-80. The *Crosby* Court found the Massachusetts Burma law preempted because it interfered with Congress' intent to limit the amount of pressure applied by the United States on the Burmese government. *See id.* at 377-380. Massachusetts' law penalized certain transactions that federal law permitted and affected individuals

beyond the scope of federal sanctions. *See id.* at 378 (noting that the Burma law "conflicts with federal law at a number of points").

The Travel Act "amounts in substance to a rejection of a part of the policy" underlying federal sanctions directed toward the listed states. *Pink*, 315 U.S. at 203. The conflicts created by the Travel Act are even more striking than those addressed in *Crosby*. IEEPA explicitly exempts transactions "ordinarily incident to travel to or from any country" from Presidential regulation. 50 U.S.C. § 1702(b)(4). TWEA exempts importation "of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, microfilms, microfiche, tapes, compact disks, CD ROMs, artwork, and news wire feeds." 50 U.S.C. App. § 5(b)(4). OFAC grants "specific" and "general" licenses relating to travel to the listed states for purposes related to professional research and educational activities. *See* 31 C.F.R. §§ 515.564, 515.565, 538.212, 542.206(c), 560.507(b)-(c). For years, these express exemptions and regulations have permitted Petitioners to travel to and conduct research in the listed states.

2. OFAC's new "general license" for academic and cultural exchanges further encourages the travel to Cuba "effectively foreclose[d]" by the Travel Act

The President has taken further action toward the listed states – in particular, Cuba – since the court of appeals' denial of Petitioners' request for *en*

banc rehearing. This further action confirms the impasse between the Travel Act and the growing federal policy that endorses and encourages the travel to the listed states that the Travel Act prohibits.

In recognition of certain "policy changes" announced by the President in January 2011 that endeavor to "continue efforts to reach out to the Cuban people in support of their desire to freely determine their country's future," OFAC significantly relaxed its rules governing licensed travel to and financial transactions with Cuba so as to "allow for greater licensing of travel to Cuba for educational, cultural, religious, and journalistic activities and [to] expand licensing of remittances to Cuba." *See* 76 Fed. Reg. 5072, 5073 (Jan. 28, 2011). OFAC's final rule amends 31 C.F.R. § 515.565 to create:

> [a] new general license authorizing accredited U.S. graduate and undergraduate degree-granting academic institutions to engage in Cuba travel-related transactions incident to certain educational activities . . . .

Id. This new general license "authorizes transactions incident to the educational activities" and "authorizes students to participate in academic activities in Cuba through any sponsoring U.S. institution, not only through the accredited U.S. institution at which the student is pursuing a degree." *Id.* OFAC's final rule also adds 31 C.F.R. § 515.565(b)(2) "to restore a statement of specific

licensing policy for 'people-to-people' exchanges," which involve "educational exchanges not involving academic study pursuant to a degree program when those exchanges take place under the auspices of an organization that sponsors such programs to promote people-to-people contact." *Id.* To fund this travel, the new rule allows that "U.S. academic institutions may open accounts at Cuban financial institutions for the purpose of accessing funds in Cuba for transactions authorized pursuant to [31 C.F.R. § 515.565]." *Id.*

Where the Travel Act "effectively forecloses travel to, and research in, the designated countries," App. at 47a, federal policy now permits academic, educational and person-to-person travel to Cuba without prior notice or approval. And while the Travel Act is based on the belief that "[a]ny travel to a terrorist country necessarily subsidizes that terrorist regime"[8] and aims to prevent public and private funds from "underwriting Fidel Castro's regime,"[9] the federal policy permits U.S. academic institutions to make deposits in state-owned Cuban banks in order to fund such travel. The Travel Act cannot be reconciled with this expanding federal policy favoring the conduct of which Florida's legislature disapproves.

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[8] Transcript: *Florida House of Representatives Second Reading of HB 1171*, 4 (2006) (statement of Rep. David Rivera).

[9] Caputo & Corral, *supra* note 3.

D. The Travel Act Usurps Authority Delegated To The President And Deprives Him Of Flexible And Effective Authority To Sanction The Listed States

"In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) (quoting *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933)). The *Crosby* Court held that Massachusetts' Burma law undercut Congress' authorization permitting the President to impose sanctions against Burma and to terminate sanctions upon specified findings of progress. 530 U.S. at 374-78. Massachusetts' law undermined the President's authority in part because its lack of any provision for termination or adjustment made it "impossible . . . to restrain fully the coercive power of the national economy when he may choose" and thereby weakened the President's economic and diplomatic leverage. *Id.* at 376-77. The Travel Act is at odds with the President's province to speak for the Nation in developing a comprehensive, multilateral and flexible strategy to effect change in the listed states.

Congress has repeatedly granted the President broad and exclusive authority to devise a flexible foreign policy to promote political change in the listed states. For example, the CDA grants the President the authority to take the initiative to lead the international community in promoting diplomatic

relations with Cuba and to reduce sanctions in carefully calibrated ways to reward positive developments. *See* 22 U.S.C. §§ 6002(1), 6002(7), 6003. IEEPA grants the President substantial flexibility to control relations between the United States and foreign countries during times of crisis. *See* 50 U.S.C. §§ 1701-1707. Sanctions against other listed states are similarly designed. Congress' comprehensive empowerment of the President in this area indicates a "clear mandate and invocation of exclusively national power" belying "any suggestion that Congress intended the President's effective voice to be obscured by state or local action." *Crosby*, 530 U.S. at 381. The Travel Act both prevents the President from conducting carrot-and-stick diplomacy because of its rigidity and usurps the authority of the President to speak for the United States with one voice with respect to the listed states. The Travel Act's prohibition on research, travel or any other activity "related to or involving" the listed states imposes constraints that compromise this vital aspect of the President's policymaking authority. Like the Massachusetts Burma law, the Travel Act prevents the President from wielding full control over the national economy by regulating certain transactions.

The Travel Act implements a perpetual sanction with no termination provision, and any future Presidential attempt to modify U.S. sanctions in response to improvements in international relations with the listed states will be weakened by an inability to control the full coercive power of the

national economy.[10] Florida law will be out of step with the President's federal foreign policy directives, and the economic consequences of this syncopation threaten to be significant. The Travel Act creates the same contradiction that *Crosby* found unconstitutional. It disrupts a harmonious U.S. foreign policy towards the listed states with the discordant proclamations of the Florida legislature.

III. The Court Of Appeals' Attempt To Redeem The Travel Act By Recasting It As A Budget Bill Eviscerates *Crosby*

The Travel Act is preempted under *Crosby* irrespective of whether its chosen sanction involves the state purse. The Travel Act is not a facially-neutral spending law and its effect on foreign affairs is not an incidental "brush," contrary to the court of appeals' view. App. at 7a. Instead, the Travel Act is a direct condemnation of the listed states. The Act does not restrict funds for all academic or scholastic travel. It does not even restrict travel by continent or to places where the State Department has issued a travel warning. The Travel Act instead sends the clear message that Florida's legislature wishes to take a harder line with respect to the listed states than Congress and the President have chosen to take. The Travel Act is an economic sanction at odds with U.S. foreign policy towards Cuba and the other

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[10] OFAC's new general license to Cuba would normally permit Petitioners to resume their career-sustaining research, but the Travel Act bars their access to necessary foundation grants administered through the state university system. App. at 47a.

listed states, and its preemption cannot be avoided by *post hoc* attempts to characterize it as an innocuous budget bill.

A charitable reading of the Travel Act as a budget bill is belied by the Act's restriction of even nominal state funds needed to "coordinate, or administer, or to support the implementation, organization, direction, coordination, or administration of activities related to or involving travel to a terrorist state." FLA. STAT. § 1011.90(6). Universities thrive on private and federal grants, the value of which far exceeds any burden imposed on the State's educational system to administer them. The Act's broad reach into private pockets, combined with the Act's manifest contravention of clear federal policy supporting and encouraging travel to the listed states, confirms that the Act is a sanction and not a budget bill.

To be sure, the court of appeals accurately stated that a state "[b]y and large" controls its budget. App. at 11a. But state budgetary decisions are not beyond all constitutional scrutiny. *See, e.g.*, *Lee v. Macon County Bd. of Educ.*, 584 F.2d 78, 82 (5th Cir. 1978) ("Funding decisions are within the competence of the board . . . in the absence of a constitutional violation." (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)); *cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1994) (deeming budget autonomy claims "unremarkable" in light of constitutional concerns). Because the Travel Act is a state sanction against the listed states in an area of traditional

federal concern and in which area the federal government has spoken both directly and recently, the State's important but misplaced appeals to budgetary autonomy must yield.

Sanctions serve as powerful diplomatic tools because of the economic forces behind them. Whether they cut off aid, restrict loans or – like the Travel Act – limit financial transactions, the "stick" behind a sanction in carrot-and-stick diplomacy is the power of the dollar. It is ironic that the court of appeals' deference to the State's fiscal actions is used to immunize the Travel Act from constitutional scrutiny. The Massachusetts' Burma law struck down in *Crosby* would also stand in effect under the court of appeals' analysis because it restricted the use of state funds and thus involved the state's purse. Allowing the court of appeals' *per curiam* opinion to stand invites other states to bathe their own economic sanctions and foreign policy initiatives in state fiscal policy, in direct conflict with *Crosby* and at a time when national uniformity in foreign policy is essential.

IV. This Court Should Confirm That The Travel Act's Ban On The Use Of Non-State Funds For Activities Related To Or Involving Travel To The Listed States Is Preempted *A Fortiori* Under *Crosby*

The Travel Act's restriction on the use of private, non-state funds is preempted for the same reasons that its restriction on the use of state funds is preempted. But because the Massachusetts

Burma law at issue in *Crosby* did not reach non-state funds, this Court did not hold that state sanctions laws preempted based on their restriction of state spending are also preempted to the extent that they restrict non-state spending. Such a holding should follow *a fortiori* from *Crosby* because state restrictions on private spending are even less within the state's fiscal purview than the restrictions on public spending that this Court has already deemed preempted in the face of even less comprehensive federal sanctions.

Unlike the Massachusetts law in *Crosby*, the Travel Act restricts the use of federal, state and private grants as well as the nominal state funds required for the university system to administer them.[11] A state or local law is unconstitutional if its "true purpose . . . [is] to make a political statement" relating to foreign policy. *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1380 (D.N.M. 1980)); *accord Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1180 (S.D. Fla. 2000) (striking down a Florida law because the "purpose . . . [was] to protest and condemn Cuba's totalitarian regime"); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E. 2d 300, 307-08 (Ill. 1986) (finding a law expressing disapproval of the South African government

[11] Under the Travel Act, the individual Petitioners cannot use their private grants given to the CRI by the Ford Foundation and others because such grants are distributed through the state university system. App. at 47a-50a (finding that the Travel Act prevents the CRI and individual Petitioners from accessing private grants to fund travel to the listed states).

unconstitutional because "embargoes or boycotts are outside the realm of permissible State activity"). The district court correctly found that the Travel Act is a "political statement of condemnation" against Cuba and the other listed states, and that its restriction on the use of private funds decidedly outside the State's purse "illustrates [its] sanctioning nature . . . ." App. at 46a-47a.[12] Despite the State's *post hoc* efforts to recast the Act as a budget measure, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

The Travel Act is not just a spending bill because it reaches far beyond the state's budget. The State has no legitimate interest in managing the private and federal grants that the Travel Act now restricts. And the effect of the State's restriction on nominal state funds used to administer federal and private grants is minimal, while the Act's combined effect on Petitioners and on the national foreign policy towards the listed states is substantial.

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[12] The district court rightfully concluded that "[h]ad the Florida legislature limited the prohibition to the use of state funds to direct travel costs, it would be easy to find that such limitation was a discretionary spending decision entitled to deference." App. at 47a. But the Florida legislature did not so limit the Travel Act, and its limitations are not entitled to deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

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