No. 10-1139

In the Supreme Court of the United States

FACULTY SENATE OF FLORIDA INTERNATIONAL UNIVERSITY, ET AL., PETITIONERS

v.

STATE OF FLORIDA

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In 2006, the State of Florida restricted state universities from using state or nonstate funds to support travel to foreign nations that have been designated by the United States Department of State as state sponsors of terrorism. See Fla. Stat. Ann. § 1011.90(6) (West 2009). In addition, the State restricted public officers and employees from being reimbursed for travel to such nations. See *id.* § 112.061(3)(e) (West 2008). The question presented is whether those restrictions, which interfere with academic or educational travel abroad by faculty members at Florida state universities, are preempted by federal law.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. For many years, federal law has provided for the Executive Branch to determine whether and which foreign governments sponsor international terrorism. Specifically, the Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.*, the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, and the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, all permit the Secretary of State to determine whether "the government of [a foreign] country has repeatedly provided support for acts

of international terrorism." 22 U.S.C. 2371(a) (Supp. IV 2010); 22 U.S.C. 2780(d); 50 U.S.C. App. 2405(j)(1)(A). Currently the Secretary has designated four such countries as sponsors of international terrorism: Cuba, Iran, Sudan, and Syria. See U.S. Department of State, *State Sponsors of Terrorism*, http://www.state.gov/j/ct/c14151.htm.

Designation as a state sponsor of terrorism typically triggers a number of restrictions, including on foreign aid, arms exportation and sales, and trade and commerce. See 22 U.S.C. 2371(a) (Supp. IV 2010); 22 U.S.C. 2780(d); 50 U.S.C. App. 2405(j)(1). Travel to countries identified as state sponsors of terrorism, however, is not restricted as a consequence of their federal designation, and indeed is expressly permitted under other legal or regulatory provisions—either as a general matter (with respect to Iran, Sudan, and Syria) or under particular circumstances (with respect to Cuba). See pp. 10-12, *infra*. In addition, several federal programs fund academic travel abroad and do not restrict travel to countries found to sponsor terrorism. See pp. 13-14, *infra*.

2. In 2006, the Florida Legislature enacted "An act relating to travel to terrorist states" (Travel Act or Act). See 2006 Fla. Laws ch. 54. That Act does not directly restrict travel to any foreign country, but it restricts the financing of travel to countries that are state sponsors of terrorism in two ways.

First, the Travel Act provides:

> 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, coordi-

> nation, or administration of, activities related to or involving travel to a terrorist state.

Fla. Stat. Ann. § 1011.90(6) (West 2009). The Act thus prohibits state universities from using any state funds or administering any nonstate funds to support travel to "a terrorist state," which is defined as any country "designated by the United States Department of State as a state sponsor of terrorism." *Ibid.*

Second, the Travel Act provides:

> 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.

Fla. Stat. Ann. § 112.061(3)(e) (West 2008). The Act thus prevents public officers and employees from being reimbursed for travel to "a terrorist state."

3. Petitioners in this case are the Faculty Senate of Florida International University, which is a representative body elected by the entire faculty of that institution, and eight professors or educational researchers at various Florida state universities. See Pet. App. 18a n.2. They brought suit against various state defendants, alleging as relevant here that the pertinent provisions of the Travel Act are inconsistent with the Supremacy Clause and the federal foreign affairs power. See *id.* at 72a. The State of Florida intervened in the action as a defendant, and the other state defendants were subsequently dismissed. See *id.* at 16a n.1, 18a n.3.

The district court granted in part and denied in part petitioners' motion for summary judgment and a perma-

nent injunction. See Pet. App. 16a-70a. The court held the Act preempted to the extent that it forbids the use for travel to designated foreign nations of (i) nonstate funds, (ii) state funds necessary to the administration of nonstate funds, and potentially (iii) state funds necessary to obtaining federal travel licenses. See *id.* at 45a-49a.[1] In the court's view, blocking the use of those types of funds impermissibly interferes with the federal foreign affairs power, because the federal government's ability "to choose between a range of policy options in developing its foreign relations with the designated countries is impaired by" the Act's limitations on travel to those countries. *Id.* at 45a, 51a.

4. The court of appeals affirmed in part, reversed in part, vacated the permanent injunction, and remanded for further proceedings. See Pet. App. 3a-15a. Contrary to the district court, the court of appeals viewed "the distinction between state-contributed funds and other funds administered by the State [a]s one without a meaningful difference," because "the use of both kinds of funds results in an expense to the State." *Id.* at 6a n.3. The court thus viewed the question as whether the State could control its "own spending and, in this case, state spending on education—two core issues of traditional and legitimate state concern." *Id.* at 6a. The court recognized that "if a conflict with federal law or policy were plain enough, even these traditional state concerns could be overridden," but the court found no such conflict here. *Id.* at 7a. The court held that the

[1] The district court noted as a reason for preemption that the Travel Act prevents the use of state funds necessary for educators or students to obtain federal travel licenses to Cuba, see Pet. App. 48a-49a, but the court did not include the use of such funds within the scope of its permanent injunction, see *id.* at 70a.

Travel Act does not conflict "with the federal sanctions laws" and "no[] more than incidentally invades the realm of federal control of foreign affairs." *Id.* at 12a.

DISCUSSION

Federal law imposes a variety of sanctions against state sponsors of terrorism, but is carefully drawn to permit academic travel to those countries. Accordingly, insofar as Florida's Travel Act prevents or deters such travel, it undermines the careful congressional calibration of sanctions and the consequences of discretionary Presidential action in this area. Although the court of appeals erred in holding to the contrary, plenary review of that decision is not warranted. Petitioners identify neither any conflict among the courts of appeals nor even any other similar state laws. This Court may wish, however, to grant the petition, vacate the decision below, and remand for further proceedings in light of new regulations promulgated by the Department of the Treasury to implement a policy announced by the President since the court of appeals issued its decision.

A. As Applied To Petitioners, The Travel Act Conflicts With Federal Law And Thus Is Preempted

1. The Travel Act prevents the use of state or nonstate funds for academic travel to countries designated as state sponsors of terrorism

a. The record in this case reflects uncertainty about how the State interprets and intends to enforce the challenged provisions of the Travel Act. One of those provisions, Fla. Stat. Ann. § 1011.90(6) (West 2009), provides that "[n]one of the state or nonstate funds made available to state universities" may be used to implement or support "activities related to or involving travel to a ter-

rorist state," which is defined as any country "designated by the United States Department of State as a state sponsor of terrorism." The other provision, *id.* § 112.061(3)(e) (West 2008), provides that "[t]ravel expenses of public officers or employees for the purpose of" implementing or supporting "activities related to or involving travel to a terrorist state shall not be allowed under any circumstances." The no-funding and no-reimbursement provisions of the Travel Act operate independently; the former applies only to state universities, whereas the latter applies to state entities more generally.

The no-funding provision of the Travel Act affects petitioners—who are professors or educational researchers at various state universities—by barring their universities from dispensing any state or nonstate funds to support petitioners' academic travel to countries designated as state sponsors of terrorism. It is not clear, however, whether the Act's no-funding provision prevents state universities from facilitating petitioners' academic travel in ways that do not involve the administration of funds. For instance, at the summary judgment hearing, the State suggested that the Act might not preclude state universities from writing letters of introduction for petitioners or assisting with petitioners' applications for federal travel licenses. See 1:06-cv-21513 Doc. No. 146, at 69-71 (S.D. Fla. Oct. 3, 2008) (Hearing).

It also is not clear whether the no-reimbursement provision of the Act affects petitioners at all. That uncertainty is due in part to the fact that the Act was signed into law on May 30, 2006, and petitioners brought suit for declaratory and injunctive relief two weeks later on June 13, 2006. See Pet. App. 18a-19a. This action

thus was filed before the State could enforce the Act. Moreover, the district court permanently enjoined the Act's application to nonstate funds and state funds incidental to the administration of nonstate funds. See *id.* at 69a-70a. As a result, it is not apparent from the record how the Act operates on state universities except by blocking their administration of state or nonstate funds to support travel by faculty members to designated terrorist nations.

b. It is also not apparent whether petitioners challenge the Act on its face or only as applied to bar their academic travel. Petitioners' allegations in their complaint concern only the manner in which the Act prevents state universities from administering private, state, or federal funds for academic travel to certain designated nations, primarily Cuba.[2] At the summary judgment hearing, however, petitioners clarified that they challenged the Act both on its face and as applied to their proposed travel. See Hearing 13; see *id.* at 10-11.[3] On appeal, petitioners did not expressly disavow

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[2] Six of the individual petitioners (Perez, Deere, Alvarez, Martinez, Smith, and Harper) allege that the Act prevents the administration of private grant funds from university accounts for academic travel to Cuba. See 1:06-cv-21513 Doc. No. 35, at 6-9 (S.D. Fla. Aug. 2, 2006) (Complaint); Doc. No. 116, at 3-4, 9 (S.D. Fla. Nov. 30, 2007) (Statement). One petitioner (Jestrow) appears to allege that the Act prevents the administration of both private and federal funds for academic travel to Cuba. See Complaint 9. The remaining individual petitioner (Sadri) alleges that the Act prevents the administration of state funds for academic travel to Iran. See Complaint 7-8; Statement 5-6; Hearing 14.

[3] The district court invited the United States to express its views in connection with petitioners' motions for preliminary and permanent relief. Both times, the government notified the court that it would monitor the proceedings but that "it would be premature to express its views" "[g]iven the preliminary nature of the proceedings, the uncer-

their facial challenge, but they focused on the disbursement of federal and private funds by state universities for academic travel. See Pet. C.A. Br. 21-25, 38-41. In response, the State asserted "[t]hat is the *only* application of the Act [petitioners] have properly challenged." Resp. C.A. Reply Br. 3-4. The court of appeals considered the Act only as applied to bar funding for academic travel by university employees, see Pet. App. 6a n.4, and did not address the Act's no-reimbursement provision.

Before this Court, petitioners again focus solely on the use of federal and private grants for academic travel, see Pet. 32-33 & n.12, and do not assert that the court of appeals erred by addressing only the Act's application to funding for academic travel. Moreover, petitioners no longer appear to press any challenge to the Travel Act's restrictions on state funds (except for nominal state funds used to administer federal and private grants). See p. 17, *infra*. The State, however, maintains that "[p]etitioners have now abandoned the as-applied challenge to the Travel Act" that they pursued before the lower courts. Br. in Opp. 9; see *id.* at 10, 17. Thus, even at this stage of the proceedings, the parties appear to disagree on the nature of petitioners' challenge to the Act.

c. In light of that uncertainty, this brief addresses the issue that the lower courts actually decided and that petitioners most clearly present here: whether the Act's no-funding provision is preempted to the extent that it prevents the use of federal and private grants (and nominal state funds used to administer federal and private

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tainty regarding how [respondent would] construe the statute, and the apparent lack of certainty regarding how the statute will or may be applied." 1:06-cv-21513 Doc. No. 65, at 3 (S.D. Fla. Aug. 22, 2006); see Doc. No. 131, at 2 (S.D. Fla. May 23, 2008).

grants) for academic travel to federally-designated sponsors of terrorism. As explained above, it is not evident whether the no-funding provision precludes other means of facilitating academic travel. See Pet. App. 8a n.8. And neither the court of appeals nor petitioners have addressed the Act's no-reimbursement provision.

2. The federal sanctions regime against state sponsors of terrorism is carefully calibrated not to prohibit academic travel to those countries

a. For many years, federal law has provided for the Secretary of State to determine whether and which foreign governments sponsor international terrorism. See pp. 1-2, *supra*. Designation as a state sponsor of terrorism typically triggers a number of restrictions, including on foreign aid, arms exportation and sales, and trade and commerce. See 22 U.S.C. 2371(a) (Supp. IV 2010); 22 U.S.C. 2780(d); 50 U.S.C. App. 2405(j)(1). Those restrictions, however, do not extend to travel by American citizens. Federal law permits such travel because it fosters a degree of goodwill with the populations of those countries independent of the diplomatic process; furthers humanitarian objectives; and cultivates important institutional and personal connections. See, *e.g.*, 76 Fed. Reg. 5072 (Jan. 28, 2011) (explaining the benefits of travel by American citizens to Cuba). Currently the Secretary has designated four countries as sponsors of international terrorism: Cuba, Iran, Sudan, and Syria. With respect to each of those nations, although restrictions are imposed under other federal laws, those laws permit travel for academic or educational purposes.

i. *Iran, Sudan, and Syria*. The Executive Branch is authorized to impose additional restrictions against state sponsors of terrorism pursuant to the Interna-

tional Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq*. IEEPA, however, expressly excepts transactions ordinarily incident to travel to or from any country. See 50 U.S.C. 1702(b)(4). For that reason, although federal regulations restrict a broad range of financial transactions involving Iran, Sudan, and Syria, they exempt "transactions ordinarily incident to travel" to or from those countries. See 31 C.F.R. 560.210(d) (Iran), 538.212(d) (Sudan), 542.206(c) (Syria). By allowing such transactions, federal law protects the ability of individuals to travel to Iran, Sudan, or Syria for educational or other purposes. See Pet. App. 58a n.33 ("The determination that the federal government uses travel as a tool to effect foreign policy with respect to [Iran, Sudan, and Syria] is also clear.").[4]

ii. *Cuba*. The Trading With the Enemy Act (TWEA), 50 U.S.C. App. 1 *et seq*.—which was amended by IEEPA, see Pub. L. No. 95-223, 91 Stat. 1625—conferred broad authority on the President to impose comprehensive embargoes on foreign countries. See *Regan* v. *Wald*, 468 U.S. 222, 225-226 (1984). The Cuban Assets Control Regulations, 31 C.F.R. Pt. 515, implemented under the TWEA and carried forward under IEEPA and the Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. 6032(h), 6064-6065, impose such an embargo on Cuba. Although those regulations restrict a broad range of commercial and financial transactions with Cuba, the Treasury Department's Office of Foreign

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[4] Congress has provided for additional sanctions on Iran, Sudan, and Syria. See, *e.g.*, Iran Sanctions Act of 1996, 50 U.S.C. 1701 note; Sudan Accountability and Divestment Act, 50 U.S.C. 1701 note; Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, 22 U.S.C. 2151 note. None of those statutes restricts travel by U.S. persons.

Assets Control (OFAC) may license certain "[t]ravel-related transactions to, from, and within Cuba by persons subject to U.S. jurisdiction." 31 C.F.R. 515.560.

Of particular relevance to this case, in early 2011 the President directed the Secretary of the Treasury to expand travel opportunities to Cuba. Shortly thereafter, OFAC amended its Cuban travel regulations to "allow for greater licensing of travel to Cuba for educational, cultural, religious, and journalistic activities." 76 Fed. Reg. at 5072. Pursuant to that change in policy—which postdated the court of appeals' decision in this case—OFAC issued a general license of significance here. That general license authorizes "travel-related transactions" for various purposes by "faculty" of "[a]ccredited U.S. graduate and undergraduate degree-granting academic institutions." 31 C.F.R. 515.565(a). Among those purposes, faculty members may "[p]articipat[e] in a structured educational program in Cuba as part of a course offered for credit by the sponsoring U.S. academic institution." 31 C.F.R. 515.565(a)(1). That new general license complements an existing general license that authorizes "travel-related transactions" by "full-time professionals who travel to Cuba to conduct professional research in their professional areas," provided that "[t]he research is of a noncommercial, academic nature." 31 C.F.R. 515.564(a)(1)(i).

Taken together, those general licenses appear to authorize most, if not all, of the academic travel to Cuba that petitioners contend is effectively blocked by the Travel Act's no-funding provision. But even to the extent that the general licenses do not already authorize such travel, petitioners and other educators may apply for specific licenses authorizing Cuban travel-related transactions for their professional research and meet-

ings, 31 C.F.R. 515.564(b), or educational activities, 31 C.F.R. 515.565(b). That feature of the regulations is not novel. At the time petitioners brought this case, if they did not qualify for the general license for professional research, 31 C.F.R. 515.564(a) (2006), they were able to apply for specific licenses to conduct "[p]rofessional research," 31 C.F.R. 515.560(a)(4), 515.564(b) (2006); "[e]ducational activities," 31 C.F.R. 515.560(a)(5), 515.565(b) (2006); or "[a]ctivities of private foundations or research or educational institutes," 31 C.F.R. 515.560(a)(10), 515.576 (2006). OFAC retains the ability to grant specific licenses for those reasons under the current regulations.

The 2011 amendments to the Cuban travel regulations, considered against the backdrop of federal law's longstanding acceptance of academic travel to the federally designated countries, confirm that the court of appeals erred when it held that the United States has no "definite substantive foreign policy position * * * in favor of academic travel * * * that could be undermined by Florida's Act." Pet. App. 14a. One of the reasons for the 2011 regulatory amendment is to expand the opportunities for educational travel to Cuba across-the-board by obviating the need for faculty members or their institutions to seek their own specific licenses. Contrary to the court of appeals' determination then, at issue in this case is not "some indistinct desire on the part of the Executive Branch or Congress to encourage generally academic travel." *Ibid.* Rather, as the district court recognized, both Congress and the Executive Branch have embodied the policy in favor of academic travel in the relevant regulatory regimes. See *id.* at 58a n.33.

b. The Department of Education awards grants and fellowships to faculty and students at institutions of higher education for travel abroad, without restricting travel to countries designated as sponsors of terrorism. Specifically, the Department funds such travel through programs authorized by Title VI of the Higher Education Act of 1965 (HEA), 20 U.S.C. 1121 *et seq.*, and the Mutual Educational and Cultural Exchange Act of 1961 (MECEA), 22 U.S.C. 2452. With respect to the HEA, the Department funds fellowships for both faculty and students, see 20 U.S.C. 1122(a) and (b) (2006 & Supp. IV 2010), and many of those fellowships involve travel to foreign countries. In addition, the federal funds for many of those fellowships operate as grants that are made directly to institutions of higher education. See 20 U.S.C. 1122(a)(1)(A) (Supp. IV 2010) and (b)(1). The Travel Act would prevent state universities in Florida from disbursing those federal grant funds to faculty and students.

With respect to the MECEA, the Department of Education administers three Fulbright-Hays programs that are particularly relevant here: Doctoral Dissertation Research Abroad (DDRA), Faculty Research Abroad (FRA), and Group Projects Abroad (GPA). Through DDRA and FRA, the Department awards fellowships to faculty and students at institutions of higher education to engage in research abroad. The funds for those fellowships are also paid directly to the institutions themselves, which then disburse them to the fellows. See 34 C.F.R. 662.30, 663.30. Through GPA, the Department awards grants to higher education institutions, state education departments, and private nonprofit organizations for a variety of overseas projects. See 34 C.F.R. 664.2, 664.10. Again, the Travel Act would

prevent Florida state universities from disbursing any federal Fulbright funds to their faculty or students.[5]

3. The Travel Act undermines the congressional calibration of sanctions against, and the consequences of discretionary Presidential action with regard to, countries designated by the Executive as state sponsors of terrorism

a. Under the Supremacy Clause, there are various circumstances in which a state law must yield to a federal one, including when the "[state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); see *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996). In determining "[w]hat is a sufficient [state-law] obstacle" for preemption purposes, courts must consider the federal scheme "as a whole" together with "its purpose and intended effects." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000); see *Savage* v. *Jones*, 225 U.S. 501, 533 (1912).

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[5] The Department of Education also administers programs that award grants to institutions themselves for strengthening educational ties with foreign nations, including countries designated as state sponsors of terrorism. See 20 U.S.C. 1122 (2006 & Supp. IV 2010), 1124 (2006 & Supp. IV 2010), 1130 (2006 & Supp. IV 2010). In addition, the Department of State administers Fulbright programs that award grants to students and faculty members without requiring disbursement by their educational institutions. See 22 U.S.C. 2454(e)(1). Those programs include educational exchanges with countries designated as state sponsors of terrorism, and thus further evince the federal policy in favor of such travel. See, *e.g.*, J. William Fulbright Foreign Scholarship Board, *2009-2010 Annual Report* 63, *available at* http://fulbright.state.gov/uploads/82/9d/829d45a3638fea6b9a5d91530bd415ad/FINALnew-fullreport.pdf.

Here, it is not difficult to discern how the Travel Act interferes with the accomplishment of federal objectives. First, although Congress has imposed a number of political, economic, and military sanctions on countries found to have sponsored terrorism, it has not prohibited travel to those countries. See pp. 10-12, *supra*. Second, Congress has established numerous grants and fellowships for academic research and study abroad, without restricting travel to countries designated as state sponsors of terrorism. See pp. 13-14, *supra*. Albeit in different ways, together those federal sanctions and educational programs foster the ability of United States citizens to travel to designated foreign countries.

The Travel Act "undermines the intended purpose and 'natural effect'" of those federal programs. *Crosby*, 530 U.S. at 373 (quoting *Savage*, 225 U.S. at 533). The Act prevents Florida state universities from disbursing any funds within their control—whether federal, state, or private in nature—for academic travel that federal law expressly authorizes and in some cases encourages. Because most of those grant monies, whatever their source, appear to flow through universities under the present system, the Act effectively stands as an obstacle to the ability of faculty and students at state institutions in Florida (and only Florida) to engage in academic travel to countries designated under the federal sanctions regimes. The evident import of the Act then is to place an additional state-law sanction on top of the federal regime.

b. For the foregoing reasons, this case is similar to *Crosby*, which concerned a Massachusetts statute that barred state entities from contracting with companies doing business with Burma. See 530 U.S. at 366-367. Shortly after that Massachusetts law was enacted, Con-

gress imposed a set of mandatory and conditional sanctions on Burma. See *id.* at 368. This Court held that the state statute interfered with the federal sanctions regime by "penaliz[ing] some private action that the federal Act (as administered by the President) may allow" and thus "pull[ing] levers of influence that the federal Act does not reach." *Id.* at 376; see *id.* at 379. As the Court observed, "[s]anctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force." *Id.* at 380.

As in *Crosby*, Congress has crafted a comprehensive sanctions regime for countries designated as state sponsors of terrorism. That regime generally permits academic travel to Iran, Sudan, and Syria, and permits academic travel to Cuba in circumstances subject to the discretion of the President. By foreclosing the avenue through which financing of such travel occurs—*i.e.*, by barring the disbursement of state and even federal or private funds by state universities—Florida's Travel Act "undermines the congressional calibration of force" against foreign designated nations, *Crosby*, 530 U.S. at 380; "blunt[s] the consequences of discretionary Presidential action" with respect to those nations, *id.* at 376; and "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments," *id.* at 381.

c. The court of appeals purported to distinguish *Crosby* on the ground that the Travel Act "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. 11a. But in *Crosby*, the state statute at issue only prohibited spending Massachusetts's money on goods or

services offered by entities doing business with Burma. See 530 U.S. at 367. The Court rejected the argument that Massachusetts's statute "escape[d] pre-emption because it [was] an exercise of the State's spending power rather than its regulatory power." *Id.* at 373 n.7 (quoting *Wisconsin Dept. of Indus.* v. *Gould Inc.*, 475 U.S. 282, 287 (1986)). Although a State's spending decisions in a proprietary capacity generally are unaffected by federal law, see *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227-228 (1993), the State correctly acknowledges (Br. in Opp. 17) that the mere fact that a state law takes the form of a spending measure does not categorically insulate it from preemption.

In any event, the Travel Act does not only prohibit spending "Florida's money." Pet. App. 11a. It also prohibits state universities from administering *federal* or *private* grant funds. Indeed, those restrictions are the only ones directly at issue before this Court because petitioners appear to have abandoned any challenge to Florida's spending of state funds, except for the "nominal state funds used to administer federal and private grants." Pet. 33; see Pet. 33 n.12 (endorsing the district court's observation that the Travel Act would not be preempted if it restricted only the use of state funds for academic travel). Most petitioners rely on private grants, and the administration of those grants by state universities implicates in only an indirect and minor way the State's control over its own spending. The court of appeals focused solely on the State's interest in controlling the outlay of *state* funds, without examining what putative interest the State could have in blocking the flow of *nonstate* funds. See Pet. App. 11a-12a.

d. To be sure, state universities expend some nominal sum in the administration of federal and private grants for academic travel abroad. The State, however, has not asserted any substantial proprietary reason for declining to administer those nonstate grants for travel by individual faculty members and students to the designated countries in the same manner that state universities administer grants for travel to other countries. The State argues (Br. in Opp. 8 n.3, 9) that the Travel Act protects the safety of faculty and students at state universities. But the Act is obviously both over and underinclusive in that respect. It extends to countries like Cuba that pose relatively less severe risks for travelers than many other countries to which the Act does not extend. See *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 425-426 (2003) (finding that a statute's underinclusivity "raise[d] great doubts" about whether the state's asserted aims were real).

Moreover, the breadth of the Travel Act makes clear that Florida is acting in a regulatory rather than a proprietary capacity: the Act prevents faculty and students at Florida state universities from traveling to certain foreign nations, even when that travel is funded by federal or private dollars. The impact of that regulation on foreign affairs is not incidental or indirect; it is the very purpose of the Florida law. The Act thus is not a facially neutral state statute governing state spending that happens to have a differential impact on countries the federal government has designated for special sanctions regimes. Rather, the Act imposes an additional restric-

tion on those countries precisely because they are already subject to federal sanctions.[6]

e. Finally, the State argues (Br. in Opp. 10, 14-15) that it may not be compelled by federal law to support academic travel to countries designated by the federal government as sponsors of terrorism. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898, 935 (1997). Setting aside that petitioners appear to have abandoned their challenge to the Travel Act's restrictions on direct state funding for such travel, the question here is not whether the State may be compelled to expend its own funds on academic travel abroad. The question is whether, having decided to administer funds for such travel generally, the State may discriminate—including in the administration of federal and private grants—against only those faculty and students who wish to travel to federally-designated foreign nations. The answer to that question under *Crosby* is no. Florida may not penalize faculty and students who wish to travel to those nations any more than Massachusetts could penalize companies that wished to do business with Burma.

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[6] Although the legislative history of the Travel Act is not extensive, it demonstrates that the State was acting for regulatory reasons directly related to the conduct of foreign policy. At a hearing in the Florida House of Representatives, the bill's sponsor, Representative Rivera, explained that the Department of Justice had recently indicted two faculty members at a Florida university for espionage. See 1:06-cv-21513, Doc. No. 123-1, at 2, 12 (S.D. Fla. Dec. 17, 2007). Representative Rivera observed that "[a]ny travel to a terrorist country necessarily subsidizes that terrorist regime because money will be spent * * * in that country that ultimately goes into the coffers of the terrorist regime." *Id.* at 4. For that reason, he explained, the Travel Act would "prohibit taxpayer dollars from being used by * * * universities to organize trips to terrorist countries." *Id.* at 3.

B. Plenary Review By This Court Is Not Warranted

The court of appeals' decision nevertheless does not warrant review for several reasons. *First*, the record in this case is poorly developed. It is not clear how the State interprets the challenged provisions of the Travel Act or even whether petitioners challenge both the no-funding and no-reimbursement provisions on their face or only as applied to petitioners' proposed academic travel. See pp. 6-8, *supra*. Indeed, it appears that petitioners have now abandoned their argument that the State may not decline to spend its own money to fund foreign academic travel—which was the focus of the decision below. The court of appeals did not separately analyze whether the State may validly decline to administer federal and private grants. The court erred insofar as its decision resolved that narrower question, but its application of existing preemption doctrine to the particular legislation at issue here does not merit review.

Second, petitioners do not contend that the decision below is in conflict with any decision of another court of appeals. Nor do petitioners identify any similar state statutes that could be affected by the court of appeals' decision in this case. Cf. *Crosby*, 530 U.S. at 371 n.5 (noting that 19 municipalities had enacted similar statutes).[7] Petitioners contend (Pet. 14) that the court of

[7] On May 1, 2012, the Governor of Florida signed a bill prohibiting state and local governmental entities from contracting for certain goods or services with companies that do business in Cuba or Syria. See 2012 Fla. Laws ch. 196. The bill amends an existing Florida law that contains a savings clause, providing that its restrictions "become[] inoperative on the date that federal law ceases to authorize the states to adopt and enforce the[se] contracting prohibitions." Fla. Stat. Ann. § 287.135(8) (West Supp. 2012). At the time he signed the bill, Governor Scott stated that "[w]hen the 2012 Florida Legislature added sanctions

appeals' decision conflicts with *Crosby*, but they overread both *Crosby* and the decision below. *Crosby* recognized that a State's exercise of its spending power is not altogether immune from preemption, see 530 U.S. at 373 n.7, but it did not overrule the distinction that this Court has drawn for preemption purposes between a State's acts as a regulator and its acts as a proprietor. The court of appeals erred in holding that the Act represents a permissible exercise of Florida's proprietary authority over its own fisc insofar as federal and private grants are concerned, but the court did not hold more broadly that Florida may always avoid preemption in "the guise of setting budgetary priorities." Pet. 14.

Third, the question whether Florida may validly decline to administer federal grants for foreign academic travel does not appear to be of great practical significance at this time. The Department of Education has informed this Office that it has not funded travel to any designated foreign nation by faculty or students from a Florida state university in the past ten years. To be sure, because most petitioners allege that they use private funds (rather than federal or state funds) for their academic travel, it is difficult to gauge the full impact of

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against Cuba and Syria to section 287.135, it retained the Savings Clause. Hence, the Savings Clause must mean that the substantive restrictions are inoperative if they would conflict with federal law." Letter from Rick Scott, Governor, to Ken Detzner, Secretary of State 3 (May 1, 2012), *available at* http://www.flgov.com/wp-content/uploads/2012/05/5.1.12-HB-959-Transmittal-Letter1.pdf. Governor Scott recognized that because under *Crosby* "a conflict [with federal law] may exist, the restrictions will not go into effect unless and until Congress passes * * * a law permitting states to independently impose such sanctions against Cuba and Syria." *Ibid.* It thus currently appears that, either by operation of the statute or executive discretion, Florida's new "sanctions against Cuba and Syria" will not be enforced.

the Travel Act. But in the absence of other similar state statutes, the question does not appear to be currently of sufficient importance to merit plenary review by this Court.

Even though the question does not merit plenary review, there has been an important regulatory development since the court of appeals issued its decision. As explained above, see pp. 11-12, *supra*, 2011 amendments to the Cuban travel regulations further demonstrate that, contrary to the view of the court of appeals, "a definite substantive foreign policy position exists in favor of academic travel * * * that could be undermined by Florida's Act." Pet. App. 14a. This Court may wish then to grant the petition, vacate the decision below, and remand for further proceedings in light of the regulatory change. That would also allow the court of appeals to focus more specifically on whether the State may validly decline to administer federal and private grants.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of the 2011 amendments to the Cuban Assets Control Regulations.

Respectfully submitted.

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