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

STATE OF FLORIDA'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

PAMELA JO BONDI
Attorney General
Louis F. Hubener*
Chief Deputy Solicitor General
Timothy D. Osterhaus
Deputy Solicitor General
State of Florida
Office of the Attorney General
The Capitol – PL 01
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)
*Counsel of Record

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FLORIDA'S SUPPLEMENTAL RESPONSE TO THE BRIEF OF THE UNITED STATES

The United States does not have effective diplomatic relations, if any at all, with the regimes the State Department has listed as state sponsors of terrorism—Iran, Syria, Cuba, and Sudan. These are among the most dangerous places any American could choose to travel, even for academic purposes, yet the Government contends that § 1011.90(6), Fla. Stat. (the "Travel Act"), in refusing to subsidize such travel, is a "sanction" preempted by federal law.

The Government's far-reaching preemption argument expands the meaning of the term "sanction" far beyond the penalties at issue in *Crosby v. National Foreign Trade Council*, 530 U. S. 363 (2000), seeking to do indirectly what it could never do directly—require state support of federal policies.[1] And in making light of Florida's safety concerns, the Government ignores the ongoing shadow war with Iran, the merciless brutalities of the Syrian regime, and its own inability to influence the behavior of the listed countries, much less aid Americans who are seized as political pawns in those places. This alone distinguishes state sponsors of terrorism from other countries where the safety of travelers is not always assured.[2]

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[1] Four of the five judges (three in the court of appeals) who have sat on this case did not find that the Travel Act imposed a sanction on anyone. The fifth, District Court Judge Patricia Seitz, did so only in a limited context. Judge Seitz, however, did not find the Act's refusal to *fund* academic travel was anything other than a permissible discretionary spending decision. Pet. App. 43a, 47a.

[2] As examples, the Court might take note of the American hikers

(Continued …)

The Government nevertheless argues, and Florida agrees, that this case does not merit review. Florida strongly disagrees, however, with the Government's suggestion to vacate the decision of the court of appeals and remand this case for consideration of new policies that arguably constitute a "substantive foreign policy position" in favor of academic travel. This suggestion ignores the recent decision in *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011), wherein the Court emphasized that the state actions at issue in *Crosby* and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), which it found preempted, *directly interfered* with the operation of a federal program. There is a difference between not providing state resources to support a federal policy and directly interfering with the operation of a program. Moreover, nothing in the brief discloses the basis for compelling Florida to subsidize academic travel to Iran, Sudan, Syria, or Cuba, or any country, simply because

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imprisoned in Iran for over two years. *See* Donna Leinward Leger, *For $1 million bail, Iran releases two American hikers,* USA Today, Sept. 22, 2011. A U.S.A.I.D. worker, Alan Gross, is serving a 15-year sentence in Cuba for what would not be an offense almost anywhere else. *See* Damien Cave, *Prison Term for Crimes Against Cuba Is Upheld,* N.Y. Times, Aug. 5, 2011; *Cuba Proposes US Release 5 In Exchange for Alan Gross (May 10, 2012),*http://baltimore.cbslocal.com/2012/05/10cuba-proposes-the-u-s-release-cuban-5-in-exchange-for-alan-gross. North Korea, listed as a state sponsor of terrorism when the Travel Act became law, has engaged in similar conduct. *See* Choe Sang-Hun, *N. Korea Sentences 2 U.S. Journalists to 12 Years of Hard Labor*, N.Y. Times, June 8, 2009. Such state behavior, peculiar to these regimes, is not unpredictable. The Government offers no reason at all why Florida, or any state, should be compelled to risk its academic resources in places where the United States has no influence.

the United States thinks it might be a good idea. In short, there is no need to remand this issue because the Government's argument is wrong. As the court of appeals said:

> the strength of Florida's traditional state interest in managing its own spending and the scope of its academic programs is sufficient [and] is not preempted by federal law or violative of the federal foreign affairs power.

Pet. 14a-15a. The Government appears to accept the proposition, not disputed by any of the five judges who have sat on this case, that Florida may not be compelled to *fund* academic travel. Given the Government's failure to show how the compelled use of a university's administrative resources differs, its remand suggestion should be discounted.[3]

1. The Government first recommends that the petition be denied for a number of reasons. Gov't Br. at 1, 23. It observes correctly that the record in this case is poorly developed; that petitioners have abandoned key arguments; that no conflict exists between the circuits on the question presented here; that petitioners

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[3] In 2006 and 2008, the district court invited and "re-invit[ed]" the Government to appear as an amicus. *See* 1:06-cv-21513, Doc. Nos. 13, 128. The Government declined both times acknowledging only a "potential interest" and that it would "continue to monitor these proceedings closely." *Id.* at Doc. Nos. 65, 131. Only now has the Government offered its views—*see* Pet. 5a. ("No foreign country [or] government has complained about the Act.")—but the interest it has discovered is nothing new.

"overread" this Court's existing precedents; and that little "practical significance" attends this case at this time. *Id.* at 20-22. More than this, the Government observes that "even at this stage of the proceedings, the parties … disagree on the nature of petitioners' challenge." *Id.* at 8.

Given this disarray, it is clear that this case is not a good vehicle for revisiting this Court's preemption jurisprudence as set out in *Crosby*. *See* Gov't Br. at 6 ("It is not clear, … 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 [or] whether the no-reimbursement provision of the Act affects petitioners at all."); *id.* at 21 ("[t]he Department of Education has … not funded travel to any designated foreign nation by faculty or students from a Florida state university in the past ten years"). For all of these reasons, the Government sensibly warns against plenary review.

2. As a threshold matter, the Government wrongly characterizes Florida's law as an obstacle to Congress' objectives because it "*prevents* faculty and students at Florida state universities from travelling to certain foreign nations." Gov't Br. at 18 (emphasis added). This is not correct. Florida's law only forbids use of state resources to *support* academic travel to states sponsoring terrorism; it does not otherwise bar travel or impinge on federal prerogatives to determine where Americans may go. As then-District Court Judge Jordan put it:

> The [Act] does not diminish the President's (or Congress') flexibility or

> authority…. 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.

Pet. 76a. *See also* Pet. 10a ("Florida's Act does not prohibit – as a matter of law – anyone from traveling any place"). The district and appeals courts' interpretation of the Act comports perfectly with that of the Act's legislative sponsor: "[Those] who wish to travel to terrorist countries, even under the auspices of the university will still be able to do so, just not with taxpayer money." [1:06-cv-21513, Doc. No. 123-1, at 2-3].

In addition, the Government incorrectly suggests that Florida's law forecloses use of nonstate grant funds for certain academic travel. Gov't Br. at 7, 17-18. Florida's law merely restricts university *administration* of nonstate grants with respect to designated terrorist countries. Again, the use of state resources is the issue. As long as nonstate grant funds flow separate and apart from state accounts and do not spend state resources the law has no effect.

> Nothing in this bill will prevent a professor … from going directly to a Rockefeller Foundation, Ford Foundation, George Soros,

> Ted Turner, whoever they may want to go see to get money to conduct research in a terrorist country. They can do it directly … with somebody else's money, but not Florida's money.

[1:06-cv-21513, Doc. No. 123-1, at 2-3]. Florida does not block university travelers from obtaining nonstate grants so long as they are administered elsewhere.[4]

3. The Government cites no federal law that *requires* Florida to support academic travel with state resources. The fact that federal rules may "protect[] the

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[4] The Government concedes that some grants are made "to students and faculty members without requiring disbursement by their educational institutions." Gov't Br. at 14 n.5. Florida's Act does not affect such grants that require no state action.

Grants made through universities can require significant efforts. For example, the Fulbright-Hays programs cited by the Government (at 13) requires institutions to: distribute applications; screen applications using specific criteria; forward screened applications to the Government with an institutional grant request; administer the grant under complicated federal regulations; and disburse funds per federal procedures. 34 C.F.R. 663. *See also Wahba v. New York Univ.,* 492 F.2d 96, 100 n.3 (2d Cir. 1974) (describing a university grant as "a mutual joining of interests on the part of the grantor and the grantee institution … [in which] the grantee assumes responsibility for fiscal and administrative management and fulfillment of any special conditions."). *Compare Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may [not] command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. [Irrespective of] the burdens or benefits … such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

ability of individuals to travel to Iran, Sudan, and Syria for educational and other purposes" (Gov't Br. at 10) and "allow for greater licensing of travel to Cuba" (*id.* at 11), does not mean that Congress intended to compel the use of state resources to support such travel.

Furthermore, this Court need not remand this issue because the court of appeals has considered and resolved it:

> 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. * * *
>
> A State's decision to fund academic work in country 'A' but not country 'B' is not an impermissible sanction [and does not] more than incidentally invade[] the realm of federal control of foreign affairs."

Pet. 7a, 12a. The Government's brief points to no regulation that has, or could, change these conclusions.

4. The Court should also decline the Government's invitation to remand this case because the preemption argument plainly fails on the merits. The Government's argument only indirectly addresses the Tenth Amendment issue. (The petitioners and amici have ignored it entirely.) The Government argues the question is not whether a State may be compelled to expend its own funds, but whether it may discriminate against those who wish to travel to states that sponsor terrorism. Gov't Br. at 19. But as the court of appeals

recognized, administration of grant funds does involve an expense to Florida, and under *Printz*, federal law cannot compel such an expenditure.[5]

5. The Government's claim that the Travel Act is preempted because Florida has imposed a "sanction" in conflict with the *Crosby* decision is meritless. First, it is not even clear whom the Government believes is being sanctioned. Florida understands from the Government that it is not the purpose of any federal law to *aid* the regimes identified as sponsors of terrorism. Second, a word as critical as the term "sanction" does not mean whatever a litigant wants it to mean. "[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U. S. 213, 224 (1996).[6] In *Crosby*, Massachusetts' refusal to do business with any entity conducting business in Myanmar was clearly a penalty directed at both Myanmar and the business entities. Florida's decision not to subsidize a faculty member or student in

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[5] The Government at least acknowledges that federal funds are not at issue. Gov't Br. at 21. This is correct. In fact, none of the individual petitioners claimed that but for the Travel Act federal funds were available to support travel. If the Government truly wants to promote academic travel to regimes that sponsor terrorism, it might impose this as a condition of accepting federal funding for state universities, such as with Title IX.

[6] According to Black's Law Dictionary, a sanction is a "[p]enalty or other mechanism of enforcement used to provide incentives for obedience with law or with rules and regulations. That part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance." *Black's Law Dictionary* 1341 (6th ed. 1990).

traveling to regimes on the State Department's list is not. The loss of a faculty member would be, at best, a significant inconvenience to a university. At worst, it might be highly disruptive to course offerings and even subject the university to liability claims.

If the federal government had a history of overseeing States' funding decisions for their university programs, then the Government's preemption analysis might bear closer consideration. But the opposite is true. Our federal system has never countenanced such oversight. Decisions about university funding and resource allocation are traditionally and exclusively a matter of state interest. In such cases there is a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009) (confirming that the presumption against preemption applies in all preemption cases, including claims of implied conflict preemption*); see also Wis. Dep't of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 291 (1986) (preemption should not be inferred where state spending decision implicates deeply rooted local responsibility).

Even if Florida's state interests were considered to truly affect foreign affairs—a point which is not conceded, and which the court of appeals rejected—it is appropriate under *Garamendi* to weigh the strength of the State's interest when it is legislating in an area of traditional competence. *See* 539 U. S. at 419-420 & n.11, 425-426. The Government's brief suggests that Florida's safety concerns are not valid because the law is both over and underinclusive. Some countries not on the list may be unsafe, while Cuba, it suggests, is not. Mr. Gross, who is 63 years old and serving a 15–year

sentence in a Cuban prison, might beg to differ. In any case, the Government proposes a test a State could never win because there is no bright line test for safety. The point is, the United States has no effective diplomatic relations with the regimes on the State Department's list, and when Americans are seized as pawns it can do little to assist them.[7]

6. The Government does not mention that the Travel Act is not the only restriction on academic travel in Florida's system. The law merely designates one category of travel that will not be state-subsidized, which is supplemented by other school-specific policies. *See, e.g.,* Fla. Atl. Univ., Study Abroad & Int'l Travel Guidelines,http://www.fau.edu/goabroad/Safety_and_Security_Policies_for_International_Study_and_Travel.php (last visited June 4, 2012) ("**FAU routinely does not sponsor … programs to locations on the U.S. State Department Travel Warning list**") (emphasis in original).

In fact, many universities restrict academic travel based on the State Department's list of dangerous

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[7] If the Government believes that travel to Cuba is different and safe, it might consider removing it from the State Department's list of states that sponsor terrorism and rewriting the opening paragraph of its travel website that describes: "[t]he Cuban government['s] routine[] employ[ment of] repressive methods … includ[ing] intense physical and electronic surveillance … detention and interrogation of both Cuban citizens and foreign visitors." U.S. Dep't of State, *Cuba, Country Specific Info.*, April 30, 2012, http://travel.state.gov/travel/cis_pa_tw/cis/ cis_1097.html (last visited June 4, 2012).

countries that travelers should avoid.[8] Dozens of nations appear on this list, including Iran, Sudan, and Syria, which are three-fourths of the countries subject to Florida's law. What distinguishes state sponsors of terrorism, however, is that their governments do not acknowledge or abide by international norms, and at their whim travelers can become political pawns. The hard reality is that Americans in these countries are anything but safe. And because universities face real consequences if their faculty members or students are victimized, and because the United States has no ability to influence the behavior of these regimes, the Government's overinclusive and underinclusive argument is not persuasive. It hardly establishes that the real world interests of Florida are less important than a vague federal interest in academic travel.

This Court has recently warned against "free-ranging assertions of foreign policy consequences, when

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[8] *See* U.S. Dep't of State, Current Travel Warnings, http://www.travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited June 4, 2012) ("**Travel Warnings** are issued when long-term, protracted conditions that make a country dangerous or unstable lead the State Department to recommend that Americans avoid … that country [and] when the U.S. Government's ability to assist American citizens is constrained"). *See also* 1:06-cv-21513, Doc. No. 138, at 4 (describing travel prohibitions of other universities); Doc. No. 138-2 (attaching university travel policies and articles reporting academic travel suspensions). *See also* Mary Beth Marklein, *Students studying abroad face dangers with little oversight*, USA Today, Mar. 28, 2009 ("Many [colleges and universities] cancel or relocate programs if State Department travel advisories warn of danger. And students typically must sign disclaimers saying they're aware of the risks.").

those assertions come unaccompanied by a persuasive legal claim." *Garcia v. Texas*, 131 S. Ct. 2866, 2868 (2011). In the end, the Government seems to concede that here, in addition to serious record problems, there are no real foreign policy consequences nor any persuasive legal claims, and therefore no reason for plenary review. With that much, Florida agrees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL
LOUIS F. HUBENER*
CHIEF DEPUTY SOLICITOR GENERAL
TIMOTHY D. OSTERHAUS
DEPUTY SOLICITOR GENERAL
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL – PL 01
TALLAHASSEE, FL 32399
(850) 414-3681
(850) 410-2672 (FAX)
Counsel for Respondent
*COUNSEL OF RECORD

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