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## Eleventh Circuit Invalidates Florida Law for Conflicting with Federal Law Towards Cuba: *Odebrecht Const., Inc. v. Sec'y Fla. Dep't of Transp.*

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ELEVENTH CIRCUIT INVALIDATES  
FLORIDA LAW FOR CONFLICTING WITH  
FEDERAL LAW TOWARDS CUBA:  
*ODEBRECHT CONSTR., INC. V. SEC'Y FLA.  
DEP'T OF TRANSP.*

Michael G. Martinez\*

INTRODUCTION

In May 2013, the United States Court of Appeals for the Eleventh Circuit affirmed<sup>1</sup> the grant for preliminary injunction by the District Court for the Southern District of Florida,<sup>2</sup> which enjoined the State of Florida from enforcing a law known as the Cuba Amendment,<sup>3</sup> because it violated the Supremacy Clause<sup>4</sup> of the U.S. Constitution. The Cuba Amendment was a Florida law that prohibited companies with any business connection to Cuba from engaging in the bidding process for state contracts valued at one million dollars or more.<sup>5</sup>

This comment will review the Eleventh Circuit's decision, and will consider the effect this decision will have on international commerce. The author's position is that the Eleventh Circuit correctly enjoined the Cuba Amendment as it violated the Constitution and impeded the already extensive, federal regulatory scheme. Further, this comment argues that the Eleventh Circuit's decision has a great influence on the preservation of both foreign and domestic entities' ability to engage in international commerce. First, this comment will discuss the development of federal law governing relations with Cuba and the Cuba Amendment. Second, this

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<sup>1</sup> See *Odebrecht Constr., Inc., v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1272 (11th Cir. 2013).

<sup>2</sup> See *Odebrecht Constr., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1308 (S.D. Fla. 2012), *aff'd sub nom. Odebrecht Constr., Inc., v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268 (11th Cir. 2013).

<sup>3</sup> FLA. STAT ANN. § 251.471 (West 2012).

<sup>4</sup> U.S. Const. art. VI, cl. 2.

<sup>5</sup> FLA. STAT ANN. § 251.471 (West 2012).

comment will discuss the analysis of the district court and the court of appeals. Finally, it will discuss the practical impact of the Eleventh Circuit's decision and how it will affect international commerce.

## I. HISTORY

### A. FEDERAL LAW GOVERNING RELATIONS WITH CUBA

In 1917, Congress enacted the Trading with the Enemy Act (TWEA),<sup>6</sup> which empowered the President "to regulate and embargo trade with foreign nations."<sup>7</sup> However, the federal government did not impose its embargo against Cuba until October 1960.<sup>8</sup> While the United States initially recognized Fidel Castro's government after the revolution to overthrow Fulgencio Batista,<sup>9</sup> relations between the two countries quickly worsened in August 1960 as Castro began nationalizing American property without compensation and establishing his regime as strongly communist.<sup>10</sup> In January 1961, the United States severed diplomatic relations with Cuba and restricted any travel there by Americans.<sup>11</sup> The Treasury Department then promulgated the Cuban Assets Control Regulations (CACRs)<sup>12</sup> in 1963 to enforce the embargo. The CACRs "apply to all persons and entities subject to United States jurisdiction and generally

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<sup>6</sup> Trading with the Enemy Act, ch. 106, 40 Stat. 411 (codified as amended in scattered sections of 50 App. U.S.C.). The Act broadly allowed the President to regulate, license, and prohibit trade with foreign nations.

<sup>7</sup> *Odebrecht Constr., Inc., v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1275 (11th Cir. 2013).

<sup>8</sup> See GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOTT & MILICA COSIC, CASE STUDIES IN ECONOMIC SANCTIONS AND TERRORISM, CASE NO. 60-3, U.S. v. CUBA (1960- : CASTRO) 1 (2011), available at <http://www.iie.com/publications/papers/sanctions-cuba-60-3.pdf>.

<sup>9</sup> See *Timeline: US-Cuba Relations*, BBC NEWS: LATIN AMERICA & CARIBBEAN (Oct. 11, 2012), <http://www.bbc.com/news/world-latin-america-12159943>.

<sup>10</sup> See Hufbauer et al., *supra*, note 8; see also *Timeline: US-Cuba Relations*, *supra* note 9.

<sup>11</sup> Hufbauer et al., *supra* note 8. Foreign relations between the two countries continued to deteriorate after several incidents: the U.S.-backed failed Bay of Pigs invasion, several plans to assassinate Fidel Castro, and the Cuban Missile Crisis. See *Timeline: US-Cuba Relations*, *supra* note 9.

<sup>12</sup> Cuban Asset Control Regulations, 31 C.F.R. pt. 515.

prohibit trade with Cuba and travel to Cuba.”<sup>13</sup> Under the CACRs, “United States jurisdiction” includes only “U.S. corporations, their domestic and foreign subsidiaries, and any foreign company owned or controlled by a U.S. citizen.”<sup>14</sup> Notably, this definition does not permit sanctions against a company for actions by its foreign-parent company or foreign affiliates that share a common parent company.<sup>15</sup>

Even after the creation of the CACRs, Congress continued to pass legislation with an eye toward governing its relationship to Cuba. For example, Congress enacted the Cuban Democracy Act (CDA) in 1992 as a response to what Congress found to be the Cuban government’s “consistent disregard for internationally accepted standards of human rights and . . . democratic values.”<sup>16</sup> The Act sought to increase “economic sanctions against the Cuban government while simultaneously permitting humanitarian relief to the Cuban people.”<sup>17</sup> In general, the CDA gives the President authority to sanction other countries for conducting trade with Cuba by making them ineligible for aid.<sup>18</sup>

In 1996, Congress passed the Cuban Liberty and Democratic Solidarity Act (Libertad Act), codifying certain regulatory sanctions against Cuba and extending the federal embargo indefinitely.<sup>19</sup> One of the listed purposes of the Act was to “strengthen international sanctions against the Castro government.”<sup>20</sup> Additionally, the Act requires the President to submit reports to congressional committees that provide a “description of Cuba’s commerce with foreign countries, including an identification of Cuba’s trading partners and

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<sup>13</sup> *Odebrecht Constr., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1310–11 (S.D. Fla. 2012), *aff’d sub nom.* *Odebrecht Constr., Inc., v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268 (11th Cir. 2013).

<sup>14</sup> *Odebrecht*, 715 F.3d at 1276; *see also* 31 C.F.R § 515.329.

<sup>15</sup> *Odebrecht*, 715 F.3d at 1276; *see also* 31 C.F.R § 515.329.

<sup>16</sup> *Odebrecht*, 876 F. Supp. 2d at 1311 (quoting Cuban Democracy Act of 1992, 22 U.S.C. § 6001 (2012)).

<sup>17</sup> *Odebrecht*, 715 F.3d at 1276. *See generally* 22 U.S.C. § 6002 (2012) (providing the policy reasons behind enacting the CDA).

<sup>18</sup> *See* 22 U.S.C. § 6003(b) (2012).

<sup>19</sup> *See generally* 22 U.S.C. §§ 6021–91 (2012) (providing the provisions of the Act); *United States v. Plummer*, 221 F.3d 1298, 1308 n.6 (11th Cir. 2000) (concluding that § 6032(h) “continues the embargo indefinitely and effectively suspends the . . . requirement that the President revisit the embargo each year”).

<sup>20</sup> 22 U.S.C. § 6022(2) (2012).

the extent of such trade.”<sup>21</sup> This demonstrates further Congress’ intent for the federal government to regulate and to be responsible for foreign relations with Cuba. Four years later, the passage of the Trade Sanction Reform and Export Enhancement Act of 2000 reduced some of the sanctions, including some restrictions pertaining to exporting medical supplies and agricultural products.<sup>22</sup> Moreover, the Act prohibited travel to Cuba for tourist activities.<sup>23</sup> The extent of regulation by Congress into nearly every facet involving Cuba further indicates its intent for the federal government to be responsible for foreign relations with Cuba. Although the law over the past fifty years has generally restricted interaction between the United States and Cuba, the statutes and regulations are not without exceptions and President Obama has also lessened some of the travel restrictions by amending various regulations.<sup>24</sup>

#### B. FLORIDA’S CUBA AMENDMENT

It was against this backdrop of federal laws that on May 1, 2012, Florida Governor, Rick Scott, signed the controversial Cuba Amendment into law.<sup>25</sup> In an open letter to Florida Secretary of State, Ken Detzner, regarding the bill, Governor Scott explained that he felt it was imperative to “continue to place economic pressure on the Cuban . . . government.”<sup>26</sup> Governor Scott further stated that the law “demonstrates Florida’s commitment to spreading political and economic freedom in Cuba.”<sup>27</sup>

As passed by Governor Scott, the Cuba Amendment provided that “a company . . . engaged in business operations in Cuba . . . is ineligible for, and may not bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for

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<sup>21</sup> 22 U.S.C. § 6038(a) & (b)(2) (2012).

<sup>22</sup> 22 U.S.C. §§ 7201–09 (2012).

<sup>23</sup> See 22 U.S.C. § 7209(b) (2012).

<sup>24</sup> See, e.g., *Odebrecht Constr., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1312 (S.D. Fla. 2012), *aff’d sub nom. Odebrecht Constr., Inc., v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268 (11th Cir. 2013) (discussing the limitations of the Libertad Act and the Trade Sanctions Reform and Export Enhancement Act).

<sup>25</sup> FLA. STAT. § 251.471 (2013).

<sup>26</sup> *Odebrecht*, 876 F. Supp. 2d at 1310, n.4.

<sup>27</sup> *Id.*

goods or services of \$1 million or more.”<sup>28</sup> In the terms of the Amendment, “company” and “business operations” are broadly defined, which ensured the law would substantially affect for-profit entities with any commercial ties to Cuba.<sup>29</sup>

The Cuba Amendment further provided that before bidding on any government contracts subject to the amendment, a company was required to submit a certification that it did not engage in business operations in Cuba.<sup>30</sup> If a company filed a false certification, it would be required to pay a “civil penalty equal to the greater of \$2 million or twice the amount of the contract” and would be “ineligible to bid on any contract with an agency or local governmental entity for 3 years.”<sup>31</sup>

As enacted, the Cuba Amendment has the potential to absolutely devastate the Cuban economy and to put even more strain on the relationship between the United States and Cuba. For example, companies subject to the law would have to cease any business operations in Cuba to be able to continue to bid on large public contracts in Florida. Since the federal government had expressly indicated its intent to regulate foreign relations based on the extensive framework of laws outlined above, Florida’s attempt to impede the Cuban economy would have undermined the federal government’s approach to Cuba.

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<sup>28</sup> FLA. STAT. § 287.135(2) (2013).

<sup>29</sup> See also Odebrecht, 876 F. Supp. 2d at 1310 (“[a]mendment effectively encompasses domestic companies with no connection to Cuba other than by proxy”). “Company” is defined as any “entity or business association, including all wholly owned subsidiaries, majority-owned subsidiaries, parent companies, or affiliates of such entities or business associations, that exists for the purpose of making profit.” FLA. STAT. § 215.473(c) (2013). Further, the Amendment defines “business operations” as “engaging in commerce in any form in Cuba . . . including, but not limited to, acquiring, developing, maintaining, owning, selling, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, military equipment, or any other apparatus of business or commerce.” FLA. STAT. § 281.135(1)(b) (2013).

<sup>30</sup> FLA. STAT. § 287.135(5) (2013).

<sup>31</sup> FLA. STAT. § 287.135(5)(a)(1)–(2) (2013).

II. ODEBRECHT CONSTR., INC. v. PRASAD, FLA.  
DEP'T OF TRANSP.

## A. PARTIES

In this case, the plaintiff, Odebrecht Construction, Inc. (Odebrecht), is a Florida corporation that has derived almost \$4 billion in revenues since its founding in 1990 from government infrastructure and transportation contracts awarded by agencies in the State of Florida.<sup>32</sup> Odebrecht is a subsidiary of Odebrecht, S.A., a “Brazilian conglomerate in the engineering, construction, water and wastewater, ethanol, real estate, chemical and petrochemical fields” that does business throughout the world.<sup>33</sup> In 2012, one of Odebrecht, S.A.’s other subsidiaries, COI Overseas Ltd., was the lead contractor in a project to expand and overhaul the Cuban Port of Mariel.<sup>34</sup> Odebrecht, however, was not involved with the project or any projects in Cuba.<sup>35</sup>

Defendant, Ananth Prasad, was the Secretary of the Florida Department of Transportation (FDOT), which is tasked with “coordinating, maintaining, and regulating transportation in the State of Florida.”<sup>36</sup> The Secretary is also responsible for enforcing the Cuba Amendment for the FDOT’s contracts worth one million dollars or more.<sup>37</sup>

B. OPINION OF THE U.S. DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF FLORIDA

Shortly after the Cuba Amendment was signed into law, but before its effective date, Odebrecht brought an action in the District Court for the Southern District of Florida pursuant to 42 U.S.C. § 1983 against the FDOT to challenge the constitutionality of the Cuba

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<sup>32</sup> See Odebrecht, 876 F. Supp. 2d at 1308–09.

<sup>33</sup> *Id.* at 1309 (citing Pl.’s Am. Compl., ¶ 20).

<sup>34</sup> *Id.*; see also Nick Miroff, *US Cuba Embargo Grows New Fangs in Florida*, GLOBAL POST (June 13, 2012), <http://www.globalpost.com/dispatch/news/regions/americas/cuba/120612/us-trade-embargo-florida-law-odebrecht>.

<sup>35</sup> See Odebrecht Constr., Inc., v. Sec’y, Fla. Dep’t of Transp., 715 F.3d 1268, 1273 (11th Cir. 2013).

<sup>36</sup> Odebrecht, 876 F. Supp. 2d at 1309.

<sup>37</sup> *Id.*

Amendment and filed a motion for a preliminary injunction to prevent its enforcement.<sup>38</sup> The District Court granted the injunction, concluding that the Cuba Amendment violated the Supremacy Clause, Foreign Affairs Power, Foreign Commerce Clause and that the Amendment was inoperative on its own terms.<sup>39</sup> The District Court concluded that the Cuba Amendment violated the Supremacy Clause primarily because “[f]ederal law regulates all aspects of commerce with Cuba, including but not limited to the importation and exportation of various goods and services, travel between the United States and Cuba, and private rights of action against the Cuban government.”<sup>40</sup> The pervasiveness of federal law relating to Cuba thus demonstrates Congress’ intent for the federal government to regulate foreign affairs with Cuba, and not to leave it to the individual states.

*C. OPINION OF THE U.S. COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT*

In response to the district court’s order, the FDOT filed an interlocutory appeal with the Eleventh Circuit, arguing that the Cuba Amendment is constitutional and that the district court erred in granting the preliminary injunction.<sup>41</sup> The Eleventh Circuit focused primarily on whether the Cuba Amendment stood “as an obstacle to the carefully calibrated federal regime.”<sup>42</sup> The Court concluded that the Cuba Amendment violated the Supremacy Clause of the Constitution and affirmed the grant of the injunction.<sup>43</sup> The Court held that the Cuba Amendment violated the Supremacy Clause for three reasons: it applied more broadly, punishing more companies and more conduct than under federal law; it provided for much more severe penalties than under federal law; and it undermined the

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<sup>38</sup> *Id.* at 1308. Odebrecht argued that the Cuba Amendment violated several provisions of the United States Constitution: the Supremacy Clause, the Foreign Affairs Power, and the Foreign Commerce Clause. *See id.* In addition, Odebrecht argued that the amendment was inoperative by its own terms. *Id.*

<sup>39</sup> *See id.* at 1313–21.

<sup>40</sup> *Id.* at 1316.

<sup>41</sup> *See Odebrecht Constr., Inc., v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268, 1272 (11th Cir. 2013).

<sup>42</sup> Odebrecht, 715 F.3d at 1274.

<sup>43</sup> *See id.* at 1272.

President's capacity to direct diplomatic discussions and impose sanctions on Cuba.<sup>44</sup> The practical consequences of the statute would have included impeding both foreign and domestic companies' abilities to engage in trade with the United States, eliminating substantial revenues of those companies, and detrimentally affecting the state and global economy.

### III. DISCUSSION

#### A. REPORT

The framework of federal laws discussed above was in effect in 2012 when Florida enacted the Cuba Amendment. Where a state law, such as Florida's Cuba Amendment, conflicts with a federal law, the Supremacy Clause is implicated and federal law will preempt.<sup>45</sup> In *Crosby v. National Foreign Trade Council*,<sup>46</sup> a decision on which the Eleventh Circuit relied heavily, the Supreme Court invalidated a law similar to the Cuba Amendment that was enacted by Massachusetts, which prohibited trade with Burma because it violated the Supremacy Clause by conflicting with federal law.<sup>47</sup> The Court concluded that

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<sup>44</sup> See *id.* at 1281.

<sup>45</sup> The Supremacy Clause provides that the Constitution and the laws of the United States "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. This principle gives Congress the power to preempt state laws. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Preemption may occur in several circumstances, see *id.*, but the pertinent method for preemption here is conflict preemption. "[S]tate law is naturally preempted to the extent of any conflict with a federal statute." *Id.* Conflict preemption includes cases where "compliance with both federal and state regulations is a physical impossibility." *Arizona v. United States*, 132 S. Ct 2492, 2501 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)). Additionally, conflict preemption exists when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>46</sup> *Crosby*, 530 U.S. 363 (2000).

<sup>47</sup> *Id.* at 366 (holding the state statute invalid under the Supremacy Clause because of "its threat of frustrating federal statutory objectives"). On the other hand, the congressional act imposed only three months after the enactment of the Massachusetts law "imposed mandatory and conditional sanctions on Burma" and provided the President discretion to impose those

[b]ecause the state Act's provisions conflict with Congress's specific delegation to the President of flexible discretion, with limitation of sanctions to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause.<sup>48</sup>

Finding that all of the concerns present in *Crosby* were even more prevalent here, the Eleventh Circuit held that the Cuba Amendment violated the Supremacy Clause because it "conflict[ed] directly with the extensive and highly calibrated federal regime of sanctions against Cuba."<sup>49</sup> According to the Court, the Cuba Amendment applied "more broadly than the federal regime," thereby punishing companies like Odebrecht that did not violate federal laws relating to Cuba.<sup>50</sup> The Court also found that the law imposes substantial penalties that exceed the federal penalties, and that it effectively "undermines the substantial discretion Congress has afforded the President both to fine-tune economic sanctions and to pursue multilateral strategies with Cuba."<sup>51</sup> By punishing a broader set of companies for a broader set of conduct with more severe penalties than provided for under federal law, the Cuba Amendment violated the Supremacy Clause, and the Amendment would have served to harm the financial welfare of companies that have no control over a remotely connected subsidiary or affiliate that might be engaging in business activities in Cuba. In striking down this Amendment, the Eleventh Circuit has potentially protected the state and global economy from substantial economic harm.

As the Eleventh Circuit notes, the Cuba Amendment applies to entities and conduct to a significantly broader extent than the federal regime.<sup>52</sup> For example, while the federal framework applies only to a

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sanctions and develop and implement a comprehensive strategy to do so. *Id.* at 368–70.

<sup>48</sup> *Crosby*, 530 U.S. at 388.

<sup>49</sup> *Odebrecht*, 715 F.3d at 1272, 1281.

<sup>50</sup> *Id.* at 1281.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

“person subject to the jurisdiction of the United States,”<sup>53</sup> the Cuba Amendment affects any “company” engaged in “business operations” in Cuba.<sup>54</sup> The Cuba Amendment punishes U.S. companies for the actions of their foreign parents or affiliates, regardless of how remote the connection is between the companies.<sup>55</sup> This stands in stark contrast to the federal regime, which “only sanctions U.S. companies for their own actions or the actions of their own subsidiaries.”<sup>56</sup> Here, the Cuba Amendment would have penalized Odebrecht despite Odebrecht having no connection to COI Overseas, LTD—the company renovating Cuba’s Port of Mariel—other than a shared parent company.<sup>57</sup> Moreover, the Cuba Amendment targets conduct indiscriminately, without allowing for the same exceptions permitted under the federal regime; indeed, it “penalizes any commerce with Cuba.”<sup>58</sup> Consequently, the Court held, the Cuba Amendment improperly “conflict[ed] with federal law ‘by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.’”<sup>59</sup>

In addition, the Eleventh Circuit held that the Cuba Amendment violates the Supremacy Clause because it imposes additional penalties beyond those provided under federal law.<sup>60</sup> The TWEA provides for criminal penalties of up to twenty years imprisonment and a \$1,000,000 fine for a willful violation, or a civil penalty up to \$50,000.<sup>61</sup> While the federal penalties are severe, the Cuba Amendment imposes additional and substantial penalties, including a fine that would be at minimum \$2,000,000, double that of the

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<sup>53</sup> 50 App. U.S.C. §5(b)(1) (2012); 31 C.F.R. § 515.329. These laws apply only to “U.S. citizens and residents, wherever located; any person located in the United States; any U.S. corporation; any corporation, wherever located, that is owned or controlled by a U.S. citizen or resident; and any corporation, wherever located, owned or controlled by a U.S. corporation (i.e., a foreign subsidiary of a U.S. corporation).” *Odebrecht*, 715 F.3d at 1281–82.

<sup>54</sup> For definitions of each term, see *supra*, note 30.

<sup>55</sup> *Odebrecht*, 715 F.3d at 1282.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; *Odebrecht Constr., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1309 (S.D. Fla. 2012), *aff’d sub nom. Odebrecht Constr., Inc., v. Sec’y, Fla. Dep’t of Transp.*, 715 F.3d 1268 (11th Cir. 2013); *Odebrecht*, 715 F.3d at 1273.

<sup>58</sup> *Odebrecht*, 715 F.3d at 1283.

<sup>59</sup> *Id.* (quoting *Crosby*, 530 U.S. at 378).

<sup>60</sup> *Id.* at 1283.

<sup>61</sup> 50 App. U.S.C. § 16(a) & (b)(1) (2012).

*criminal* penalty under federal law, and a three-year ban on public contracting in the state of Florida.<sup>62</sup> The potential for such extreme penalties gives only a few options to companies that would have been subject to the law—they could either cease bidding on public contracts in Florida, suffer substantial monetary fines, or cease business operations in Cuba. However, like Odebrecht and COI Overseas here, companies that have no control over, or even any relationship with, a parent company or affiliate would not have that final option. Consequently, such a company would be limited to the first two options, which would have innumerable ramifications, including eliminating sizable portions of the company’s revenues and stunting the state and global economy.

Finally, the Court held that the Cuba Amendment violates the Supremacy Clause because it “undermines the President’s capacity to fine-tune these sanctions and to direct diplomatic relations with Cuba.”<sup>63</sup> The President’s persuasiveness in diplomatic discussions depends on his ability to offer the benefits of the entire national economy.<sup>64</sup> The Cuba Amendment eliminates a substantial portion of those benefits: “access to Florida’s public contracting market, worth \$8 billion a year at the state level alone.”<sup>65</sup> Considerable negative response to the Cuba Amendment from countries—including Canada, Brazil, the European Union, and Norway—only substantiates the undermining capability of the Amendment to diplomatic relations.<sup>66</sup>

### B. ANALYSIS

The Court properly held that the Cuba Amendment conflicted with federal law, and therefore violated the Supremacy Clause of the United States Constitution. In conducting its analysis, the Eleventh Circuit correctly applied Supremacy Clause precedent, relying considerably on the Supreme Court’s decision in *Crosby*. The issue

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<sup>62</sup> See *id.*; see also FLA STAT. § 287.135(5)(a) (2013); Odebrecht, 715 F.3d at 1283.

<sup>63</sup> Odebrecht, 715 F.3d at 1285.

<sup>64</sup> *Id.* (quoting *Crosby*, 530 U.S. at 381) (“The President’s ‘maximum power to persuade [in diplomatic discussions] rests on his capacity to bargain for the benefits of access to the entire national economy.’”).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., *id.*

before the Eleventh Circuit was whether the Cuba Amendment stood “as an obstacle to the carefully calibrated federal regime.”<sup>67</sup> As stated by the Supreme Court, what constitutes a sufficient obstacle “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>68</sup> The Eleventh Circuit did just that; it conducted an extensive review of the numerous federal laws in place and determined the purposes and intended effects of that framework.<sup>69</sup> Concluding that these laws were “designed to sanction strongly the Castro regime while simultaneously permitting humanitarian relief and economic transactions that will benefit the Cuban people[,]” the Court held that the State of Florida “plainly was not operating in an area where the federal government ha[d] been asleep at the switch.”<sup>70</sup>

The pervasiveness of this framework of federal laws indicates that federal government has made the determination that it is better suited to regulate foreign relations with Cuba than the individual states. The Constitution itself provides that federal laws are the supreme law of the land and the Eleventh Circuit acted in accordance with that principle when deciding this case.<sup>71</sup> Moreover, Congress’ delegation of discretionary authority to the President to sanction Cuba would be rendered ineffective if the Cuba Amendment was permitted to stand.<sup>72</sup> As the Court states, the federal framework “empower[s] the President to engage in a multilateral approach to Cuba.”<sup>73</sup> The Supreme Court noted in *Crosby* that Congress would not “have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.”<sup>74</sup> “[T]he differences between the state and federal Acts in scope and type of sanctions . . . compromise the very capacity of the President to speak for the Nation with one voice in dealing with other

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<sup>67</sup> *Id.* at 1274.

<sup>68</sup> *Id.* (quoting *Crosby*, 530 U.S. at 373).

<sup>69</sup> *See id.* at 1275–78.

<sup>70</sup> *Id.* at 1278.

<sup>71</sup> *See* U.S. Const. art. VI, cl. 2.

<sup>72</sup> “[E]nforcement of the Cuba Amendment overrides the nuanced federal policy.” *Odebrecht*, 715 F.3d at 1286.

<sup>73</sup> *Id.* at 1285.

<sup>74</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 376 (2000).

governments.”<sup>75</sup> Absent the Eleventh Circuit’s decision, the Cuba Amendment would have compromised the President’s authority delegated to him by Congress and it would have contravened the vast federal framework in place regulating conduct with Cuba.

The FDOT claims that the Eleventh Circuit’s own decision in *Faculty Senate of Florida International University v. Winn*,<sup>76</sup> where it upheld a state statute restricting state universities from spending public funds on travel to a country designated as a state sponsor of terrorism, is controlling.<sup>77</sup> However, the Eleventh Circuit distinguishes this case because, unlike the law in *Faculty Senate*, “[t]he Cuba Amendment creates more than a minor or incidental brush with federal law” and its primary intent is “to prohibit or obstruct domestic and foreign companies’ trade with Cuba.”<sup>78</sup> Accordingly, the Court rejected the FDOT’s claim that *Faculty Senate* was controlling and concluded that the Cuba Amendment was preempted.<sup>79</sup>

Therefore, the Eleventh Circuit correctly invalidated the Cuba Amendment because it frustrates the purposes and intent of federal law and violated the Supremacy Clause.

### C. PRACTICAL IMPACT

The Cuba Amendment would have significantly impeded domestic and foreign entities’ ability to engage in trade with the United States. Moreover, it would have substantially affected the decisions of these companies to engage in business in Florida. For instance, Odebrecht has derived a substantial portion of its revenues from contracting with governmental entities in Florida, including all of its revenues in 2011, which totals to approximately \$214.5 million.<sup>80</sup> By subjecting companies like Odebrecht to the Cuba Amendment, Florida could have caused a company to lose the source

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<sup>75</sup> Odebrecht, 715 F.3d at 1285 (quoting Crosby, 530 U.S. at 381).

<sup>76</sup> *Faculty Senate of Florida Int’l Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010).

<sup>77</sup> See Odebrecht, 715 F.3d at 1286–87.

<sup>78</sup> Odebrecht, 715 F.3d at 1287.

<sup>79</sup> See *id.*

<sup>80</sup> Odebrecht Constr., Inc. v. Prasad, 876 F. Supp. 2d 1305, 1309 (S.D. Fla. 2012), *aff’d sub nom.* Odebrecht Constr., Inc., v. Sec’y, Fla. Dep’t of Transp., 715 F.3d 1268 (11th Cir. 2013)

of the majority of its revenues. Additionally, companies located in Brazil and Canada—Florida's two largest trading partners—expressed concern about the law.<sup>81</sup> Indeed, these companies threatened not to invest any more in Florida for fear of being subject to the Cuba Amendment's penalties.<sup>82</sup> The Cuba Amendment would have also eliminated countless jobs in the state of Florida, potentially devastating the state's economy while causing significant ripples in the global economy. By invalidating the Cuba Amendment, the Eleventh Circuit allowed the framework created by the federal government to regulate foreign relations and allowed the President to develop a strategy to sanction the Cuban government without weakening the economy.

### CONCLUSION

The Eleventh Circuit properly affirmed the grant of the preliminary injunction, enjoining enforcement of the Cuba Amendment. The Court correctly concluded that the law violated the Supremacy Clause because it conflicted with the pervasive framework of federal laws that regulate relations between the United States and Cuba. Moreover, the Court's decision preserved the ability of domestic and foreign entities to engage in international commerce and to affect positively the global economy.

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<sup>81</sup> See, e.g., Patricia Mazzei, *Trading Partners Warn of Backlash if Rick Scott Signs Anti-Cuba Bill Pushed by Miami-Dade Lawmakers*, NAKED POLITICS, MIAMI HERALD BLOG (Apr. 22, 2012, 9:40 PM), <http://miamiherald.typepad.com/nakedpolitics/2012/04/trading-partners-warn-of-backlash-if-ric-k-scott-signs-anti-cuba-bill-pushed-by-miami-dade-lawmakers.html>.

<sup>82</sup> See *id.*