Eleventh Circuit Affirms Injunction Against Florida's Cuba Sanctions Law, Finds Federal Preemption

In May 2013, the U.S. Court of Appeals for the Eleventh Circuit affirmed an injunction against enforcement of the "Cuba Amendment,"[1] a 2012 Florida law that, inter alia, bars firms with affiliates doing business in Cuba from bidding on state contracts.[2] The court found that the extensive network of federal statutory and administrative sanctions against Cuba preempts the statute.[3]

The Eleventh Circuit's opinion summarized the Florida law:

> Broadly speaking, the law prevents any company that does business in Cuba—or that is in any way related to a company that does business in Cuba—from bidding on state or local public contracts in the State of Florida. *See* Fla. Stat. §287.135(2) ("A company that . . . is 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 goods or services of $1 million or more."); *id.*, §215.473(1)(c) (defining the term "company" to encompass all subsidiaries, parent companies, or affiliates of the entity).[4]

The state legislature adopted the amendment

> to use the lever of access to Florida's $8 billion-a-year public contracting market to exert additional economic pressure on the Cuban government and to influence American foreign policy. Governor Scott acknowledged as much when he signed the Cuba Amendment into law, stating in a letter to Florida Secretary of State Ken Detzner that the Cuba Amendment "demonstrates Florida's commitment to spreading political and economic freedom in Cuba" and that "[i]t is imperative that Florida and the United States continue to place economic pressure" on the Cuban government.[5]

The plaintiff/appellee, Odebrecht Construction, Inc. (Odebrecht), is a large Florida construction corporation that has worked on numerous large public projects in Florida.[6] While Odebrecht has never done business in Cuba, its Brazilian parent has two subsidiaries involved in a construction project there.[7] Following enactment of the Cuba Amendment, but before it entered into force, Odebrecht asked the U.S. District Court for the Southern District of Florida to enjoin enforcement, alleging that "the Cuba Amendment violates the Supremacy Clause, U.S. Const. art. VI, cl. 2; the Foreign Affairs Power, *see, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); and the Foreign Commerce Clause, U.S. Const. art. I, §8, cl. 3."[8]

The district court agreed and entered a preliminary injunction against enforcement of the statute. Florida appealed. In a forty-four-page opinion, the court of appeals affirmed the injunction, concluding that "Odebrecht has demonstrated a substantial likelihood of success

[1] 2012 Fla. Laws 196, §2 (amending Fla. Stat. §287.135).

[2] Odebrecht Constr., Inc. v. Secretary, 715 F.3d 1268, 1272 (11th Cir. 2013).

[3] Patricia Mazzei, *Federal Appeals Court: Florida Law Prohibiting Hiring of Companies Tied to Cuba Is Unconstitutional*, MIAMI HERALD, May 6, 2013, *at* http://www.miamiherald.com/2013/05/06/3383474/federal-appeals-court-florida.html.

[4] *Odebrecht*, 715 F.3d at 1272.

[5] *Id.* at 1279.

[6] *Id.* at 1272–73.

[7] *Id.* at 1273.

[8] *Id.*

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on its claim that the Cuba Amendment violates the Supremacy Clause of the Constitution under principles of conflict preemption."[9]

> The Cuba Amendment conflicts directly with the extensive and highly calibrated federal regime of sanctions against Cuba promulgated by the legislative and executive branches over almost fifty years. The Supremacy Clause of the Constitution "provides a clear rule that federal law 'shall be the supreme Law of the Land.'" *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012) (quoting U.S. Const. art. VI, cl. 2). The Cuba Amendment differs dramatically from the federal regime as to the entities covered, the actions triggering sanctions, and the penalties imposed. The Amendment also overrides the nuances of the federal law and weakens the President's ability "to speak for the Nation with one voice in dealing" with Cuba. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). In addition, Odebrecht has demonstrated the other equitable requirements that warrant a preliminary injunction: Odebrecht would have suffered irreparable harm absent the injunction, the balance of harms strongly favored the injunction, and the injunction did not disserve the public interest.[10]

The court began its analysis by reviewing the circumstances where federal law preempts state law.

> The *Supremacy Clause of the United States Constitution* 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. "Under this principle, Congress has the power to preempt state law." *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). Preemption can occur in a number of circumstances. Its most straightforward form, express preemption, occurs when Congress "enact[s] a statute containing an express preemption provision." *Id.* at 2500–01. That has not occurred in this case, nor is there any claim that it has. The second—field preemption—precludes the states "from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* at 2501 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992)). The Supreme Court has instructed us that we may infer congressional intent to displace state law altogether "from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (internal quotation marks and alterations omitted).
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> Third, and most critical for our purposes, "state laws are preempted when they conflict with federal law." *Id.* (citing *Crosby*, 530 U.S. at 372). Conflict preemption covers "cases where 'compliance with both federal and state regulations is a physical impossibility.'" *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)). But conflict preemption is broader than that; it also covers cases "where the challenged 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)). In this broader form, the lines between conflict preemption and field preemption are admittedly blurry, as the Supreme Court has recognized. *See Crosby*, 530 U.S. at 372 n.6. . . . The essential question in this case is whether the Cuba Amendment stands as an obstacle to the carefully calibrated federal regime.[11]

[9] *Id.* at 1272.
[10] *Id.*
[11] *Id.* at 1274.

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Following a substantial review of U.S. economic sanctions against Cuba,[12] the court found an "obvious, direct and apparent conflict" between federal and state laws.[13] The court drew upon the U.S. Supreme Court's unanimous decision in *Crosby v. National Foreign Trade Council*.[14]

> At issue in *Crosby* was the constitutionality of a Massachusetts law that, like the State of Florida, prohibited state agencies from purchasing goods or services from any person or entity doing business with Burma, with a few exceptions for companies that are in Burma solely to report the news or to provide international telecommunications goods or services or medical supplies. 530 U.S. at 367. Three months after the Massachusetts law was passed, Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma. *Id.* at 368. . . .
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> It was against this federal backdrop that the Supreme Court scrutinized the Massachusetts law. Justice Souter's opinion for seven of the justices concluded that "[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." *Id.* at 388. . . .
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> All of the concerns animating the Supreme Court's decision in *Crosby* are present here—and to a far greater degree. Undeniably, the Cuba Amendment conflicts with federal law in (at least) three ways: (1) the Cuba Amendment sweeps more broadly than the federal regime does, punishing companies like Odebrecht that do not run afoul of the federal Cuban sanctions and penalizing economic conduct that the federal law expressly permits; (2) the Cuba Amendment has its own substantial penalties that go beyond the federal sanctions; and (3) the Cuba Amendment undermines the substantial discretion Congress has afforded the President both to fine-tune economic sanctions and to pursue multilateral strategies with Cuba.[15]

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

Arctic Council Meets; United States and Other Arctic States Conclude Marine Oil Pollution Agreement

In May 2013, the Arctic Council[1] convened a ministerial session in Kiruna, Sweden, attended by U.S. Secretary of State John Kerry.[2] The ministers concluded the "Kiruna Dec-

[12] *Id.* at 1274–78.
[13] *Id.* at 1280.
[14] 530 U.S. 363 (2000).
[15] *Odebrecht*, 715 F.3d at 1280–81 (footnotes omitted).

[1] *See* John R. Crook, Contemporary Practice of the United States, 105 AJIL 568, 580 (2011).

[2] *See* U.S. Dep't of State Press Release No. 2013/0544, Secretary Kerry Travel to Sweden to Attend the Arctic Council Meeting (May 10, 2013), *at* http://www.state.gov/r/pa/prs/ps/2013/05/209224.htm; U.S. Dep't of State Press Release No. 2013/T06-04, Secretary of State John Kerry, Remarks at the Arctic Council Ministerial Session (May 15, 2013), *at* http://www.state.gov/secretary/remarks/2013/05/209403.htm.

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