

No. 12-13958-C

In the

United States Court Of Appeals

For the

Eleventh Circuit

ODEBRECHT CONSTRUCTION, INC.,

Plaintiff-Appellee,

vs.

ANATH PRASAD, in his official capacity as Secretary of the Florida Department
of Transportation,

Defendant-Appellant.

On Appeal from an Order of the United States District Court for the Southern
District of Florida Granting a Preliminary Injunction

**BRIEF OF *AMICUS CURIAE* FLORIDA CHAMBER OF
COMMERCE IN SUPPORT OF PLAINTIFF-APPELLEE
ADVOCATING AFFIRMANCE OF THE DISTRICT COURT**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

The Florida Chamber of Commerce, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to FRAP 26.1.

The following persons and entities have an interest in the outcome of this appeal in addition to those previously identified by the parties in their briefs:

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The Florida Chamber of Commerce, Inc. is a Florida not-for-profit corporation. It has no parent corporation and no stock.

/s/ Stephen H. Grimes
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STATEMENT OF *AMICUS CURIAE*

Amicus curiae, Florida Chamber of Commerce, Inc. (the “Florida Chamber”), respectfully submits this brief in support of Plaintiff-Appellee, Odebrecht Construction, Inc. (“OCI”). All parties have consented to the filing of this brief.¹ The Florida Chamber asks the Court to affirm the district court’s order enjoining enforcement of Chapter 2012-196, Laws of Florida (the “Cuba Amendment”).² This law bars companies with lawful business in Cuba or Syria from Florida government contracts of \$1 million or more.

In submitting this brief, the Florida Chamber in no way supports the governments of Cuba or Syria. The Florida Chamber seeks invalidation of the Cuba Amendment because it will disrupt legitimate business activities of Florida companies as well as discourage foreign investment in Florida.

The Florida Chamber is a not-for-profit corporation and trade association advocating for business interests in Florida. As the leading voice of business in the state, the Florida Chamber represents more than 139,900 grassroots members with

¹ In accordance with FRAP 29(c)(5), the Florida Chamber represents that: (a) no party’s counsel authored this brief in whole or in part; (b) no party’s counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person -- other than the Florida Chamber, its members, or its counsel -- contributed money that was intended to fund preparing or submitting this brief.

² Although Ch. 2012-196, Laws of Florida, relates to companies with “business operations” in Cuba or Syria, Cuba is the focus of this case. This brief refers to the law as the Cuba Amendment to maintain consistency with the district court’s decision and the briefs of the parties.

more than three million employees. It promotes building a stronger Florida economy and securing Florida's future through pro-business solutions, encouraging investment in the state, and private-sector job creation. Florida Chamber members vary in size ranging from small businesses to some of the nation's largest corporations and its membership reflects the diversity of Florida's industries.

The Florida Chamber appears as a friend of the Court to provide a broader perspective of the vast implications and unintended consequences of the Cuba Amendment. With its long history championing the interests of the Florida business community and working to grow and strengthen Florida's economy, the Florida Chamber respectfully suggests that its views may assist the Court in this matter.

STATEMENT OF THE ISSUE

The issue in this case is whether the district court abused its discretion in granting a preliminary injunction enjoining enforcement of the Cuba Amendment.

SUMMARY OF THE ARGUMENT

Maintaining the preliminary injunction is necessary to the public interest. If enforced, the Cuba Amendment will have far-reaching implications and unintended consequences that will irreparably harm Florida businesses and the state's economy. Since the Cuban revolution in 1959, the United States has developed a comprehensive and intricate framework of laws and regulations governing trade relations and sanctions with Cuba. Under this framework, United States companies owned by, or affiliated with, foreign companies transacting business in Cuba are not penalized or sanctioned based on the activities of their foreign corporate relatives. Moreover, within the federal framework, some U.S. companies are authorized to transact limited business in Cuba pursuant to licenses issued by the United States government.

Because of the broad scope of the Cuba Amendment, it will bar many Florida businesses from Florida's most significant government contracts. The Cuba Amendment applies to contracts of \$1 million or more with Florida state agencies and the more than 1,500 local governments in the state.

Although OCI is the only business to lodge a legal challenge to the Cuba Amendment to date, many other companies will undoubtedly follow suit if this unconstitutional law is enforced. The public interest is served by preserving the

status quo until the constitutionality of the Cuba Amendment is finally determined in this case.

The preliminary injunction is also in the public interest because enforcement of the Cuba Amendment will strain relations with Canada and Brazil, two of Florida's largest foreign trading partners, and will discourage other foreign investment in the state. Florida has been working hard to bring additional businesses and new jobs to the state. Many of these efforts have been directed at foreign investors which have expressed concern about the Cuba Amendment erecting barriers to trade in Florida. Enforcement of the Cuba Amendment will have a chilling effect on foreign investment in Florida and its businesses and will discourage economic development in Florida by foreign companies from democratic countries. Preventing enforcement of the Cuba Amendment will avoid this harm to Florida's economy and loss of existing and new jobs from foreign business.

ARGUMENT

I. ENJOINING ENFORCEMENT OF THE CUBA AMENDMENT IS IN THE PUBLIC INTEREST

Among the factors that this Court considers in determining the propriety of preliminary injunctive relief is “whether preliminary relief would disserve the public interest.” *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). The district court concluded that the public interest is served “through a unified federal policy toward Cuba that is not impeded or restricted” Doc. 24, p. 23. Additional reasons specific to Florida’s economy support a finding that enjoining enforcement of Cuba Amendment will serve the public interest.

A. Failure to maintain the status quo will have far-reaching implications

FDOT argued below that OCI is the only challenger to the Cuba Amendment thereby suggesting that its impact will be limited. Doc. 15, p. 20. FDOT repeats this point in its principal brief. The reality is that the Cuba Amendment will have extensive and detrimental implications to Florida businesses and Florida’s economy if it is implemented even temporarily.

The Cuba Amendment will affect not just OCI, but many companies that currently do business in Florida,³ or want to do business in Florida. These companies span multiple industries and business sectors.⁴ Foreign parents or foreign affiliates of Florida businesses currently provide products or services in Cuba including banking and financial services, communications and information technology services, pharmaceutical products, agricultural products, gasoline and air transportation. Mazzei, *supra* note 4. Florida businesses also provide services to the Cuban people through licenses granted by the federal government. Office Of The Treas., Office Of Foreign Asset Control, Cuba: What You Need To Know About U.S. Sanctions Against Cuba (Jan. 24, 2012). These licenses further U.S. foreign policy by reaching out to the Cuban people in support of democracy through opening lines of communication, providing humanitarian aid, and narrowing the divide between United States citizens and their family members in

³ The Cuba Amendment's bar applies both to bidding opportunities on new contracts and renewals of existing contracts. Ch. 2012-196, § 2, Laws of Fla. (amending §287.135(2), Fla. Stat.).

⁴ Before the Cuba Amendment was signed into law by Governor Scott, the Florida State Board of Administration ("SBA") preliminarily identified 238 companies in which Florida currently invests that could have business ties to Cuba. Patricia Mazzei, *Fla.'s Trading Partners Warn of Backlash if Gov. Scott Signs New Anti-Cuba Legislation*, Miami Herald, April 22, 2012, Doc. 5-7. The number of companies barred from Florida government contracts under the Cuba Amendment will likely be much larger than 238 because Florida governments contract for goods and services with many companies in which Florida does not invest.

Cuba. Press Release, The White House, Fact Sheet: Reaching Out to the Cuban People (April 13, 2009).⁵

Federal law imposes no sanctions on U.S. companies with foreign parents or affiliates that do business in Cuba or that have licenses to transact business in Cuba. *See* 50 U.S.C. app. § 5(b) (Trading With the Enemy Act of 1917 applies to “any person . . . subject to the jurisdiction of the United States”); 31 C.F.R. § 515.329 (Cuban Assets Control Regulations apply to domestic companies and their subsidiaries). Thus, Florida businesses can currently contract with Florida state or local governmental entities even if they have “business operations”⁶ in Cuba through a foreign parent or affiliate or pursuant to a federal license. That all will change if the Cuba Amendment is enforced.

Just as the Massachusetts selective-procurement law struck down by the Supreme Court in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Cuba Amendment penalizes companies with lawful “business operations” in Cuba by barring them from all Florida state and local government contracts of \$1

⁵ Available at http://www.whitehouse.gov/the_press_office/Fact-Sheet-Reaching-out-to-the-Cuban-people.

⁶ The term “business operations” for purposes of the Cuba Amendment is all-encompassing and includes “engaging in commerce in any form in Cuba” Ch. 2012-196, § 2, Laws of Fla. (creating §287.135(1)(b), Fla. Stat.)

million or more.⁷ The contracting and bidding opportunities that will be unavailable to such companies are vast because the Cuba Amendment was drafted to apply to virtually all state and local governmental entities in the state.

The Cuba Amendment applies to “an agency or local governmental entity” Ch. 2012-196, § 2, Laws of Fla. (amending § 287.135(2), Fla. Stat.). The Cuba Amendment defines an “agency” as “any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government.” § 287.012(1), Fla. Stat. (2012). Chapter 20, Florida Statutes, identifies 26 different executive branch agencies not including boards, commissions, councils and other units of organizations within the executive branch. *See* § 20.052, Fla. Stat. (2012) (authorizing creation of advisory bodies within the executive branch). Although it is unclear exactly how many entities meet the Cuba Amendment’s definition of “agency,” the number is likely in the hundreds.⁸

⁷ The Massachusetts law invalidated in *Crosby* included exceptions for those reporting news, providing telecommunications goods or services, or medical supplies in Burma. *Crosby*, 530 U.S. at 380. The Cuba Amendment contains no exceptions for any ongoing “business operations,” even those operations expressly licensed by the United States government.

⁸ A 2004 Florida Senate survey identified 654 collegial and regulatory bodies within the executive branch at that time. The Florida Senate, Interim Project Report 2005-134, Comm. On Gov’t Oversight and Productivity, Review of

In addition, there are more than 1,500 local governmental entities subject to the Cuba Amendment. The Cuba Amendment defines a “local governmental entity” to mean “a county, municipality, special district, or other political subdivision of the state.” Ch. 2012-196, § 2, Laws of Fla. (amending § 287.135(1), Fla. Stat.). Florida has 67 counties, 410 municipalities, and almost 1,000 special districts. *See* U.S. Census Bureau, 2012 Census of Governments: Organization Component Preliminary Estimates, Local Governments by Type and State 2012.

The current lack of any challenger to the Cuba Amendment other than OCI is not due to a lack of interest or concern by other companies. OCI filed its case early on and the district court granted the requested preliminary injunction prior to the Cuba Amendment taking effect. Following the district court decision, state and local governments have not attempted to implement and apply the Cuba Amendment. Accordingly, no company to which the Cuba Amendment applies has been barred from bidding on, or renewing, a contract with a Florida governmental entity.

If the status quo is not maintained, Florida courts can expect a multiplicity of actions in numerous jurisdictions brought by the many companies that will be

Executive Branch Collegial Bodies (Nov. 2004), *available at* http://archive.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-134go.pdf.

affected by the Cuba Amendment against various state and local governmental entities that fall within its purview. Of course, these government defendants will be forced to expend taxpayer dollars defending a law that is clearly unconstitutional. Meanwhile, Florida businesses will suffer because companies with legitimate operations in Cuba will be barred from renewing existing contracts or bidding on new contracts based on a state law that violates the Constitution.

The public interest is furthered by having the issue of the constitutionality of the Cuba Amendment resolved in this proceeding without the Cuba Amendment first being enforced.

B. The public interest is served by encouraging foreign investment in Florida and its businesses

Florida's economy depends on foreign investment in the state. According to the Governor's Florida World Trade Month Proclamation dated April 3, 2012, 55,000 companies in Florida export products or services, 1.3 million jobs in Florida depend on international business, and foreign companies employ 236,700 Floridians. Proclamation of Rick Scott, Governor, Florida World Trade Month (April 3, 2012). Florida government officials and business leaders have been working together to attract foreign investment to the state that will bring additional high-skilled and high-paying jobs for Florida residents. Florida government officials tell businesses, both foreign and domestic, that Florida is "open for business" and encourage them to relocate to the Sunshine State. The Cuba

Amendment adds a caveat telling the world that Florida is “open for business” only if you are a company with no corporate connection whatsoever to any business operations in Cuba and even if the federal government has expressly licensed the company to transact business in Cuba. The Cuba Amendment will irreparably harm companies with lawful business operations in Cuba by shutting them out of all significant government contracting in Florida.

Democratic foreign governments, including those essential to Florida’s economic future, have taken notice and voiced their concerns. Not long after passage of the Cuba Amendment, the Florida Chamber received a call from the office of the Canadian ambassador to the United States expressing concern that the law could affect scores of Canadian companies that engage in business in Florida but also have “business operations” in Cuba. Mazzei, *supra* note 4. Brazil’s Minister of Development Industry and Trade also weighed in sending a letter to United States Secretary of Commerce John Bryson expressing “deep concern by a variety of economic development stakeholders in Brazil” regarding the Cuba Amendment and seeking support of the Department of Commerce to avoid the “potential emergence of barriers” to the “growing bilateral trade” between the United States and Brazil. Doc. 16-6, p. 4. This is particularly troubling considering that Brazilian tourists became a \$1 billion vacation market in Florida last year and Brazil is the second largest international market for Florida goods.

United States Census Bureau, Foreign Trade, State Exports for Florida.⁹ Canada is likewise one of state's top exporters with more than \$4 billion in Florida-origin goods exported to Canadian businesses and consumers in 2011. *Id.* Canada and Brazil are so important to Florida that they both were the focus of international trade missions by Governor Scott and Florida business leaders in 2011. News Release, Governor Rick Scott Embarks on Week-Long Canada Trade Mission (June 6, 2011);¹⁰ *Gov. Rick Scott Heads to Brazil for Trade Mission*, Miami Herald, Oct. 20, 2011.¹¹

If the Cuba Amendment is enforced, its impact will reverberate far beyond the borders of the Sunshine State. Democratic foreign governments and their businesses will be reluctant to do business in Florida. These are the very foreign companies that Florida has worked so hard to attract. Maintaining positive relations with potential foreign investors, and particularly Florida's largest foreign trading partners, is essential to building a stronger Florida economy for the future. The weighing of the equities favors maintaining the status quo where enforcement of the Cuba Amendment, even briefly, could irreparably damage Florida's relationships with foreign investors essential to Florida's economy and where there

⁹ Available at <http://www.census.gov/foreign-trade/statistics/state/data/fl.html>.

¹⁰ Available at <http://www.flgov.com/2011/06/06/governor-rick-scott-embarks-on-week-long-canada-trade-mission/>.

¹¹ Available at <http://miamiherald.typepad.com/nakedpolitics/2011/10/gov-rick-scott-heads-to-brazil-for-trade-mission.html>.

can be “no harm from the state’s nonenforcement of invalid legislation.” *U.S. v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012).

CONCLUSION

For the foregoing reasons, *amicus curiae*, Florida Chamber of Commerce, Inc., respectfully urges this Court to affirm the district court’s Order Granting Preliminary Injunction.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 2,641 words.

/s/ Stephen H. Grimes
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CERTIFICATE OF SERVICE

I certify that on October 22, 2012, I filed a copy of the foregoing *AMICUS* BRIEF with the Clerk of Court using the Appellate CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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