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The Politics of Music and Film: The Validity of a Local Government's Cultural Embargo on Cuba

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COMMENT

THE POLITICS OF MUSIC AND FILM: THE VALIDITY OF A LOCAL GOVERNMENT'S CULTURAL EMBARGO ON CUBA

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I. INTRODUCTION

Under the Cuban Assets Control Regulations,¹ promulgated under The Trading with the Enemy Act of 1917,² trade with Cuba is severely restricted. President John F. Kennedy's Proclamation in 1962 espoused a series of restrictions on trade with Cuba.³ Most recently, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996,⁴ better known as the Helms-Burton Act, further highlighted the U.S. policy to not do business with any

1. 31 C.F.R. § 515.201 (1999).

2. 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1994).

3. See Muriel van den Berg, *The Cuban Liberty and Democratic Solidarity Act: Violations of International Law and the Response of Key American Trade Partners*, 21 MD. J. INT'L L. & TRADE 279, 281 (1997).

4. 22 U.S.C. §§ 6021-6091 (1996).

company that does business with the Cuban government. Miami-Dade County, in South Florida, took similar punitive measures against Fidel Castro's dictatorship by passing a countywide resolution that Miami-Dade County would not do business with any company or entity that does business with the Cuban government.⁵ However, in an effort to show solidarity with the federal government and support the local Cuban exile community, Miami-Dade County violated the U.S. Constitution by venturing into an area of law that is preempted by the federal government. The local resolution is invalid for two reasons: (1) matters of foreign policy are reserved for the federal government and (2) banning Cuba-based musicians from performing in public venues violates the First Amendment.

A. *Social Setting: Miami*

Recently Miami politics has received much attention. Although Los Angeles California is home to the most Hispanics,⁶ Cubans and Cuban-Americans encompass the largest immigrant group in Miami⁷ and, most often, its most vocal political group in terms of U.S.-Cuba relations. Such are the decibels of the voice of Cuban exiles that foreign policy has crept into local government ordinances. Miami-Dade County has a resolution which, in its bulk, mirrors federal statutes dictating that the United States, or in this case the County, will not do business with any company that does or promotes business with Cuba.⁸ The two laws differ, however, in that the federal statutes specifically exempt "cultural exchanges,"⁹ while the local resolution omits such a clause. The discrepancy between the two authorities, together with the fact that the county is regulating

5. See Miami-Dade County, Fla., Resolution R-202-96 (Mar. 5, 1996), reprinted in Appendix A of this comment.

6. See Mary Sutter, *Miami's Sour Note: Anti-Cuban Laws May Put Latin Grammy's in L.A.*, DAILY VARIETY, Nov. 12, 1999, at 3.

7. Miami is home to approximately 700,000 Cubans and their off-spring, Miami-Dade County's largest immigrant group. See Oscar Musibay, *The New Cuban Mystique*, MIAMI BUS., Apr. 1999, at 72. Furthermore, Cubans are the country's most affluent Hispanic immigrant group. See *id.*

8. Miami-Dade County, Fla., Resolution R-202-96 (Mar. 5, 1996), reprinted in Appendix A of this comment.

9. See Mutual Educational and Cultural Exchange Act of 1961, 22 U.S.C. §§ 2451-2461 (1994).

foreign policy, means that federal law preempts the county ordinance.

B. The Marketing of Cuban Nostalgia

"Today, the romance that began in the 1950s with Ricky Ricardo and *I Love Lucy* is reaching new heights as Americans rediscover their fascination with Cuba."¹⁰ In Miami, many baby boomers are reaching into their past and getting reacquainted with their roots.¹¹ Their children, first generation Cuban-Americans, find themselves in the difficult position of creating a life that meshes their U.S. nationality with their Cuban heritage. So rather than identifying themselves in reference to a hyphen, first generation Cuban-Americans have coined the term "Generation Ñ."¹² Living in the United States, their country of birth, but embracing their Cuban culture and tradition has caused the members of Generation Ñ to take a renewed pride in their heritage.¹³ However, the search for substance behind the stories of yesteryear costs money and this rediscovered interest in Cuba is more than a historic look back, it is big business.¹⁴

While all things Cuban seem to be whisked off of store shelves, it is the music that is having the biggest impact. According to statistics released by the Recording Industry Association of America, the trade group that represents U.S. record companies, Latin music is experiencing a multi-year trend of strong growth.¹⁵ During the first two quarters of 1998, sales of Latin music grew at twice the rate of the overall industry.¹⁶

10. Musibay, *supra* note 7, at 71.

11. *See id.* at 72.

12. *See* John Leland & Veronica Chambers, *Generation Ñ*, NEWSWEEK, July 12, 1999, at 52; Thomas Hayden et al., *Critical Más 20 for 2000*, NEWSWEEK, July 12, 1999, at 56.

13. *See* Musibay, *supra* note 7.

14. Musibay, *supra* note 7.

15. *See* Jordan Levine, *Latin Music Wave Rolls Over Miami; Pop Music: The MIDEM Trade Show Turns the South Beach Area into a Pulsating Sounding Board*, L.A. TIMES, Aug. 28, 1998, at F2.

16. *See id.*

II. FEDERAL TRADE RESTRICTIONS ON CUBA AND THE CULTURAL EXCHANGE EXCEPTION

A. *The Trading With the Enemy Act of 1917*

Current U.S. trade policy with Cuba stems from the Trading with the Enemy Act of 1917 (TWEA).¹⁷ The Act was intended to prevent an enemy country, or national of that country, from using property available to the United States for its disposition by giving the President the authority, in time of national emergency, to impose embargoes on transactions between the United States and targeted countries.¹⁸ The most important amendment to the Act, for purposes of this comment, is the 1988 Berman Amendment,¹⁹ which denies the President the authority to regulate or prohibit the importation or exportation of informational materials from any country. The Amendment specifically prohibits the President from banning the importation, "whether commercial or otherwise, of publications, films, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, news wire feeds, and other information and informational articles."²⁰ The regulations explicitly prohibit the issuance of specific licenses for transactions involving the payment to Cuba for television rights, appearance fees, royalties, pre-performance expenses, or other such payments in connection with or resulting from any public exhibition or performance in the United States or in Cuba.²¹ Therefore, the Berman Amendment creates an exception to the United States' economic embargo on Cuba. For the President to

17. 50 U.S.C. app. §§ 1-6, 7-39, 41-44 (1994). Although the Trading with the Enemy Act was originally applied to both wartime and peacetime emergencies, Congress amended § 5(b) in 1977 to limit its applicability to wartime. Nevertheless, the declaration of the Cuban emergency and the Regulations promulgated thereunder were continued under the Trading with the Enemy Act by a "grandfather" clause and continue in force today. See *Capital Cities/ABC, Inc., v. Brady*, 740 F. Supp. 1007, 1008 n.2 (S.D.N.Y. 1990). See also Leslie Jose Zigel, Comment, *Constricting the Clave: The United States, Cuban Music, and the New World Order*, 26 U. MIAMI INTER-AM. L. REV. 129, 165 (1994).

18. 50 U.S.C. app. § 5(b) (1994). See also Laura A. Michalec, *Trade with Cuba Under the Trading with the Enemy Act: A Free Flow of Ideas and Information?*, 15 FORDHAM INT'L L. J. 808 (1992).

19. 50 U.S.C. app. § 5(b)(4) (1994).

20. *Id.* See 31 C.F.R. § 515.332 (1999) (defining "information and informational materials").

21. See 31 C.F.R. § 515.565(c)(1) (1999).

ban the listed materials would be an illegal, cultural embargo on Cuba.

However, the TWEA does not define "other informational materials." The phrase is susceptible to various interpretations, as will be illustrated by two contradicting federal court decisions.

In *Capital Cities/ABC, Inc. v. Brady*²² the court explored the ordinary, dictionary meaning of the word "material" to note that the word could be construed as something purely tangible.²³ However, the court further articulated that "material" could indeed refer to intangibles such as "ideas, perceptions, observations or data that may be worked into a more finished form."²⁴ The decision in this case, though, did not apply the rules of traditional statutory interpretation:

even though the phrase 'other informational materials' follows a list made exclusively of items communicating information in a tangible form such as books and tapes, the traditional rule of statutory construction that work in a list should be given a similar or related meaning is not dispositive here because the phrase "informational materials" is set off by the disjunctive "or" revealing a congressional intent to broaden, not limit, the preceding class.²⁵

The plaintiff in this case owns and operates the ABC Television Network.²⁶ In 1988, ABC placed a bid to televise the 1991 Pan American Games, being held in Havana, Cuba, for \$8.7 million payable to the Pan American Sports Organization (PASO).²⁷ The bid was accepted with the express condition that PASO would remit seventy-five percent of this sum to the Cuban entity responsible for organizing the Games.²⁸ When ABC notified the Office of Foreign Assets Control (OFAC) of the agreement, OFAC informed ABC that a specific license was necessary.²⁹ ABC initially applied for the specific license, but then withdrew the application claiming that the OFAC's position

22. 740 F. Supp 1007 (S.D.N.Y. 1990)

23. *See id.* at 1011.

24. *Id.*

25. *Id.*

26. *See id.* at 1009.

27. *See id.*

28. *See id.* at 1010. The Cuban entity responsible for hosting and organizing the Pan American Games is called Cimesports, S.A. *See id.*

29. *See id.*

was contrary to the intent of the Berman Amendment.³⁰ Furthermore, ABC contended that live broadcast coverage of the Games required no more than a general license for the purpose of newsgathering.³¹ OFAC stated that it would grant ABC a general license if they kept travel expenses to a minimum and conformed to the provisions of 31 C.F.R. § 515.319, which provides that royalties must be paid to a blocked account.³² When ABC renewed the application process for a specific license, OFAC denied it on the basis that the transaction would result in a substantial economic benefit to Cuba.³³

The court in *Capital Cities* held that due to an absence of differentiation between tangible and intangible materials in the legislative history of the act, it would uphold OFAC's interpretation that the live broadcasts of the games mandated a specific license under the Berman Amendment.³⁴

The District Court for the Southern District of Florida took a different approach in *Cernuda v. Heavey*.³⁵ *Cernuda* involved the pre-indictment seizure of 200 paintings imported by Ramon Cernuda, the director of the Cuban Museum in Miami, because he allegedly imported the art in violation of TWEA and the regulations.³⁶ Cernuda, who sought to have the seized paintings returned, argued that he tried to obtain a license from OFAC to exhibit the paintings and received no specific response to the application, other than a letter from an OFAC official stating that artworks were exempt from the scope of the regulations.³⁷

The court found that the seized paintings were exempt from the TWEA as "informational materials" under the Berman Amendment.³⁸ Moreover, the court held that OFAC's decision to not categorize the paintings as "other informational materials" and to not respond to Cernuda's applications for a specific license

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.* According to OFAC, in order for ABC to be entitled to a general license, the broadcasts had to consist of informational reports or documentaries about the Games and related events accessible to the press. *See id.* at n.5.

35. 720 F. Supp. 1544 (S.D. Fla. 1989).

36. *See id.* at 1545.

37. *See id.* at 1546, 1551.

38. *See id.* at 1553.

were arbitrary and capricious decisions.³⁹ In effect, the decision reversed OFAC's decision and returned the seized paintings to Cernuda.⁴⁰

It is difficult to compare and contrast *Capital Cities* and *Cernuda* in terms of the Miami-Dade resolution. Whether bringing musicians to perform in the United States is prohibited by the TWEA hinges on whether the phrase "other informational materials" is interpreted to include intangibles. If this phrase were indeed limited to tangible items only, then a live performance by a Cuba-based musical group is permitted and any efforts by rogue localities to prohibit such performances would be preempted by federal legislation pursuant to the Berman Amendment.

B. The Cuban Assets Control Regulations

In 1962, President John F. Kennedy declared a national emergency due to the Communist take-over of Cuba by Fidel Castro following the Cuban Revolution of 1959.⁴¹ President Kennedy acted pursuant to the Trading with the Enemy Act when he placed an economic embargo on Cuba that remains in place today.⁴²

The Treasury Department, which was authorized to administer the Act, delegated its duty to the Office of Foreign Assets Control, which subsequently issued the Cuban Assets Control Regulations.⁴³ These regulations bar the flow of money from the United States to Cuba.⁴⁴ Functionally, the regulations disallow Cuba-based artists and entertainers to be paid for their services while in the United States, pursuant to the "cultural exchange" exception to the embargo. The rationale is that, given

39. See *id.* at 1551-52.

40. See *id.* at 1554. The court reasoned that the Regulations required a more generous reading than OFAC gave them in this case because the list of what constitutes informational material is merely an example, not an exclusive list. See *id.* at 1551.

41. See Proclamation 3447, 27 Fed. Reg. 1085 (1962). President Ronald Reagan issued a proclamation on October 4, 1985, that effectively suspended entry into the United States as non-immigrants by Officers or Employees of the Government of Cuba or the Communist Party of Cuba. See Proclamation 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985).

42. See Michalec, *supra* note 18, at 815.

43. See 31 C.F.R. § 515.201 (1999). See also Michalec, *supra* note 18.

44. See 31 C.F.R. § 515.201 (1999).

the communist dictatorship governing the island nation, all payments made to Cubans visiting the United States will ultimately fall in the hands of Fidel Castro. Allowing musicians to collect money from their shows essentially provides American dollars to support Castro's dictatorship because the Cuban government collects the bulk of the earnings.⁴⁵

C. Mutual Educational and Cultural Exchange Act of 1961

The Mutual Educational and Cultural Exchange Act of 1961⁴⁶ was passed prior to the U.S. embargo on Cuba and remains in effect today. The purpose of the act is to promote "understanding between the people of the United States and the people of other countries by means of education and cultural exchange."⁴⁷ Thus, the act is essentially a statement by the federal government in support of educational and cultural exchanges as a peaceful means of forging friendly relations with other countries. This act allows foreign students, artists, and musicians to travel to the United States.

Miami-Dade County Resolution R-202-96 does not contain any provision specifically disallowing musicians from performing in public venues. The lack of a specific clause paralleling the federal cultural and educational exchange exception has resulted in inconsistent enforcement of the resolution.⁴⁸

45. See Ernesto Portillo, Jr., *America Warms Up to Cuban Music*, COPLEYS NEWS SERV., June 22, 1998.

46. 22 U.S.C. §§ 2451-2461 (1994).

47. *Id.* See also 22 U.S.C. § 1475d (1999) (stating that "a cultural exchange, international fair or exposition, or other exhibit or demonstration of United States economic accomplishments and cultural attainments, provided for under this chapter or the Mutual Educational and Cultural Exchange Act of 1961 . . . shall not be considered a 'public work' as that term is defined in section 1651 of Title 42.")

48. See discussion *infra* Part III.B. Although Administrative Order 3-12, as amended, allows for the Board of County Commissioners to waive requirement of Resolution R-202-96 (pursuant to R-1321-99) by a finding that "the special characteristics of the purchase or the transaction is necessary for the operation of the County, or for the health, safety, welfare, economic benefit or well-being of the public," the failure to include a "cultural exchange" exception allows for too broad a discretion in the application of the ban. See Miami-Dade County, Fla., Administrative Order 3-12 (Jan. 13, 2000).

D. The Cuban Liberty and Democratic Solidarity Act (Helms-Burton Act)

The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996,⁴⁹ otherwise known as the Helms-Burton Act,⁵⁰ is one of the most controversial pieces of legislation signed by President Bill Clinton during his first term in office.⁵¹ The bill was born out of international criticism of the Cuban Democracy Act of 1992.⁵² Congress passed the Cuban Democracy Act of 1992⁵³ in the hopes that exploiting the economic hardship on Cuba created by the collapse of the Soviet Union would hasten a move towards democracy.⁵⁴ The Helms-Burton Act of 1996 tightened the Cuban embargo, but loosened restrictions on cultural exchanges.⁵⁵ Since its passage, "visits by Cuban musicians to the United States have increased more than 500 percent."⁵⁶

III. THE MIAMI-DADE COUNTY RESOLUTION

A. The Resolution: Its Inception

On March 5, 1996, Robert A. Ginsburg, County Attorney for Miami-Dade County, circulated a proposed administrative order dealing with Cuba to the Board of County Commissioners.⁵⁷ This administrative order implemented Resolution No. R-202-96 and directed the County Manager to review the possibility of amending an existing administrative order "to create a new policy prohibiting [Miami-Dade County from entering into]

49. 22 U.S.C. §§ 6021-6091 (1996).

50. The Act was dubbed "Helms-Burton Act" because U.S. Representatives Jesse Helms and Dan Burton sponsored it. See Ann Davis, *Helms to Cuba: See You in Court*, NAT'L L.J., Jul. 10, 1995, at A1.

51. See van den Berg, *supra* note 3.

52. Cuba initiated a series of United Nations resolutions that, without specifically naming the United States, condemned economic embargoes against Cuba. See van den Berg, *supra* note 3, at 282.

53. 22 U.S.C. § 6001 (1997).

54. See van den Berg, *supra* note 3.

55. See Michael Grunwald, *Sounds of Political Discord: In Miami, Some Exiles Hear a Different Beat Out of Cuba*, BOSTON GLOBE, Feb. 28, 1998, at A1.

56. *Id.*

57. See Memorandum from Robert A. Ginsburg, County Attorney, Miami-Dade County, Fla., to Board of County Commissioners, Miami-Dade County, Fla. (Mar. 5, 1996) (copy on file with author).

contracts with firms doing business, directly or indirectly, with Cuba."⁵⁸ "Miami-Dade County is the only local jurisdiction in the nation with an ordinance that prohibits it from contracting with any group that conducts business with Cuba."⁵⁹

B. The Resolution: Its Inconsistent Application

On its face, the county resolution virtually mirrors the United States' policy against Cuba by restricting trade and business relationships. The main difference lies in that the federal government has created various exceptions to the economic embargo against Cuba. Those exceptions, however, are not only absent from the resolution's text, but are also absent from the following administrative decisions made by the Mayor of Miami-Dade County and the Board of Commissioners regarding various Cuba-based artists and entertainers. According to Miami-Dade County Mayor Alexander Penelas, concerts by Cuba-based artists represent a public nuisance.⁶⁰

1. Los Van Van

Los Van Van, a Cuba-based salsa band, toured U.S. cities in 1999. However, when the group went to Miami, the reception was less than upbeat.⁶¹ Along with the city's 750,000 Cuban-American citizens, the Cuban-born mayor and three Cuban-American commissioners tried to cancel the band's October 9, 1999 performance which was to be held at a county-owned auditorium.⁶² Instead of flatly refusing to rent the auditorium to the band in accord with Resolution R-202-96, the county told the group at the last minute that it needed a \$5 million insurance policy.⁶³ It only took the promoter one-day to get the policy, but when she returned the auditorium was no longer available

58. Miami-Dade County, Fla., Resolution R-202-96 (Mar. 5, 1996), *reprinted in* Appendix A of this comment.

59. Alisa Valdes-Rodriguez, *Latin Grammys Need a Venue: Miami Waits*, L.A. TIMES, Oct. 30, 1999, at F1 (internal quotes omitted). The State of Florida, however, statutorily restricts the State from investing with Cuban companies. See FLA. STAT. ch. 215.471 (1999).

60. See Sutter, *supra* note 6.

61. See *NBC Nightly News: Miami Trying to Ban Performance by Cuban Musicians* (NBC television broadcast, Oct. 9, 1999).

62. See *id.*

63. See *id.*

because it was rented out to a group of Cuban exiles opposing the concert.⁶⁴ Their plan was to protest the concert by playing an anti-Castro film entitled "Liberty."⁶⁵ The Los Van Van concert eventually took place, despite protests by Cuban exiles.⁶⁶

2. Midem Miami

The annual Midem Latin music trade show⁶⁷ has also fallen victim to Resolution R-202-96 as applied to artists and entertainers. In 1997, the Resolution was strictly applied and thus no Cuba-based artists appeared at the trade show.⁶⁸ In fact, a local arts board member was fired for suggesting that Miami-Dade County suspend its ban on Cuban artists for the festival.⁶⁹

In 1998, Miami-Dade County canceled its funding when Midem officials brought in Cuban musicians.⁷⁰ The opening night party had to be moved from a Miami-Dade County-owned venue, Vizcaya, to the City of Miami Beach.⁷¹ Midem and the City of Miami Beach reached an agreement whereby public money would not be used to produce the festival and no Cuban music exhibitors would be allowed.⁷² Only one apolitical Cuban musician was permitted to perform.⁷³

3. Latin Grammys

It was at the MIDEM music conference at Miami Beach in June 1999 that the National Academy of Recording Arts and Sciences (NARAS) announced its intention to organize the Latin

64. *See id.*

65. *See id.*

66. *See* Tim Padgett, *The Salsa Censors*, TIME MAG., Apr. 3, 2000, at 78.

67. MIDEM Miami is the smaller version of the original 33-year-old MIDEM Cannes, produced by France's Reed Midem Organization, which attracts 11,000 delegates from 85 countries. *See* Levin, *supra* note 15.

68. *See* Grunwald, *supra* note 55.

69. *See id.*

70. *See* Jordan Levin, *County Law a Barrier for Grammys?*, MIAMI HERALD, Oct. 21, 1999, at 1E.

71. *See id.*

72. *See* Jay Weaver, *Cuban Musician to Play at Conference; Exiles Express Anger at Trade Show Organizer for Getting Around Miami-Dade Ban*, SUN-SENTINEL (Fort Lauderdale), Jan. 25, 1998, at B4.

73. *See id.*

Grammys award show.⁷⁴ Miami-Dade County took the same position with the Latin Grammys as with Midem: Cuba-based musicians would not be allowed at an event held in a public venue. Miami is regarded as the capital of the Latin American entertainment industry for it "is home to all but one of the world's major Latin music labels and most of Latin music's biggest stars."⁷⁵ Yet, due to the county administrators' interpretation of the resolution, the first Latin Grammys music awards show will take place in Los Angeles, California, not South Florida.⁷⁶

While NARAS asserted that South Florida's recently opened American Airlines Arena was the most appealing venue for the event, Resolution R-202-96 would cause problems for the production because Miami-Dade County owns the arena.⁷⁷ The County administrators' historical application of Resolution R-202-96 would effectively ban the Grammys and NARAS if any Cuban artists were asked to appear at the event.⁷⁸ Thus, although the Resolution does not specifically ban "cultural exchanges," such events are effectively banned by the manner in which the Resolution is enforced. One writer asserts that this resolution "would block Miami from providing police, fire and other key city services if the internationally televised awards show were held at a venue that has received public money, which most major arenas have."⁷⁹

4. Travel Industry Conventions

Miami-Dade County's strong stance in enforcing the resolution has not been consistent. In May 1999, the county spent approximately \$400,000 to help host the Pow Wow tourism convention at the Miami Beach Convention Center⁸⁰ and to fund Pow Wow related parties at the county-owned Vizcaya⁸¹ and Port

74. See Leila Cobo, *Latin Music Awards Head West to Los Angeles*, MIAMI HERALD, Dec. 30, 1999, at A1.

75. Valdes-Rodriguez, *supra* note 59.

76. See Cobo, *supra* note 74.

77. See *id.*

78. See *id.*

79. Valdes-Rodriguez, *supra* note 59.

80. The Miami Beach Convention Center is not owned by Miami-Dade County. Although the City of Miami Beach is located in Florida's Miami-Dade County, the City of Miami Beach is an independent city governed by a Mayor and a Board of Commissioners.

81. Vizcaya is the same venue where Miami-Dade county refused to allow MIDEM

of Miami.⁸² Many of the exhibitors at the convention are tour operators from Canada, Spain, England, Germany and Italy which heavily promote Cuba as a vacation destination.⁸³ In fact, Canada is Cuba's biggest supplier of foreign investment and the number one source of foreign tourism.⁸⁴ Another county-funded travel conference, La Cumbre, brings tour operators to Miami from all over Latin America, including some agencies that promote trips to Cuba.⁸⁵

Perhaps the inconsistent application of Resolution R-202-96 to events is due to the corresponding economic benefit the event presents to the county. While the Latin Grammys would have brought the one-time revenue of approximately \$35 million to Miami-Dade County,⁸⁶ the ongoing tourism industry is crucial to the South Florida economy and therefore sponsoring tourism conventions will arguably provide the county with a greater economic benefit. Furthermore, travel conventions lack national and arguably even local media attention and thus there is a reduced chance of public outcry from inconsistent enforcement of the resolution.

5. FIU-Miami Film Festival

The Florida International University's Seventeenth Miami Film Festival is the latest victim of the Miami-Dade County Resolution's ban on Cuban entertainment. The festival was scheduled to screen *La Vida Es Silbar (Life is to Whistle)*,⁸⁷ "the

to host their opening night party.

82. See Levin, *supra* note 70.

83. See *id.*

84. See Allan Fotheringham, *Dr. Castro, Meet Dr. Foth*, EDMONTON SUN, Jan. 6, 1999, at 11.

Cuba is also trying to attract Canadian tourists to visit Cuba. Zigel, *supra* note 17. "It is estimated that Cuba is spending \$10,000,000 on Canadian marketing alone, about triple South Florida's annual marketing budget. 'There is no question that Canada is Cuba's number one market and that they are pulling business away from us,' said Merrett Stierheing, President, Greater Miami Convention and Visitors Bureau." *Id.* quoting Anne Concreiff Arrarte, *Ad Blitz, New Hotels, Cheap Prices are Luring Canadians to Cuba*, MIAMI HERALD, Mar. 19, 1995, at 1A.

85. See Levin, *supra* note 70.

86. See *id.*

87. This film "has been widely interpreted to be subtly critical of Cuban society and government." Jordan Levin, *Miami-Dade Threatens to Cancel Film Fest Grant*, MIAMI HERALD, Feb. 25, 2000, at 1A. The movie's three characters explore the restriction of Cuban society in their search for happiness in post-revolution Cuba, a highly restrictive

first film made under the auspices of the Cuban government film agency to show in the festival's regular lineup.⁸⁸ Approximately two days before the screening of the sold-out show at a 1,700-seat theater, county officials announced that they would withdraw nearly \$50,000 in funding promised to the festival if it went ahead with the scheduled screening.⁸⁹ The county, as had been done in the case of *Los Van Van*, *Midem-Miami*, and the Latin Grammys, cited the county ordinance as the basis of revoking the grants.⁹⁰

Festival officials insisted that no money went to Cuba for the film.⁹¹ "The festival receives [the movie] for free from its U.S. distributor, New Yorker Films, which in turn pays WANDA, a company from Spain that co-produced the film in Cuba."⁹² Regardless of whether the Spanish production company contributed any money to the Cuban government during production, the film satisfies federal government standards for film distribution and can thus be legally shown in the United States.⁹³

Ultimately, the film played to a full house, despite the county's promise to withdraw their financial support.⁹⁴ Although the film was actively advertised, the Office of Miami-Dade County Mayor and other county officials claimed to be unaware of the film's connection to Cuba.⁹⁵ There not being any protests surrounding the film,⁹⁶ the Resolution R-202-96 was not invoked until reporters for the Miami Herald conducted inquiries.⁹⁷

This incident further exemplifies that the county's inconsistent enforcement of the resolution is merely a political move aimed at refocusing media attention from high profile

and oppressive government. See generally *id.* The film further criticizes Cuba's repression of individual and a free economy. See Rene Rodriguez & Charles Rabin, *Ban or No, 'La Vida' Film Fills Gusman*, MIAMI HERALD, Feb. 27, 2000, at 1B.

88. Levin, *supra* note 87.

89. See *id.*

90. See *id.*

91. See *id.*

92. *Id.*

93. The Berman Amendment prohibits the executive branch from regulating the importation, from any country, of certain materials including films. See discussion *supra* Part II.A.

94. See Rodriguez & Rabin, *supra* note 87.

95. See Levin, *supra* note 87.

96. See Rodriguez & Rabin, *supra* note 87.

97. See Levin, *supra* note 87; Rodriguez & Rabin, *supra* note 87.

events to the issue of Castro's rule in Cuba. After all, the county's enforcement of the resolution is not consistent even though its rationale for enforcement is consistent in every situation.

County officials maintain that the resolution does not ban such events, but rather only prohibits taxpayer dollars from sponsoring the events. However, the county is effectively banning such cultural exchanges, thereby creating issues of federal preemption and violations of the First Amendment.⁹⁸ Although the film festival was not likely influenced by the withholding of the almost \$50,000, given that such is only .01% of its budget,⁹⁹ other events with smaller financial backers would, in all likelihood, be forced to comply with the county's demands.

6. Latin American Studies Association

Shortly after the film festival came to its official close, the Miami-Dade County Commission once again threatened an event hosted by Florida International University. The University planned to host more than 5,000 members of the Latin American Studies Association¹⁰⁰ at the Miami-Dade Cultural Plaza and the Historical Museum of Southern Florida in downtown Miami.¹⁰¹ According to County officials, holding the reception at a county-owned venue would violate Resolution R-202-96 because 112 of the invited members were Cuban scholars.¹⁰² Again, the county's rationale for implementing the resolution remained consistent.

However, after threatening to ban the event, county officials made a decision that was inconsistent with prior decisions regarding participation by Cuban nationals in education and cultural exchanges. The county allowed the reception to take place because when the University signed a contract to rent the facility, the county accidentally forgot to require the usual signed

98. See discussion *infra* Parts IV, V.

99. See *FIU President 'Disappointed' Over Film Flap*, MIAMI HERALD, Feb. 26, 2000, at 4B.

100. The Latin American Studies Association was founded in 1966 and is the world's largest organization of scholars who study Latin American and Caribbean history, politics, cultural, sociology and scientific issues. See Don Finebrock & Jack Wheat, *FIU Scholar Reception is Back On*, MIAMI HERALD, Mar. 10, 2000, at B1.

101. See *id.*

102. See *id.*

affidavit¹⁰³ wherein the renter agrees to comply with the anti-Cuba policy.¹⁰⁴

Had the county banned this cultural exchange from the county owned venues, the county would have violated federal statutes which preempt the local resolution.¹⁰⁵ The reception with the Cuban scholars is not so different from the previously cited events so as to yield a different outcome. Further, the county's decisions create a variety of implications. The county's unusual leniency in applying the resolution to this conference may be an indication that the county is willing to work with academic institutions' decisions to invite Cuba based scholars, professors, educators, researchers and academics. If that is true, the county would have to distinguish academics from musicians and other artists and thereby take the stance that music and art are not educational.¹⁰⁶

Unlike Midem-Miami and the Latin Grammys, the conference was not likely to draw much media attention. Despite attention from the local Spanish-language radio stations, protesters outside the hotels where the seminars were held never totaled more than ten people.¹⁰⁷ The fact that the Resolution was not strictly applied to these facts supports the theory that Miami-Dade county officials only apply the resolution in high profiled, media magnetic events and instances where the economic benefit to the County is large and long term.

Nonetheless, county arts officials, community leaders and one commissioner have proposed a cultural exception to the resolution—an exception parallel to that created by federal legislation.¹⁰⁸ “Proponents of a cultural exception argue that restricting cultural exchange subverts the resolution’s purpose of promoting democracy.”¹⁰⁹ Miami-Dade Mayor Alex Penelas responded to this proposal stating, “People are allowed to

103. The required affidavit has been reprinted in Appendix B of this article.

104. *See id.*

105. *See discussion infra* Part IV.

106. It is doubtful that the county would make such a controversial blanket statement. Nonetheless, applying the Miami-Dade resolution against musicians and artists, but not other educators, would produce such a conclusion.

107. *See* Juan O. Tamayo & Jane Bussey, *Latin American Studies Conference in Miami Ends Without Disruption*, MIAMI HERALD, Mar. 19, 2000, 7A.

108. *See* Levin, *Art Leaders Seek Exception in Cuba Rules*, MIAMI HERALD, Mar. 15, 2000, at 1B.

109. Levin, *supra* note 108.

criticize the county's Cuba policy without penalty.' . . . If they are unhappy with the policy, 'they have the right to sue.'¹¹⁰

C. The Resolution: Amended in the Wake of Controversy

On January 13, 2000, the Board of County Commissioners voted to amend Administrative Order 3-12,¹¹¹ which implements Resolution R-202-96. The amended Administrative Order states the policy of the ban:

The government of the country of Cuba continues to maintain a policy of denying common freedom of speech, press, assembly, religion, and human rights to the majority of its citizens. Until this policy changes, Miami-Dade County shall not enter into a contract with any person or entity that does business with Cuba as provided herein, or that has traveled to Cuba as provided herein.¹¹²

D. U.S. District Judge Grants a Preliminary Injunction Halting Miami-Dade's Affidavit Requirement

On May 16, 2000, the United States District Court for the Southern District of Florida issued a preliminary injunction in *Miami Light Project v. Miami-Dade County*,¹¹³ effectively banning the affidavit requirement relating to Resolution R-202-96.¹¹⁴ The plaintiffs are a group of cultural organizations and individuals involved in the production of art, music and theater performances.¹¹⁵

The court found that "there is a substantial likelihood that certain portions of the 'Cuba Affidavit' may be unconstitutional

110. Levin, *supra* note 108.

111. Miami-Dade County, Fla., Administrative Order 3-12 (Jan. 13, 2000).

112. *Id.*

113. No. 00-1281-CIV-MORENO, 2000 WL 631082 (S.D. Fla. May 16, 2000).

114. *See id.* The decision affects International Cultural Exchange and Tourist Development Council grants, two of the county's fourteen competitive grant programs, and about \$280,000 in funding. *See* Jay Weaver, Jordan Levin et al., *Judge Halts Dade Ban on Arts Ties to Cuba*, MIAMI HERALD, May 17, 2000, at 1A.

115. *See* Miami Light Project v. Miami-Dade County, No. 00-1281-CIV-MORENO, 2000 WL 631082 (S.D. Fla. May 16, 2000).

under the foreign affairs clauses of the United States Constitution and, therefore, a narrow preliminary injunction is warranted."¹¹⁶ The court recognized that the county has the right to spend tax payer money in a way it sees fit and is not required to fund Cuban artists or sponsor Cuban cultural events.¹¹⁷ However, "based on existing case law, there is a substantial likelihood that the 'Cuba Affidavit' requirement will be found unconstitutional under the foreign affairs provisions, foreign commerce clause and supremacy clause."¹¹⁸ Notably, the court did not address the affidavit's affect on First Amendment and equal protection rights and therefore did not rule on those claims when ordering the preliminary injunction.¹¹⁹

In its discussion of foreign policy, the court noted the pending U.S. Supreme Court decision in *National Foreign Trade Council v. Natsios*,¹²⁰ and held that Miami-Dade's affidavit requirement impinges on foreign affairs far beyond the Massachusetts Burma Law in *Natsios* because the "Cuba Affidavit is an independent foreign policy that has more than an incidental or indirect effect on Cuba."¹²¹

Although the court's order of a preliminary injunction bans the enforcement of the affidavit requirement, it is not dispositive of the case or the legal issues presented therein. In fact, the court specifically stated that due to the limited purpose of a preliminary injunction hearing, "a party is not required to prove his case in full at a preliminary-injunction hearing and the

116. *Id.* at *1.

117. *See id.*

118. *Id.* at *3.

119. *See id.*

120. 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 68 U.S.L.W. 3178 (U.S. Nov. 29, 1999) (NO. 99-474).

121. *Miami Light Project*, *supra* note 115, at *3 (internal quotations omitted). The following are five specific instances cited by the court as evidence that Miami-Dade's law impinges on foreign policy:

First, the law was designed to specifically impact and affect the affairs of a foreign country. Second, Miami-Dade County by its geographic proximity to Cuba is in the position to have an independent impact on foreign policy. Third, Miami-Dade County, like Massachusetts, may be a bellwether for other states. Fourth, the 'Cuba Affidavit' is significantly more restrictive than the existing United States embargo on Cuba. Finally, the 'Cuba Affidavit' affects any entity that ever interacted with Cuba or a Cuban national in the second or third degree.

Id. at *5.

findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."¹²²

IV. PREEMPTION: FEDERAL LAW TRUMPS COUNTY RESOLUTION

A. *Federal Government has Occupied the Field of Foreign Policy*

"That the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution was pointed out by authors of *The Federalist* in 1787, and has since been given continuous recognition by [the Supreme] Court."¹²³ To allow each of the 39,000 non-federal governments in this country to create its own foreign policy would hinder the country's ability to "speak with one voice."¹²⁴ Even when a state judiciary criticizes foreign laws or regimes it partakes in the "forbidden domain" of drafting foreign policy.¹²⁵ More specifically, denouncing communist regimes and ideology through unauthorized means, rather than through the application of valid laws, creates a "great potential for disruption or embarrassment."¹²⁶

In *Florida Lime and Avocado Growers, Inc. v. Paul*,¹²⁷ the Supreme Court held that Congress will be deemed to have preempted an area when either its intent to do so is unmistakable or when the nature of the regulated subject matter permits no other conclusion.¹²⁸ In *Hines v. Davidowitz*¹²⁹ the Supreme Court held that although "there can be no one crystal

122. *Id.* at *6 (internal quotations and citations omitted).

123. *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941).

124. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 53, 67 (1st Cir. 1999).

125. *Clark v. Allen*, 331 U.S. 503, 517 (1947).

126. *Zschemnig v. Miller*, 389 U.S. at 433. Nothing in the *Zschemnig* decision alluded to the need for actual, measurable effects on national policy for the state action to fall within the *Zschemnig* ban. See Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 *TEMPLE L. REV.* 813, 844 (1989).

127. 373 U.S. 132 (1963).

128. See *id.* at 142.

129. 312 U.S. 52 (1941). *Hines* deals with the registration of aliens as a distinct group. The *Hines* Court whether a state law requiring the registration of aliens conflicts with a federal law on the same subject. See *id.* at 65-66.

clear distinctly marked formula" for preemption analysis, there is a strong presumption that Congress intended to preempt the field when it legislates in areas affecting foreign policy.¹³⁰ The primary determination is whether the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³¹

Certainly, Resolution R-202-96 hinders the purposes of the federal statute. Although it is otherwise consistent with federal law, the absence of a cultural exchange provision is antonymous to the purposes of such an exception in the federal law. Moreover, the County's refusal to implement such an exception at the local level is contrary to the purposes and objectives of Congress.

Because the federal government has occupied the field of foreign relations with Cuba, state and local legislation is preempted. In *Zschernig v. Miller*,¹³² the Supreme Court invalidated an Oregon statute that conditioned the right of a nonresident alien to take property by succession or testamentary disposition upon, inter alia, reciprocal rights in the foreign country.¹³³ Because the statute "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems," the statute was an unconstitutional "intrusion into the federal domain."¹³⁴

Supporters of enforcing R-202-96 against musicians may argue that the resolution has virtually no effect on either national policy or the popularity of Cuban artists in Cuba or the United States and is thus permissible under *Zschernig*. A similar argument was used by supporters of a 1986 Baltimore ordinance prohibiting new investment of city pension funds in U.S. companies doing business in South Africa and mandating divestment of a fund aggregating \$1.1 billion.¹³⁵ The Maryland Court of Appeals, in *Board of Trustees of the Employees' Retirement System v. Mayor and City Council of Baltimore*,¹³⁶

130. *Id.* at 67.

131. *Id.*

132. 389 U.S. 431 (1968).

133. *See id.* at 430-31.

134. *Id.* at 441.

135. *See* McArdle, *supra* note 126, at 825. The Baltimore ordinance authorized the city trustees, under state conditions, to suspend the ordinance provisions for a period of up to ninety days. *See id.*

136. 562 A.2d 720 (Md. 1989).

upheld the measure and distinguished *Zschernig* on the grounds that the Baltimore ordinance would not involve local government officials in a continuing assessment or criticism of South Africa.¹³⁷

Unlike the Baltimore statute, Resolution R-202-96 is precisely a continuing assessment and criticism of Cuba. The proposed amendment to the resolution explicitly states that the government of Cuba continues to deny common freedoms and "[u]ntil this policy changes, Miami-Dade shall not enter into a contract with any person or entity that does business with Cuba."¹³⁸

B. Parallelisms: The Case of the Massachusetts Burma Law

On November 29, 1999, the U.S. Supreme Court granted certiorari to *Natsios v. National Foreign Trade Council*,¹³⁹ to decide whether Massachusetts intruded into foreign policy by adopting a law requiring state agencies to boycott companies that do business in Myanmar (formerly known as Burma). More than two-dozen state and local governments have enacted laws that bar buying goods and services from companies that do business with Burma, Cuba, and other authoritarian governments.¹⁴⁰

In the proceedings below, the First Circuit held that the Massachusetts law, which restricts the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma, was unconstitutional as an "impermissible intrusion into the foreign affairs power of the

137. See *id.* at 747.

138. Miami-Dade County, Fla., Administrative Order 3-12 (Jan. 13 2000) (emphasis added).

139. 181 F.3d 38 (1st Cir. 1999), *cert. granted*, 68 U.S.L.W. 3178 (U.S. Nov. 29, 1999) (No. 99-474).

140. See *e.g.*, Berkeley, Cal., Resolution No. 57, 881-N.S., IIB & IVB (Feb. 28, 1995); Madison, Wis., Resolution No. 52, 471, I.D. No. 17607 (Aug. 15, 1995); Santa Monica, Cal., Selective Purchasing Ordinance, Res. No. 8966 (Nov. 28, 1995); Oakland, Cal., Selective Purchasing Law; Ann Arbor, Mich., Resolution Barring Purchases from Businesses in Burma and from Those Doing Business with Burma (Myanmar) (Apr. 15, 1996); San Francisco, Cal., Admin. Code 12J.1 (1996); Carborro, N.C., Resolution Barring Purchases from Businesses in Burma and from Those Doing Business with Burma, Resolution No. 18/96-97 (Oct. 8, 1996); Takoma Park, Md., Ordinance 1966-33 (Oct. 28, 1996)

national government.”¹⁴¹ In fact, just three months after the law was passed, Congress imposed sanctions on Burma.¹⁴²

The First Circuit further held that the law was a “direct attempt to regulate the flow of foreign commerce,” an activity exclusively designated to the federal government under the Foreign Commerce Clause of the Constitution.¹⁴³ That clause gives Congress the power to “regulate Commerce with foreign Nations.”¹⁴⁴

Under the Massachusetts law, Massachusetts and its agencies are banned from contracting with companies included on the restricted purchase list except in following specific instances: when procurement of the bid is essential and there is no other bid or offer, when the Commonwealth is purchasing certain medical supplies, or when there is no “comparable low bid or offer.”¹⁴⁵

The State of Massachusetts, in its appeal to the Supreme Court, argues, “Nothing in our federal Constitution denies to the States the right to apply a moral standard to their spending decisions.”¹⁴⁶ Furthermore, “Not one constitutional grant, prohibition or command requires the states to trade with dictators.”¹⁴⁷

Those in favor of reversing the First Circuit’s decision invalidating the Massachusetts Burma Law argue that doing so would encourage the state to spend the tax payer’s money in a manner that will be supported by its citizens.¹⁴⁸ “Federalism

141. *Natsios*, 181 F.3d at 55.

142. See *Natsios*, 181 F.3d at 47. “The federal law provides for sanctions to remain in place until such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government.” *Id.* (internal quotes omitted).

143. *Id.* at 68.

144. U.S. CONST. art. 1, § 8.

145. MASS. GEN. LAWS ch. 7, § 22G (1996). “The law does not impose any explicit limits on the ability of private parties to engage in business in Burma.” *Natsios*, 181 F.3d at 46.

146. Brief for the Petitioner at 31, *Natsios v. National Foreign Trade Council*, 68 U.S.L.W. 3178 (U.S. Nov. 29, 1999) (No. 99-474), available in 2000 WL 35850, at *11-*12.

147. *Id.*

148. See *Amici Curiae Brief of the New York City Comptroller et al.* at 16, *Natsios v. National Foreign Trade Council*, 68 U.S.L.W. 3178 (U.S. Nov. 29, 1999) (No. 99-474), available in 2000 WL 38826, at *7.

Among the sovereign prerogatives reserved to the states and to the municipalities within their borders is control over their own proprietary

matters to ordinary citizens seeking to maintain a degree of control, a sense of community, in an increasingly interrelated and complex world."¹⁴⁹

Supporters of the Miami-Dade County resolution should take note of the arguments presented by the amici curiae briefs submitted in favor of the Massachusetts Burma Law. Consistent with conforming state spending to the ideals and morals espoused by a state's citizens, the amici cited the Tenth Amendment as guaranteeing the state and local governments' interests in making spending decisions that comport with both the economic and ethical priorities of their citizens.¹⁵⁰ According to this school of thought, state politicians must realize their responsibility to the citizens as guardians of the public's assets or be "held accountable on voting day."¹⁵¹

If the U.S. Supreme Court were to reverse the First Circuit's decision and hold that the Massachusetts Burma law is valid on the basis that the state and local government is allowed to spend its money in accordance to the citizens' moral priorities, then the Miami-Dade resolution would have a strong chance of survival, absent any First Amendment violation. In essence, County officials would subsequently argue that the resolution reflects the community's disapproval of the Cuban government's human rights violations.¹⁵²

The Supreme Court's decision regarding the Massachusetts Burma law is significant for both the supporters and critics of the Miami-Dade ordinance. If the Court decides the case on the grounds of preemption due to the law's involvement with foreign policy, the Miami-Dade ordinance will be also preempted due to the similarities of the two local laws. However, if the Court bases

activities, including spending. . . . Without control over their own budget and business affairs, states and localities would lack autonomy and financial independence, and ultimately would lose control over the course of their public policy and the administration of their public affairs.

Id. at 18, 2000 WL 38826, at *8 (internal quotes and citations omitted).

149. *Id.* at 14, 2000 WL 38826, at *5 (quoting *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2239 (1999) (Breyer, J., dissenting)).

150. *See id.* at 15-22, 2000 WL 38826, at *6-10.

151. *Id.* at 18-19, 2000 WL 38826, at *8.

152. "There is nothing in the law prohibiting communities from applying non-price criteria—such as human rights and environment standards—in selecting public contractors and investment. Putting it differently, the constitution does not require citizens, through their state and local governments, to conduct business directly or indirectly with slave-owners, dictators, or polluters." *Id.* at 19-20, 2000 WL 38826, at *9.

its decision solely on the federal government's enumerated power of commerce, there will still be an issue surrounding the Miami-Dade County Resolution because of the slightly different scope of the two laws. Any differences, however, cannot overshadow the fact that both laws have the same overwhelming effect of adopting foreign policy at the local level.

V. FIRST AMENDMENT: ENFORCEMENT OF COUNTY RESOLUTION IS UNCONSTITUTIONAL

Resolution R-202-96 should be evaluated, not only on foreign affairs grounds, but also for First Amendment violations.¹⁵³ The Resolution may violate the First Amendment right to freedom of speech by prohibiting Cuba-based artists and entertainers from performing in Miami. However, the First Amendment's guarantees are not absolute and there are some types of speech that are not protected.¹⁵⁴

For speech to be protected under the First Amendment, the expression must concern public affairs and be able to contribute to an informed discussion of events that affect society in general.¹⁵⁵ "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or

153. See McArdle, *supra* note 126.

In *Cernuda v. Heavey*, 720 F. Supp. 1544 (S.D. Fla. 1989), the Southern District of Florida determined that the Berman Amendment did not prohibit the free flow of ideas and information protected by the First Amendment and therefore is constitutional. "As the Supreme Court has noted, if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable." *Id.* at 1554 (internal quotes omitted).

154. According to the U.S. Supreme Court:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been though to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are not essential part of any exposition of ideas, and are of such social value as a set to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). For an article exploring *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), which declared a particular rap album legally obscene, see Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 NOVA L. REV. 159, 171 (1991).

155. See McArdle, *supra* note 126, at 836.

individual."¹⁵⁶ Regarding the enforcement of the Miami-Dade Resolution, there is little question that the speech being sanctioned by county officials concerns public affairs, given the vast discussions the issue has spawned in a highly diverse community. This expression serves a significant societal interest.¹⁵⁷ Moreover, allowing, rather than actively promoting, musical events by Cuba-based musicians has the potential to inform and teach the general public and Miami's music industry about the richness and intrigue of Cuban music and culture.

The Miami-Dade resolution falls within the bundle of rights protected by the First Amendment because it has the function of promoting speech and influencing national deliberations concerning Cuban politics in the United States. Using local government institutions to foster communications between the national government and the citizens highlights "individual interests . . . and the values of smaller, less centralized units of government."¹⁵⁸

Most importantly, a state or local government foreign policy measure will not likely express the opinions of the entire community and thus "an official statement by local government may deter the expression of divergent views thereafter, threatening the first amendment interests of at least some members or segments of a community."¹⁵⁹ If this is true, the county administrators' decision to enforce the resolution against those Cuba-based artists and entertainers who have not denounced the Cuban regime discourages opposing parties from supporting the musical performances or attending the scheduled events.

156. *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 777 (1978).

In the plurality opinion of *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982), the court noted that the right to receive information and ideas "is an inherent corollary of the right of free speech and press that are explicitly guaranteed by the Constitution." The right of inquiry was accorded congressional protection in the 1988 Berman Amendment, which prohibits governmental regulation of information and ideas under the economic embargo laws. See generally Jeanne M. Woods, *Travel that Talks: Toward First Amendment Protection for Freedom of Movement*, 65 GEO. WASH. L. REV. 106 (1996).

157. See *First Nat'l Bank of Boston*, *supra* note 156. The Supreme Court observed that "the Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." *Id.* at 776.

158. McArdle, *supra* note 126, at 837.

159. *Id.* at 838.

Advocates of enforcing the resolution against musicians and record companies may argue that the resolution does not affect the rights of the citizens because it is inapplicable to private business. To those advocates, invalidating the resolution would only be a restriction on the *local government's* ability to withhold economic dealings with U.S. firms that do business with Cuba.¹⁶⁰

One writer argues, "State and local government measures intended specifically to communicate foreign policy positions to the national government and influence the direction of that policy, implement the expressive and associational interest of the citizenry and should be presumptively protected under the first amendment."¹⁶¹ To invalidate the resolution would thus be to violate the First Amendment rights of its supporters. "Absent extraordinary circumstances in which such expression would seriously jeopardize national security, the constitutional balance weighs heavily in favor of permitting such local advocacy."¹⁶²

However, the First Amendment has less weight when the federal government is dealing in foreign affairs.¹⁶³ Even in issues involving domestic affairs, the Supreme Court has recognized that the first amendment must be flexibly applied, depending heavily on the type of speech being regulated and the context in which the regulation arises.¹⁶⁴ So, if the Miami-Dade resolution does violate the First Amendment, it could still be upheld.

First Amendment cases have placed the burden of proof on the government, enlisting it with the duty to prove the "substantiality of the interest served by the rules."¹⁶⁵ This standard is part of the four-part test articulated by the Supreme Court in *United States v. O'Brien*¹⁶⁶ that allows a sufficient governmental interest in regulating conduct to excuse incidental

160. Therefore, the Los Van Van concert was able to be held at the privately-owned Miami Arena. Theoretically, the Latin Grammys could also have been held at that venue as well, had the seating been sufficient.

161. McArdle, *supra* note 126, at 845.

162. *Id.*

163. *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007, 1012-13 (S.D.N.Y. 1990). For a detailed analysis of this case, see Pamela S. Falk, Note, *Broadcasting From Enemy Territory and the First Amendment: The Importation of Informational Materials from Cuba Under the Trading with the Enemy Act*, 92 COLUM. L. REV. 165 (1992).

164. See *Capital Cities*, *supra* note 163, at 1013.

165. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985). See generally *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-86 (1978).

166. 391 U.S. 367 (1968).

restriction of free speech.¹⁶⁷ A regulation satisfies this test if it is within the government's powers under the Constitution, if it promotes an important governmental interest, is unrelated to suppression of speech, and is no greater than necessary to further that interest.¹⁶⁸

Those who support Resolution R-202-96 may claim that not banning from public-owned venues those Cuba-based musicians who have not denounced the Castro regime is detrimental to the community because the musicians are effectively promoting their communist ideals to people of a democratic society. Although the community may disapprove of both communism as a form of government¹⁶⁹ and those who have not publicly denounced it, if there is no "clear and present danger" to the nation, the artists' and entertainers' speech cannot be banned.¹⁷⁰

VI. CONCLUSION

Although Miami-Dade County Resolution R-202-96 is facially similar to federal statutes, it is not applied in accord with the "cultural exchange" exception in the federal regulations and is therefore unconstitutional. Even if this were not the case, it is questionable whether the statute is enforceable in light of the trend of industry globalization and mergers. With fewer independent companies, there is a serious possibility that a company with U.S. federal or state contracts has a parent company doing business with the Cuban government. Therefore, absent a waiver, such broad statutes that discriminate among countries may be unenforceable because they compromise other government functions.¹⁷¹

167. *Id.* at 376-77.

168. *See id.*

169. Campbell, *supra* note 154, at 215.

170. *Whitney v. California*, 274 U.S. 357 (1927). *See also* *Dennis v. United States*, 341 U.S. 494 (1951).

171. A federal court, in *Miami Light Project v. Miami-Dade County*, No. 00-1281-CIV-MORENO, 2000 WL 631082 (S.D. Fla. May 16, 2000), presented an example of the practical unenforceability of Resolution R-202-96. "The broad scope of the 'Cuba Affidavit' was most recently apparent in the County's dealing with TCG Payphones USA, Inc. TCG Payphones is a subsidiary of AT&T Corporation, an entity that legally does business with Cuba under the CDA Act. Though AT&T violated no law, absent a special waiver by the County Manager, both it and any of its subsidiaries are prohibited from contracting with the County." *Id.* at *6 n.8.

Nonetheless, Miami-Dade County Resolution R-202-96 is preempted because the federal government has occupied the field of foreign policy granted to it by the Necessary and Proper Clause and the Foreign Commerce Clause. Furthermore, the Resolution is unconstitutional as applied because refusing to allow Cuba-based musicians to play in public venues is violative of the First Amendment right to freedom of speech.

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^{*} Juris Doctor Candidate, May 2001, University of Miami School of Law. The author would like to thank all those who believed in her, especially her parents, whose love, support, faith and encouragement gave her the strength to follow her dreams. It is her parents who instilled in her a profound love for her heritage and culture, teaching her that growing up Cuban-American means cherishing freedom while embracing her Cuban roots. That is why this comment is dedicated to the Cuban-American and Cuban exile community—that their passion for liberty be rewarded with peace and democracy for their homeland.

APPENDIX A

RESOLUTION NO. R-202-96

RESOLUTION DIRECTING COUNTY MANAGER TO REVIEW A.O. 3-12 TO CREATE A NEW POLICY PROHIBITING CONTRACTS WITH FIRMS DOING BUSINESS, DIRECTLY OR INDIRECTLY, WITH CUBA.

WHEREAS, the recent actions of the government of Cuba have demonstrated its consistent disregard for internationally accepted standards of human rights by causing the deaths of four unarmed civilian aviators; and

WHEREAS, any business enterprise or financial institution which conducts business with any other such business which maintains interests or activities with Cuba does not appear to be totally committed to universal human rights and freedom; and

WHEREAS, Metropolitan Dade County does not wish to conduct business with firms that either conduct business with Cuba or other firms that conduct business with Cuba.

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF DADE COUNTY, FLORIDA, that the County Manager is directed to review A.O. 3-12 and report to the Board on the feasibility and consequences of amending such A.O. to provide that, to the extent allowable by law, Dade County shall not knowingly enter into a contract with any firm that is deemed to be doing business with Cuba by reason of any of the following:

Directly does business with Cuba, and/or

Is affiliated with any business entity that does business with Cuba, and/or

Subcontracts with any business entity that does business with Cuba and/or

Purchases supplies from any business entity that does business with Cuba, and/or

Performs billings and/or collection services for any business entity that does business with Cuba.

Such report shall be made to this Board at the March 19, 1996 Board of County Commissioners meeting. Upon approval of

such report, the County Manager shall prepare an appropriate amendment to A.O. 3-12 and submit same to this Board for approval.

The foregoing resolution was sponsored by Commissioner Bruce Kaplan and the Budget and Rules Committee, and was offered by Commissioner Bruce Kaplan who moved its adoption. The motion was seconded by Miguel De la Portilla Commissioner and upon being put to vote, the vote was as follows:

| | | | |
|----------------------|-----|----------------------------|-----|
| James Burke | aye | Miguel Diaz de la Portilla | aye |
| Betty T. Ferguson | aye | Maurice a. Ferre | aye |
| Bruce Kaplan | aye | Gwen Margolis | aye |
| Natacha S. Millan | aye | Dennis C. Moss | aye |
| Alexander Penelas | aye | Pedro Reboredo | aye |
| Katy Sorenson | aye | Javier D. Souto | aye |
| Arthur E. Teele, Jr. | aye | | |

The Chairperson thereupon declared the resolution duly passed and adopted this 5th day of March, 1996.

APPENDIX B

MIAMI-DADE COUNTY CUBA AFFIDAVIT

In compliance with Miami-Dade County Resolution Number R-202-96, R-206-96 and R-1321-99, I _____ being first duly sworn, state that neither the firm (individual, organization, corporation, etc.), submitting this bid or proposal or receiving this contract award nor any of its owners, subsidiaries, or affiliated or related firms:

Has:

- 1) engaged in the purchase, transport, importation or participation of any transaction involving merchandise that:
 - a) is of Cuban origin; or
 - b) is or has been located in or transported from or through Cuba; or
 - c) is made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba;
- 2) engaged in any transaction in which a Cuban national or the government of Cuba has any interest, or which involves property in which a Cuban national or the government of Cuba has any interest;
- 3) been a party to, or had an interest in any franchise, license or management agreement with a Cuban national or the government of Cuba, or which involves property in which a Cuban national or the government of Cuba has any interest;
- 4) had or held any investment, deposit, loan borrowing or credit arrangement or had any other financial dealings with a Cuban national or the government of Cuba, or which involves property in which a Cuban national or the government of Cuba has any interest;
- 5) subcontracted with, purchased supplies from, or performed billing or collection services for any person or entity that does business with Cuba as provided in "1" through "4" above.

- 6) Traveled to Cuba in violation of US travel restrictions during the ten year period preceding the due date for submittal.

Signature of Affiant

Date

Printed Name of Affiant and Title

Printed Name of Firm

SUBSCRIBED AND SWORN TO (or affirmed) before me this
_____ day of _____ 19 _____.

(Signature of Notary)

(Serial Number)

(Print of Stamp Name of Notary)

(Expiration Date)

Notary Public—State of _____

