UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EXODUS REFUGEE IMMIGRATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:15-cv-1858-TWP-DKL
	)	
MIKE PENCE, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This is a case about Governor Pence's authority to carry out his core responsibility to protect the safety of everyone living in Indiana by taking limited and temporary action concerning refugees fleeing Syria who resettle in Indiana. On November 16, 2015, the Governor signed a memorandum directive that, in effect, instructs the Secretary of the Indiana Family and Social Services Administration to suspend payment of claims made by non-profit agencies for services provided to such refugees as part of resettlement. Ex. A, Decl. of Adrienne Shields, Attach. 1, Directive on Syrian Refugee Resettlement [hereinafter "Directive"]. The Governor's temporary suspension of payments to refugee resettlement agencies followed FBI Director James Comey's congressional testimony that, owing to the situation in Syria, the United States lacks information concerning the backgrounds of refugees fleeing Syria. Governor Pence—along with a majority of our Nation's Governors who took similar action—signed his November 16 directive in response both to Director Comey's testimony and to mounting evidence that Islamic jihadists, including those associated with the terrorist organization known as the Islamic State in Syria and Iraq (sometimes referred to as ISIS or ISIL, but referred to herein as "Islamic State"), may have the intention and ability to attack Western countries by joining refugees fleeing Syria.

Yet contrary to Plaintiff's hyperbolic assertions that the Governor is attempting to "close [Indiana's] borders" to Syrians, Pl.'s PI Br. at 15, ECF No. 16, impose a "total ban on all Syrian refugees," *id.* at 24, "veto placement of a refugee within the State," *id.* at 6, or "exclude Syrians from resettlement in Indiana," *id.* at 21, the Governor's responsive action is far more measured. Rather than assert authority to bar Syrian refugees from resettling in Indiana, the Governor has merely suspended payments to refugee resettlement agencies for social services they render to refugees fleeing Syria. The State will not withhold cash assistance, medical assistance,

education assistance, and other federal entitlements (such as Medicaid, TANF, and SNAP) to which refugees are otherwise entitled. The Governor's intent is not to punish particular refugees, but instead to deter the local resettlement agencies and their affiliated national Voluntary Agencies from resettling such refugees in Indiana until the United States can gather sufficient background information to make an educated assessment as to whether the refugees pose a security threat.

The Governor is also attempting to prompt more thoroughgoing consultation among the State of Indiana, and the U.S. Departments of State, Health and Human Services, and Homeland Security—all of whom are involved in the resettlement process—concerning resettlement of refugees (particularly those fleeing Syria) in Indiana. Determining when it will be safe to resettle refugees fleeing Syria (a war-torn haven for terrorists about whose residents little information is available) depends on a complex matrix of information that ebbs and flows daily. It requires inter-governmental deliberation and politically accountable judgment. Based on the available information to date, the Governor's judgment is that such resettlements are not safe at this time, and his action carrying out that judgment is a restrained, targeted response to a very real security threat, well within the traditional authority of States to protect public safety.

FACTUAL BACKGROUND

I. International Refugee Status and Resettlement

A. The role of the United Nations

The 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol Relating to the Status of Refugees, is "the core instrument of international refugee law." Ex. B, U.N. High Comm'r for Refugees, *UNHCR Resettlement Handbook* 12 (rev. ed. 2011). It defines "refugee" as a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country*; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. at 18 (emphasis added). Refugees do not have an automatic right to resettlement, and UN member nations have no obligation to accept refugees for resettlement. *Id.* at 36. Twenty-five UN member nations, including the United States, currently accept refugees. *Id.* at 65–66.

For each refugee, UNHCR, the international agency charged with protecting refugees, prepares an informational dossier to submit to resettlement member nations. *Id.* at 335–36. The dossier contains biographical information listing, among other things, each refugee's name, sex, date of birth, marital status, country of origin, citizenship, and place and country of birth. *Id.* at 338. Copies of all relevant and available documents are included: identification documents from the country of origin or asylum, marriage certificates or divorce papers, custody documents, and medical reports. *Id*. at 348. The dossier provides "a comprehensive outline of the refugee claim," including the nation of origin and a summary supporting the claim of persecution. *Id*. at 340–41. UNHCR staff identify a suitable resettlement country and submit the dossier to that country. *Id.* at 353–57.

B. The role of the United States government

The entry of foreign national refugees into the United States is governed by the federal Immigration and Nationality Act (INA), 8 U.S.C. ch. 12, as amended by the United States Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. The President makes an annual determination of how many refugees may be admitted in the upcoming fiscal year from each of the various countries and regions of the world. 8 U.S.C. § 1157.

The Act also established the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services and charged it with funding and administering various federal programs related to resettlement. 8 U.S.C. § 1521. Within the State Department, the Bureau of Population, Refugees, and Migration (PRM) is responsible for coordinating refugee policy.

The Act defines "refugee" similarly to the 1951 Convention. To qualify as a "refugee" under U.S. law, a person must be (1) located outside the person's country of citizenship (or, in the case of a stateless person, the country where the person most recently lived) and (2) "unable or unwilling to return to, and . . . unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

PRM receives refugee applications at nine Resettlement Support Centers located around the world. Ex. C, U.S. Dep't of State, *U.S. Refugee Admissions Program*. These Centers are funded and managed by PRM, but operated by international nongovernmental organizations. *Id.* For each refugee seeking protection in the United States, a Center gathers biographic and other information about the refugees, which includes, among other things, the refugee's country of origin, which is the country the refugee is fleeing (*i.e.*, the country of citizenship or residence whose protection from persecution the refugee is unable or unwilling to seek). *See* 8 U.S.C. § 1101(a)(42)(A); Ex. C, *U.S. Refugee Admissions Program*. Officers from the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) then review this information and conduct an in-person interview with the applicant. Ex. C, *U.S. Refugee*

Admissions Program. If an officer approves the applicant for resettlement, the next step is a health screening to prevent the entry of persons with communicable diseases. *Id.*

The Center locates a U.S.-based resettlement "Voluntary Agency" willing to provide "sponsorship assurance" and determine where the applicant will resettle in the United States. *Id.*; 45 C.F.R. § 400.2. Sponsorship assurance confirms that a Voluntary Agency is "willing and prepared to accept the case for resettlement, and that all necessary arrangements will be made at the local level to receive the refugee." Ex. D, Refugee Council USA, *Post Acceptance Processing*. The Center coordinates refugee travel arrangements with the Voluntary Agency. *Id.*

C. The role of the States and Indiana's State Refugee Plan

Once a Voluntary Agency accepts a refugee for resettlement in the United States, it notifies an affiliated local resettlement agency. Plaintiff Exodus Refugee Immigration, Inc., an independent nonprofit based in Indianapolis, is one such resettlement agency. Compl. ¶ 6, ECF No. 1. Exodus is part of a network of affiliates working with Church World Service Immigration and Refugee Program and Episcopal Migration Ministries—both of which are Voluntary Agencies that work with PRM—in the resettlement of refugees. Pl.'s PI Br. at 9–10. Once a refugee case is assigned to it, Exodus works with community organizations, faith-based groups and others to assist with resettlement. Ex. E, Ind. State Dep't of Health, *Refugees/Advocates* 3.

Exodus and other local resettlement agencies are eligible for government grants under the Refugee Act for services rendered to refugees. *See generally* 8 U.S.C. § 1522. Typically, States administer these grants. Participating States submit a State Plan outlining allocation of public and private resources for refugees' housing, language training, and employment assistance to promote economic self-sufficiency. 8 U.S.C. § 1522(a)(6)(A); *see also* 45 C.F.R. §§ 400.4, 400.5. Participating States may receive two types of quarterly federal grants: (1) grants for

refugee social services (*i.e.*, citizenship and naturalization preparation services and assistance in obtaining employment authorization documents); and (2) grants for cash assistance, medical assistance, and related administrative costs. 45 C.F.R. § 400.11(a). The Office of Refugee Resettlement approves quarterly grant awards. 45 C.F.R. § 400.11(d)–(e). The State draws approved funds as needed through the Department of Health and Human Services' Payment Management System. 45 C.F.R. § 400.11(e)(2).

Indiana has a State Plan for refugee resettlement. *See generally* Ex. F, Decl. of Matthew Schomburg, Attach. 1, Indiana State Plan for Title IV of the Immigration and Nationality Act: Refugee Resettlement Program. The Indiana Family and Social Services Administration Division of Family Resources administers the State Plan. Ex. F, Attach. 1, State Plan 2–3. Assistance under the State Plan includes grants to resettlement agencies for social services, which the Governor's directive affects, and cash assistance, medical assistance, education assistance, and other federal entitlements, which the directive does not affect. Ex. A, Shields Decl. ¶¶ 11–13; Ex. F, Schomburg Decl. ¶¶ 6–10.

II. The Syrian Conflict and Refugee Crisis

In March 2011, a series of antigovernment protests—inspired by a wave of similar "Arab Spring" demonstrations elsewhere in the Middle East and North Africa—erupted in Syria's southern province of Dar'a. Ex. G, Lucy Rodgers et al., *Syria: The Story of the Conflict*, BBC News (Oct. 9, 2015); Ex. H, Cent. Intelligence Agency, *The World Factbook: Syria*. The Syrian government, led by President Bashar al-Assad, responded with armed force, which led to formation of opposing militias. Ex. G; Ex. H. By 2012, the conflict had expanded into a full-fledged civil war. Ex. G; Ex. H.

To date, "the conflict has displaced 11.6 million people, including 7.6 million people internally, making the situation in Syria the largest humanitarian crisis worldwide." Ex. H. More than half a million Syrian refugees currently seek resettlement in Western nations, including the United States. Ex. I, H. Homeland Sec. Comm., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2 (Comm. Print 2015) [hereinafter "*Syrian Refugee Flows*"]. In FY2015, the United States received nearly 70,000 refugees, almost 1,700 from Syria. Ex. J, Andorra Bruno, Cong. Research Serv., R44277, *Syrian Refugee Admissions and Resettlement in the United States: In Brief* 2 (2015). The President recently announced that the U.S. would admit at least 10,000 Syrian refugees in FY2016. *Id.*

III. Terrorism and Security Concerns

A. The Syrian conflict is attracting and producing terrorists

According to the U.S. Department of State's latest *Country Reports on Terrorism*, "[t]he ongoing civil war in Syria was a significant factor in driving worldwide terrorism events in 2014." Ex. K, U.S. Dep't of State, *Country Reports on Terrorism 2014*, at 7 (June 2015). As of late December 2014, more than 16,000 foreign terrorist fighters had traveled to Syria. *Id.* That is more than the number that "traveled to Afghanistan, Pakistan, Iraq, Yemen, or Somalia at any point in the last 20 years." *Id.* Many joined the Islamic State's effort to "seize contiguous territory in western Iraq and eastern Syria for a self-declared Islamic caliphate." *Id.*

Counterterrorism experts have expressed particular concern over "the growing number of [Islamic] extremists . . . that have traveled to and from Syria (and Iraq) to fight." Ex. L, Seth G. Jones, *The Syrian Refugee Crisis and U.S. National Security: Testimony Presented Before the House Judiciary Committee, Subcommittee on Immigration and Border Security* 2 (2015). According to a recent scholarly report, a number of attacks and terrorist plots across the West

have had operational ties to (or were inspired by) the Islamic State in Syria. Ex. M, Lorenzo Vidino & Seamus Hughes, George Washington Univ., Program on Extremism, *ISIS in America: From Retweets to Raqqa*, at ix (Dec. 2015). "ISIS-related mobilization in the United States has been unprecedented[,]" the report notes. *Id.*

B. Federal officials acknowledge that terrorists are trying to infiltrate Western nations including the United States through the refugee resettlement process

The refugee resettlement process is susceptible to manipulation, as even PRM has acknowledged. In a 2011 memo to reception and placement agencies, PRM instructed the agencies to notify the State Department and the Department of Homeland Security of any "anomalies in the program" in order "to ensure that families are not separated, that women and children are not illegally trafficked into the United States, and that imposters are not posing as refugees to seek admission . . . ." Ex. N, U.S. Dep't of State, *Program Announcement 2011-08: Report of Anomaly* (Mar. 15, 2011).

The extensive connections between the Syrian crisis and terrorist activities have brought these concerns to the forefront, prompting members of Congress to investigate the screening process for refugees entering the U.S. In September 2015, the Homeland Security Committee of the U.S. House of Representatives Task Force on Combatting Terrorism and Foreign Fighter Travel made several key findings. The Committee found that "[m]embers of terrorist groups like ISIS have publicly bragged they are working to sneak operatives into the West posing as refugees, and European officials are worried this is already the case." Ex. O, H. Homeland Sec. Comm., 114th Cong., Final Rep. of the Task Force on Combating Terrorist and Foreign Flight Travel 43 (Comm. Print 2015).

What is more, a recent Homeland Security Investigations Intelligence Report states, according to one news outlet, that "ISIS likely has been able to print legitimate-looking Syrian

passports since taking over the city of Deir ez-Zour last summer, home to a passport office with 'boxes of blank passports' and a passport printing machine." Ex. P, Michele McPhee & Brian Ross, *US Intel: ISIS May Have Passport Printing Machine, Blank Passports*, ABC News (Dec. 10, 2015). Another passport office was located in Raqqa, Syria, which is the Islamic State's de facto capital. *Id*. ABC News quotes the report as stating that "[s]ince more than 17 months [have] passed since Raqqa and Deir ez-Zour fell to ISIS, it is possible that individuals from Syria with passports 'issued' in these ISIS controlled cities or who had passport blanks, may have traveled to the U.S." *Id*.

Further complicating matters, according to the Department of Homeland Security, the "near-absence of communication" between Western nations and the Syrian government means that the United States and European countries "are lacking key information that could be used to identify the passports." Ex. Q, Matthew Dalton, *Islamic State's Authentic-Looking Fake Passports Pose Threat*, Wall St. J. (Dec. 23, 2015). A former U.K. counterterrorism official estimated that Islamic State "can probably make [fake passports] good enough to get them past someone who has faced 10,000 refugees." *Id.* There are now YouTube videos "showing people how to obtain Syrian passports and impersonate Syrians." *Id.* One of the terrorists involved in the Paris attacks was registered as a refugee in Greece, and Belgian officials arrested another man who entered Europe as a refugee with a fake Syrian passport. *Id.* Belgian counterterrorism officials have also revealed that Islamic State gained control of the materials needed to make Iraqi passports when it occupied Mosul. *Id.*

In November 2015, the U.S. House of Representatives Homeland Security Committee verified that Islamic State and other terrorists "are determined" to abuse refugee programs and "focused on deploying operatives to the West." Ex. I, *Syrian Refugee Flows* 2, 3. And

Congressman Michael McCaul, Chairman of the U.S. House of Representatives Homeland Security Committee, recently confirmed that the "National Counterterrorism Center has identified 'individuals with ties to terrorist groups in Syria attempting to gain entry to the U.S. through the U.S. refugee program.'" 161 Cong. Rec. H9054 (daily ed. Dec. 8, 2015) (statement of Rep. McCaul). Representative McCaul expressed concern "that serious intelligence gaps preclude us from conducting comprehensive screening to detect all Syrian refugees with terrorist ties." *Id.*

Even more important for this case, Obama Administration officials have also expressed concern over potential gaps in the vetting process of refugees fleeing Syria. These concerns arise largely from a lack of reliable intelligence on the war-torn region. Michael Steinbach, Assistant Director of the FBI's Counterterrorism Division, explained his "concern is in Syria, the lack of our footprint on the ground in Syria, that the databases won't have information we need. So it's not that we have a lack of process, it's that there is a lack of information." Ex. R, *Countering Violent Islamist Extremism: The Urgent Threat of Foreign Fighters and Home-Grown Terror: Hearing Before the H. Comm. on Homeland Security*, 114th Cong. 46 (2015) (statement of Michael Steinbach, Asst. Dir. Counterterrorism Division, Fed. Bureau of Investigation). Confirming the importance of Steinbach's observation, FBI Director James Comey recently testified, "we can query our databases until the cows come home but nothing will show up because we have no record of that person." Ex. S, H. Homeland Sec. Comm., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015) [hereinafter *Refugee Vetting*].

Homeland Security Secretary Jeh Johnson recently said: "We do have to be concerned about the possibility that a terrorist organization may seek to exploit our refugee resettlement

process." Ex. T, Catherine Herridge, *Johnson: Yes, Terrorists Could Try to 'Exploit' Refugee System*, Fox News (Dec. 17, 2015). And Director of National Intelligence James Clapper lamented, "We don't obviously put it past the likes of ISIL to infiltrate operatives among these refugees." Ex. T, *Refugee Vetting*.

C. Terrorists have infiltrated the U.S. and other nations posing as refugees

The outcomes that U.S. officials fear have already taken place in other nations, and two recent arrests in the U.S. demonstrate that these are not merely hypothetical concerns. Just last week, two Iraqi-born men who came to the U.S. as refugees (one as a refugee fleeing Syria) were arrested on terrorism-related charges. Aws Mohammed Younis Al-Jayab, who came to the U.S. as a refugee from Syria in 2012, is accused of making false representations to federal officials regarding his travel to Syria to support terrorist activities. Ex. U, Criminal Complaint at 15–17, *United States v. Aws Mohammed Younis Al-Jayab*, No. 2:16-MJ-1 (E.D. Cal. Jan. 6, 2016). Omar Faraj Saeed Al Hardan, who came to the U.S. as a refugee from Iraq in 2009, is accused of "provid[ing] material support and resources . . . including personnel, specifically himself, training, and expert advice and assistance, to a foreign terrorist organization, namely, the Islamic State of Iraq and the Levant ('ISIL')." Ex. V, Indictment at 4, *United States v. Omar Faraj Saeed Al Hardan*, No. 16-CR-003 (S.D. Texas Jan. 6, 2016). While these arrestees are presumed innocent, and while there is no allegation they were planning attacks in the United States, their indictments nonetheless show that the federal government believes these alleged Islamic jihadists exploited the refugee program to gain entrance to the United States or at least entered the United States as refugees.

Moreover, federal law enforcement has previously linked purported refugees to terrorism in the U.S. In 2011, USCIS apparently altered its treatment of Iraqi refugee cases—resulting in a marked decline in the number of Iraqi refugees admitted to the United States—when officials

discovered that at least two al Qaeda terrorists from Iraq had been resettled in the United States after claiming refugee status. Ex. W, James Gordon Meek, *Exclusive: US May Have Let 'Dozens' of Terrorists Into Country as Refugees*, ABC News.com (Nov. 20, 2013); Ex. X, U.S. Dep't of State, *FY10 and FY11 Refugee Admissions Statistics* (showing a nearly 50 percent drop in Iraqi refugee admissions between FY2010 and FY2011).

Meanwhile,Islamic jihadists posing as Syrian refugees have successfully carried out terrorism elsewhere. Recently, a suicide bomber from the Islamic State posing as a Syrian refugee carried out an attack in Istanbul, killing at least ten and injuring several others. Ex. Y, Ceylan Yeginsu & Victor Homola, *Istanbul Bomber Entered as a Refugee, Turks Say*, N.Y. Times (Jan. 13, 2016). Also, in December 2015 two men who entered Europe using forged Syrian passports were arrested at a refugee center in Salzburg, Austria on suspicion of abetting the recent terrorist attacks in Paris. Ex. Z, Shadia Nasralla & Francois Murphy, *Two Suspected of Links to Paris Attacks Arrested in Austria Refugee Center*, Reuters (Dec. 16, 2015).

Honduran authorities recently arrested five Syrian nationals as they attempted to travel to the U.S. using stolen Greek passports. Ex. AA, Jesse Byrnes, *Honduras Arrests Five Syrians Heading to US with Fake Passports: Report*, TheHill.com (Nov. 18, 2015). Similar incidents have been reported elsewhere, including St. Maarten and Paraguay. Ex. BB, Gustavo Palencia, *Honduras Detains Syrians Bound for U.S. With Doctored Greek Passports*, Reuters (Nov. 18, 2015).

IV. Federal and State Governments Respond to the Security Risk

A. A majority of Governors oppose resettlement of Syrian refugees in their States

In the aftermath of the Paris attacks and the discovery of the connection to Syrian refugees, many U.S. Governors began to announce their opposition to resettling Syrian refugees in their States. *See, e.g.*, Ex. CC, Letter from Rick Scott, Governor of Florida, to Paul Ryan,

Speaker, U.S. House of Representatives and Mitch McConnell, Majority Leader, U.S. Senate (Nov. 16, 2015) (stating Florida's Department of Children and Families would "not support the requests" it had received to "support the relocation of 425 possible Syrian refugees to Florida"); *see also* Ex. DD, Letter from the Governors of 27 States to the Honorable Barack Obama, President of the United States (Nov. 20, 2015) (requesting collectively that the President "suspend all plans to resettle additional Syrian refugees" until "an exhaustive review of all security measures has been completed and the necessary changes have been implemented").

In Texas and Alabama, not only did the Governors object to resettlement of Syrian refugees, but officials also filed lawsuits seeking to enjoin the federal government from resettling refugees in those States. Ex. EE, Complaint at 12, *Texas Health & Human Servs. Comm'n v. United States et al.*, No. 3:15-cv-3851 (Dec. 2, 2015); Ex. FF, Complaint at 14, *State of Alabama, et al. v. United States, et al.*, No. 2:16-cv-00029-JEO (Jan. 7, 2016). Texas filed a motion for preliminary injunction that remains pending.

B. The American SAFE Act of 2015

The U.S. House of Representatives also acted quickly in response to the security threat. On November 17, 2015, U.S. Representative Michael McCaul of Texas introduced the American Security Against Foreign Enemies (SAFE) Act. Ex. GG, H.R. 4038, 114th Cong. (2015). The Act would ensure that no refugee from Iraq or Syria will be admitted into the United States unless (1) the Director of the FBI certifies the refugee's background investigation and (2) the Secretary of Homeland Security, along with the FBI Director and the Director of National Intelligence, certifies to Congress that the refugee is not a security threat. *Id.* § 2(a)–(b). The bill also would require the DHS Inspector General to assess refugee approvals independently and report to Congress. *Id.* § 2(c). On November 19, just two days after its introduction, the

measure passed in the House. It has since moved to the Senate, where a cloture vote is scheduled for January 20, 2016. 162 Cong. Rec. S63 (daily ed. Jan. 12, 2016) (cloture motion).

C. Indiana's Response

It was in this climate that on November 16, 2015, Indiana Governor Mike Pence announced: "In the wake of the horrific attacks in Paris, effective immediately, I am directing all state agencies to suspend the resettlement of additional Syrian refugees in the state of Indiana pending assurances from the federal government that proper security measures have been achieved." Ex. HH, Press Release, Off. of Ind. Governor Mike Pence, Governor Pence Suspends Resettlement of Syrian Refugees in Indiana (Nov. 16, 2015). He continued: "Unless and until the state of Indiana receives assurances that proper security measures are in place, this policy will remain in full force and effect." *Id.*

In conjunction with that statement, Governor Pence issued a directive to FSSA and all executive branch agencies "to suspend all activities in any manner processing or facilitating the resettlement of additional Syrian refugees" to Indiana until the FBI "and other federal and state security organizations" could demonstrate to the Governor and the Indiana Department of Homeland Security that resettlement "will not jeopardize the safety or security of those in Indiana." Ex. A, Attach. 1, Directive.

A few days later, Governor Pence and twenty-six other Governors wrote a letter to President Obama asking him to "immediately review the process by which you conduct background checks on all individuals applying for refugee status and address the gaps acknowledged by your director of the FBI." Ex. DD, Letter from Governors to the Honorable Barack Obama. They asked that until the completion of that review and the implementation of

any necessary changes, the President "suspend all plans to resettle additional Syrian refugees." *Id.*

Next, on December 2, 2015, Governor Pence wrote a letter to Indiana's congressional delegation advising it of his actions and clarifying several points. Ex. II, Letter from Mike Pence, Governor of Indiana, to Indiana Congressional Delegation (Dec. 2, 2015). He first noted that his order was applicable only to refugees fleeing Syria: "The State of Indiana continues to welcome refugees from other countries around the world and has done so in recent days." *Id*. at 2. He added also that he had not imposed a permanent halt but rather "a suspension of participation that we look forward to lifting once the federal government can make proper assurances to the state regarding the security of the program and addressing the concerns raised by federal officials." *Id.* Finally, he urged the delegation to act "to pause the Syrian refugee program and enact legislation that will address the safety and security concerns so that we can renew our participation[,]" noting that "any legislation that is passed must directly address the concerns raised about the Syrian refugee program so that going forward the citizens of our state and the country can be confident that it will not be abused by ISIS to bring harm to America." *Id*. at 2–3.

In practical effect, the Governor's directive means that, during its pendency, Indiana State agencies will not, with respect to refugees fleeing Syria, pay grant monies to local resettlement agencies on account of social services they have provided such refugees. Ex. A, Shields Decl. ¶ 11. However, during the pendency of the Governor's directive, refugees fleeing Syria who are resettled in Indiana who are otherwise eligible for cash assistance or other state (or state-federal) government programs, including but not limited to TANF, SNAP and Medicaid, will remain eligible and will not be denied benefits on account of the fact they are fleeing Syria.

Id. at ¶¶ 12–13. In addition, during the pendency of the Governor's directive, Indiana will continue to use federal refugee resettlement grant funds to pay claims for initial health screenings and treatments that county health departments provide for any refugees fleeing Syria, health promotion activities for such refugees, and assistance to schools that provide English language instruction to refugee children. *Id.* at ¶ 12.

V. The Response of Resettlement Agencies

Three non-profit resettlement agencies operate in Indiana: Exodus Refugee Immigration, Inc. (the Plaintiff in this case), Catholic Charities of Indianapolis, and Catholic Charities of Fort Wayne. Neither of the Catholic Charities agencies are parties to this case, although Catholic Charities of Indianapolis recently resettled a Syrian refugee family in Indianapolis. The day after the Governor issued his directive, FSSA sent a letter to the two Indianapolis-based resettlement agencies (who were most likely to resettle Syrian refugees) advising them of the directive and asking them to suspend Syrian refugee resettlement efforts in Indiana. Ex. A, Attach. 3, Letter from Adrienne Shields, Director, FSSA Division of Family Resources, to Carleen Miller, Executive Director, Exodus Refugee Immigration, Inc. (Nov. 17, 2015); Ex. A, Attach. 4, Letter from Adrienne Shields, Director, FSSA Division of Family Resources, to Heidi Smith, Director of Refugee Services, Catholic Charities Indianapolis (Nov. 17, 2015).

For its part, the Roman Catholic Archdiocese of Indiana met with the Governor regarding a family fleeing Syria it intended to resettle in the state. Archbishop Joseph Tobin refused the Governor's request that the Archdiocese suspend the resettlement, and the family arrived in Indianapolis on Monday, December 7, 2015. Ex. JJ, Press Release, Archdiocese of Indianapolis, Statement from the Archbishop Joseph W. Tobin Regarding the Resettlement of a Family of Refugees from Syria (Dec. 8, 2015).

Initially, Exodus deferred to the Governor's directive and arranged for a family of refugees fleeing Syria to resettle in Connecticut rather than Indiana. Compl. ¶¶ 49–52. Later, however, it decided that going forward it would accept refugees fleeing Syria for resettlement in Indiana, even if the State would reject its claims for Refugee Act grants for those refugees. Compl. ¶¶ 54–57; Pl.'s PI Br. at 11–12.

ARGUMENT

PLAINTIFF CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

I. Exodus Lacks a Right to Enforce Federal Laws Supporting its Preemption Claims

This case represents the intersection of dual sovereigns' core sectors of authority: protection of public safety (the State) and naturalization (the United States). On top of that, it involves an optional federal grant program, interpretation of the terms of that program and discretionary judgment as to the need to enforce those terms. Those interpretations and judgments belong in the first instance to the State of Indiana and the United States. Yet the United States is not before this Court and has not undertaken any enforcement action against the State for the Governor's decision to suspend social services grant payments to resettlement agencies on account of refugees fleeing Syria. Under these circumstances, adjudication of this case would require the Court not only to venture policy determinations balancing security threats posed by Syrian refugees against the need to enforce federal grant terms, but also to second-guess either or both the federal government and various States, including the State of Indiana, as these sovereigns work out management of the Syrian refugee crisis.

This reality reinforces a fundamental doctrinal problem with this case: Plaintiffs lack a cause of action to enforce the federal laws they say the State is violating.

A. Exodus has no cause of action to enforce the Refugee Act

The Refugee Act—specifically § 1522(a), upon which Exodus relies—contains no provision creating a private right of action either for refugees or refugee resettlement agencies. *See* 8 U.S.C. § 1522(a). Nor can Exodus rely on 42 U.S.C. § 1983 to provide a right of action to enforce the Refugee Act because the Refugee Act fails to establish an "unambiguously conferred right." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). And, given the existence of a federal remedial scheme for enforcing the terms of Refugee Act grants, Congress has displaced the Court's inherent equitable power to adjudicate a preemption claim.

1. When, as here, a plaintiff seeks to enforce a federal statute that has no private right action of its own, that plaintiff may try to invoke 42 U.S.C. § 1983 to provide a cause of action. But § 1983 applies only when State officials allegedly violate a plaintiff's federal *rights*; it does not provide a remedy for a mere violation of federal law. *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."). Nothing short of an "unambiguously conferred right" can support a cause of action under Section 1983. *Gonzaga* 536 U.S. at 283. "[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Id.*

The statutes Exodus invokes contain no "unambiguously conferred" rights. Section 1522(a) of the Refugee Act supplies "conditions and considerations" for refugee resettlement aimed at the Director of ORR and the Secretary of HHS. The statute directs the manner in which the federal government works with Voluntary Agencies and state and local governments to determine where refugees will be resettled and how the federal government will fund and provide services to them. *See generally* 8 U.S.C. § 1522(a).

Section 1522(a)(2) instructs the Director to "consult regularly" with State and local governments and Voluntary Agencies concerning "the appropriate placement of refugees among the various States and localities," taking into account factors such as the proportion of refugees already in the area, the availability of employment and housing, and the likelihood that refugees placed in that area will become self-sufficient. 8 U.S.C. § 1522(a)(2)(A), (C). This provision contains no rights-creating language and, indeed, has no bearing on Exodus. It simply directs the federal government to establish "policies and strategies" for determining where and how refugees are placed among the States. *Id.* § 1522(a)(2)(B), (C). "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (quotation omitted).

Exodus also relies on § 1522(a)(5), which provides that "[a]ssistance and services funded under this section shall be provided to refugees without regard to race, religion, nationality, sex, or political opinion." 8 U.S.C. § 1522(a)(5). This provision serves as a restraint on the government, but is not a source of positive rights, as it does not grant refugees a *right* to do anything. *Contra, e.g.*, *Planned Parenthood of Indiana, Inc. v. Comm'r, Ind. State Dep't of Health*, 699 F.3d 962, 974 (7th Cir. 2012) (finding 42 U.S.C. § 1396a(a)(23), which affords a right to "obtain [medical] assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required[,]" enforceable via § 1983). Moreover, like §§ 1522(a)(2)(A) and (C), § 1522(a)(5) has no bearing on Exodus as it has only to do with non-discrimination against *refugees*.

Simply put, Exodus's preemption claims cannot succeed because § 1522(a) is a funding program, not a source of individual rights. The only obligation it imposes on the State is to offer

a compliant state plan "[a]s a condition for receiving assistance[.]" 8 U.S.C. § 1522(a)(6). The proper remedy for a State's violation of a condition of federal funding is for the Secretary of HHS to withhold funds. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (no cause of action where "the sole remedy Congress provided for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the Spending Clause contract—is the withholding of Medicaid funds . . . ."). Refugee Act resettlement grants represent a cooperative endeavor between the federal government and the States. It is not for private citizens to enforce the terms of that cooperation. *See id.* at 1383 (explaining that Congress retains significant discretion to determine how federal laws are to be enforced).

2. The Secretary's remedial authority also precludes an equitable action under the Supremacy Clause. As the Supreme Court recently held in the context of a challenge to State reimbursement rates for Medicaid providers, the Supremacy Clause standing alone provides no private right of action. *Armstrong*, 135 S. Ct. at 1383 ("[T]he Supremacy Clause is not the 'source of any federal rights' . . . and certainly does not create a cause of action." (quoting *Golden State Transit*, 493 U.S. at 107)). Rather, it provides a "rule of decision . . . when state and federal law clash[.]" *Id.*

Exodus acknowledges this holding, but claims that *Armstrong* is no impediment because that case stands for the proposition that "the courts' equitable power to issue . . . injunctions plainly extends to claims that sound in preemption, provided that—as is the case here—there is not [sic] statutory provision either expressly or implicitly foreclosing the Court from granting the relief Plaintiff seeks." Compl. ¶ 5; Pl.'s PI Br. at 13 n.4. But as noted, Congress has indeed foreclosed a claim in equity here via federal agency enforcement, just as in *Armstrong*. Compl. ¶ 5. In *Armstrong*, the Court held that two aspects of the Medicaid statute established Congress's

intent to foreclose private enforcement: (1) the sole remedy Congress provided for a State's failure to comply with Medicaid requirements is the withholding of Medicaid funds by the HHS Secretary; and (2) the statute's text is so broad and unspecific as to be "judicially unadministrable." *Armstrong*, 135 S. Ct. at 1385. In that case, said the Court, the plaintiffs' relief "must be sought initially through the Secretary rather than through the courts." *Id.* at 1387.

The same is true here. Again, the Refugee Act provides a mechanism for dealing with non-compliant States: withdrawal of funding. The Act grants the Secretary of Health and Human Services and the Secretary of State broad authority to monitor the performance of the States in providing refugee assistance and to withhold funding from States who break the rules. 8 U.S.C. § 1522(a)(7)–(8). Moreover, § 1522(a) is too broad and non-specific to be judicially enforced. It merely provides rules for the Director of ORR to follow in determining refugee placement and imposes no obligations on States. As in *Armstrong*, Plaintiff's desired enforcement of federal law must be sought through the Secretary rather than the courts.

B. Exodus has no right of action to enforce any other federal law that forms the basis of its field-preemption and conflict-preemption claims

Exodus also more broadly asserts that plenary federal power over immigration and foreign affairs preempts the Governor's partial, temporary suspension of Indiana's participation in Refugee Act grants for resettling refugees fleeing Syria. Aside from the curious assertion that the Constitution somehow requires a State to participate in a federal grant program already rejected by 12 States, Exodus has no rights of its own to vindicate through an action for declaratory and injunctive relief under either source of plenary federal power.

1. First, Exodus suggests that the governor's order somehow violates the United Nations Convention on the Status of Refugees, which the United States signed and ratified pursuant to the United Nations Protocol Relating to the Status of Refugees. That treaty requires

the United States to abide by the terms of Article 33 of the United Nations Charter Relating to the Status of Refugees. *Garcia v. I.N.S.*, 7 F.3d 1320, 1324 (7th Cir. 1993). "Article 33 of the Convention set forth a general principle of 'nonrefoulement' under which aliens fleeing persecution could not be sent back to their native countries." *Id.*

The Convention, however, is not a self-executing treaty. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); Ex. KK, Timothy E. Flanigan, Acting Assistant Dir. OLC, *Legal Obligations of the United States Under Article 33 of the Refugee Convention* (Dec. 12, 1991). Non-self-executing treaties "are not domestic law unless Congress has . . . enacted implementing statutes." *Medellin v. Texas*, 552 U.S. 491, 505 (2008). Here, Congress's enabling legislation first took the form of 8 U.S.C. § 1253(h) (1976 ed.), which "applied *only* to deportation of refugees already in the United States." Ex. KK, Flanigan at 87 (emphasis in original). Next, Congress passed the Refugee Act to implement its obligations, but, as explained in Part I.A, *supra*, that Act affords no right of action to Exodus, and the Convention provides no independent private right of action of its own. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) ("[I]f not implemented by appropriate legislation [treaties] do not provide the basis for a private lawsuit unless they are intended to be self-executing.").

2. Second, to the extent the Supremacy Clause, Naturalization Clause, or Foreign Affairs Power protect individual rights in a self-executing way, those rights are not Exodus's to enforce. Any such enforceable rights to negate state determinations about refugees would inhere only in the refugees themselves. *See, e.g.*, *Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1171–72 (10th Cir. 2011) (holding that an environmental organization could not challenge on Supremacy Clause grounds a county ordinance that opened to off-road vehicles land arguably held by the Bureau of Land Management because the organization's claims were outside the

zone of interests the Clause was intended to protect). A non-profit corporation benefits provider is not plausibly within the "zone of interests" protected by the Naturalization Clause or the Foreign Affairs Clause.

Exodus also may not assert claims based on the rights of refugees. As explained in Part III.A, *infra*, Exodus cannot make the showing necessary to justify *jus tertii* standing. It has no ongoing relationship with any refugees—as the doctrine requires—and given Exodus's assertion that it will resettle Syrian refugees regardless of the Governor's directive, there is apparently no threat of injury to refugees in any event. In short, no refugee rights are at stake in this litigation. And even if they were, such refugees would face no apparent barriers to asserting those rights themselves, which stands as an independent reason to reject *jus tertii* standing.

II. The Governor's Directive Protects Public Safety, Affects Only a Discretionary Federal-State Grant Program, and Avoids Preemption

A. The States' historic, fundamental, and compelling interest in protecting public safety curbs the preemptive reach of federal law

"In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" courts assume Congress has not superseded a State's traditional police powers absent an unambiguous showing that preemption "'was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Indeed, States may "act in areas of their traditional competence even though their [actions] may have an incidental effect on foreign relations." *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., concurring); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–20 (2003) (applying Justice Harlan's analysis). Accordingly, when a State's action in an area of traditional state competence affects foreign relations, courts should "consider the strength of the state

interest, judged by the standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Garamendi*, 539 U.S. at 420.

Here, the State has a historic, fundamental, primary, and compelling interest in exercising its traditional police powers to protect its citizens from the threat of terrorist violence. *Id.* This power stems from the States' role as independent sovereigns in the federal system that have "historic primacy . . . [in] matters of health and safety." *Medtronic, Inc.*, 518 U.S. at 485. Indeed, States' primacy for public safety has historically included *screening immigrants*, for example with respect to disease, which states once undertook by way of seaport quarantines. *See, e.g.,* Polly J. Price, *Sovereignty, Citizenship, and Public Health in the United States*, 17 N.Y.U. J. Legis. & Pub. Pol'y, 919, 934 n.73, 935 (2014); *cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 29 (1824) (observing state quarantine legislation to be valid despite effects on interstate commerce); *Smith v. Turner* ("The Passenger Cases"), 48 U.S. (7 How.) 283, 457 (1849) (Grier, J., opinion) (overturning a state tax on immigrants but otherwise recognizing, notwithstanding Congress's naturalization power, state residual power over public safety, even respecting immigrants, founded on "the sacred law of self-defence, which no power granted to Congress can restrain or annul").

The Constitution itself embodies this understanding of state primacy over public safety, even as it enumerates plenary authority over immigration and foreign affairs to the federal government. It presupposes that States maintain a core role over domestic security. For example, the Domestic Violence Clause of Article IV, section 4 leaves it to States to quell domestic insurrection (and other local violence), and authorizes federal assistance only upon application of the State legislature (or the Governor if there is no time to convene the legislature). Relatedly, Article I, section 10 recognizes the right of States to engage in war not

only upon invasion, but "in such imminent danger as will not admit of delay." For its part, the Indiana Constitution reflects this bargain and duly provides that the Governor "shall be commander-in-chief of the armed forces, and may call out such forces, to execute the laws, or to suppress insurrection, or to repel invasion." Ind. Const. art. 5, § 12.

In other words, the broad structure of government in the United States leaves States responsible as the first line of defense against local violence, *i.e.*, violence undertaken by individuals residing in a State targeting a particular city or other community, or other calamities. *Cf.*, Posse Comitatus Act, 18 U.S.C. § 1385 (generally precluding use of the United States Army or Air Force for local law enforcement); Stafford Act, 42 U.S.C. § 5170 (precluding federal assistance for natural disasters absent application by a State's Governor). Accordingly, the Court should be particularly reluctant to interpret federal law to preempt a Governor's actions to protect state residents from terrorist threats.

B. A State's temporary and limited refusal to pass along grant monies does not contravene U.S. immigration law or foreign policy

Garamendi balancing favors the State here particularly because Governor Pence's directive protects the safety of Indiana residents, yet impacts federal policy only by foregoing federal grant dollars that the State has a right to reject anyway.

1. There is no immigration field preemption because the Governor is not regulating who may enter the United States or dictating terms for remaining in the United States

With respect to immigration-power field preemption, federal immigration laws should not preempt state public safety directives "in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *De Canas v Bica*, 424 U.S. 351, 356 (1976) *superseded by statute on other grounds* (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

Indeed, the Court in *DeCanas* specifically reaffirmed States' wide leeway to "deal[] with aliens" without being preempted, *id.* at 355, and expressly rejected the possibility the INA was so comprehensive that it left no room for state action in the field. *Id.* at 359. Neither the text nor the legislative history of the INA indicated that Congress had a "clear and manifest purpose" of "complet[ly] oust[ing] . . . state power." *Id.* at 357–58 (internal citations omitted). What is more, said the Court, "there would have been no need, in [prior cases], even to discuss the relevant congressional enactments in finding pre-emption of state regulation if all state regulation of aliens was ipso facto regulation of immigration." *Id.* at 355.

By way of example, in *Keller v. City of Fremont*, 719 F.3d 931, 937, 941 (8th Cir. 2013), the court rejected a field preemption challenge to a municipal ordinance that precluded a city from hiring illegal aliens or providing them with rental housing benefits. The court concluded that, because such restrictions did not regulate which aliens could be admitted or remain in the country, and because there was no evidence that aliens denied these benefits would leave the country, the ordinance did not constitute an attempt to regulate immigration. *Id.* at 941. The same is obviously true here. The Governor is merely refusing to pay grant monies to private agencies that resettle refugees fleeing Syria in an effort to deter such resettlement. As the actions and statements of both Catholic Charities and Exodus indicate, this temporary and partial program suspension does not even directly regulate who may enter and remain in the State of Indiana, much less in the United States more broadly. The one refugee family affected by this decision so far has resettled elsewhere in the United States. Compl. ¶¶ 49–52.

The preemption cases Plaintiff cites mostly invoke particular federal statutes and commitments, not merely the broad import of a multi-faceted federal program. *See Arizona v. United States*, 132 S. Ct. 2492, 2502, 2504, 2505–06 (2012) (relying on federal alien registration

statute to invalidate state law criminalizing failure to comply with that federal statute, relying on federal statutes specifically attaching consequences for unlawful aliens who work to preempt state law criminalizing such employment, and relying on federal statutes detailing the process for dealing with removable aliens to preempt state law authorizing arrest of removable aliens); *Garamendi*, 539 U.S. at 401, 420 (preempting statute requiring insurers "to disclose information about all policies sold in Europe between 1920 and 1945" based on specific federal commitments concerning recovery of assets converted and confiscated by the Nazi Government); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366, 376 (2000) (invalidating a statute prohibiting state agencies from purchasing "goods or services from companies doing business with Burma" as inconsistent with federal statutes specifically governing how companies may transact business in Burma); *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (preempting state statute requiring alien registration as incompatible with federal alien registration law).

In *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1875), which invalidated a state statute requiring some, but not all, immigrants to pay a bond or be denied access to the United States, the Court did rely on broad principles rather than particular federal statutes. But that case, quite in contrast with this one, implicated the interests of other countries in the "protection of the just rights" of their citizens who go abroad. *See Arizona*, 132 S. Ct. at 2498–99 (citation omitted). As the Court observed in *Arizona* (with specific reference to *Chy Lung*), "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." *Id.* The Governor's directive, in contrast, has to do with refugees, *i.e.*, immigrants ostensibly fleeing persecution by their countries. There is no similar call to be solicitous of, for example, any unlikely concerns Syria might have for these refugees.

Regardless, the Governor's directive concerns State participation in an optional federal program, not independent and direct state regulation of immigration.

2. A State's exercise of discretion to suspend (in part) participation in the refugee resettlement program is consistent with federal policy

In contrast with the field and conflict preemption cases cited by Plaintiff, Governor Pence has merely suspended, in part, a discretionary federal grant program. His directive constitutes a limited suspension of grant payments to resettlement agencies for their social services work respecting resettlement of refugees fleeing Syria. This is meant as a deterrent, but if those agencies wish to resettle those refugees regardless, the Governor will not take further action (besides denying their claims) to stop them. Ex. A, Shields Decl. ¶ 16

Critically, were the State to withdraw entirely from the Refugee Act grant program, surely no one would assert such action is somehow preempted. Indeed, there is a separate federal grant program, known as Wilson-Fish, that awards grants to private entities who resettle refugees in States that do not participate in the Refugee Act. 8 U.S.C. § 1522(e)(7); 45 C.F.R. § 400.69; Ex. LL, Office of Refugee Resettlement, *Wilson-Fish Alternative Program Guidelines for Fiscal Year 2015–2016* (June 30, 2015). Currently, Wilson-Fish is in effect in 12 States. Ex. RR, Office of Refugee Resettlement, About Wilson/Fish (last reviewed Sept. 10, 2015), http://www.acf.hhs.gov/programs/orr/programs/wilson-fish/about Therefore, it is obviously not federal policy that States must in all circumstances administer these grant programs. In fact, there is no apparent reason why, if the federal government deems Indiana in violation of its State Plan, it could not invoke Wilson-Fish and administer grant monies through that means.

Accordingly, with respect to immigration-power conflict preemption, Plaintiffs cannot meet the "high threshold" imposed by the Supreme Court. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505

U.S. 88, 110 (1992) (Kennedy, J., concurring)). Conflict preemption occurs only when "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98 (citations and internal quotations omitted). Mere tension with federal objectives is insufficient. *Whiting*, 131 S. Ct. at 1985 ("Implied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" (quoting *Gade*, 505 U.S. at 111)).

Again, *Keller*, which rejected both field and conflict preemption of an ordinance barring municipal hiring and housing benefits to illegal aliens, provides guidance. There, the court held that the city's ordinance posed no conflict with federal law because it did not "'remove' any alien from the . . . [c]ity" and because federal officials "retain[ed] complete discretion to decide whether and when to pursue removal proceedings." *Keller*, 719 F.3d at 944. Governor Pence's directive similarly poses no conflict with federal law or policy. It does not purport to preclude any refugees from settling in Indiana, and it poses no substantial obstacle to the President's goal of admitting refugees fleeing Syria. *Gade*, 505 U.S. at 98.

In this respect, it bears mentioning that the United States itself has no apparent policy that any particular number of Syrian refugees be resettled in Indiana, or in any other particular State or locale. That determination is made by the Voluntary Agencies, which are non-governmental organizations that work with the State Department and local agencies such as Exodus to decide where resettlement should occur. Ex. C, *U.S. Refugee Admissions Program*. Those private agencies decide resettlement locations based on a variety of factors, including not only location of refugees' family and friends, but also the agencies' own financial interests. Ex. MM,

Deposition of Cole Varga at 62–63. What is more, even after deciding where to locate refugees, these agencies frequently alter their plans at the last minute and send the refugees elsewhere. Ex. NN, Deposition of Carleen Miller at 48–49. It is not plausible to argue that the Governor has somehow thwarted a federal policy affording these agencies exclusive, untrammeled discretion over where to resettle refugees. States are meant to have influence, even if private agencies have come to take for granted their ability to implement their prerogatives. *See* 8 U.S.C. § 1522(a)(2)(A).

And, again, the only refugees impacted by the governor's order so far were still admitted to the United States and successfully settled in another state. ECF No. 16-1, Decl. of Carleen Miller and Cole Varga ¶ 35. Yet another family fleeing Syria was resettled in Indiana notwithstanding the Governor's directive. Ex. OO, ABC News Radio, *Syrian Refugee Family Settles in Indianapolis Despite Governor's Resistance* (Dec. 8, 2015). And Plaintiff has made clear that, regardless of the Governor's directive, it intends to resettle in Indiana over a dozen refugees fleeing Syria in the coming months. Pl.'s PI Br. at 11–12. So, in sum, there is no federal policy concerning resettlement of Syrian refugees in Indiana, and no State preclusion of such resettlement in any event.

3. The Governor's directive neither implicates U.S. treaty obligations nor portends international consequences

Exodus claims the Governor's order somehow violates Article 33 of the United Nations Protocol on the Status of Refugees, but again that Article provides only "a general principle of 'nonrefoulement' under which aliens fleeing persecution could not be sent back to their native countries." *Garcia v. I.N.S.*, 7 F.3d 1320, 1324 (7th Cir. 1993). It contains no provision governing where in a country a refugee may settle or the extent of assistance required from the sanctuary government. There is no credible claim that the Governor's directive threatens

"refoulement" of refugees fleeing Syria or even precludes resettlement in Indiana. *Cf. United States v. Pink*, 315 U.S. 203, 230–31 (1942) ("[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.").

Exodus presents no evidence that the Governor's directive would lead to "serious international consequences." Pl.'s PI Br. at 20. The Governor's directive does not impose pressure on Syria, undercut the President's diplomatic discretion, or weaken his negotiating ability, unlike the State statutes in *Crosby* and *Garamendi*, which undermined particular federal agreements with foreign nations. *Garamendi*, 539 U.S. at 424 (finding that a state statute limited the President's ability to negotiate international issues); *Crosby*, 530 U.S. at 376–77 (finding that a statute employed economic pressure on Burma and "undermine[d] the President's intended statutory authority"). Again, Indiana could withdraw from the program completely—indeed, as Wilson-Fish States already have—without creating serious international consequences or running afoul of the Supremacy Clause. Indiana's partial suspension is no different.

4. Anti-commandeering principles refute any exclusive constitutional powers preemption claims

The Constitution's anti-commandeering principles also refute both of Exodus's exclusive constitutional powers preemption theories. The cases Exodus invokes all prevent States from enforcing State statutes and regulations in view of plenary federal authority over naturalization and foreign affairs. *Arizona*, 132 S. Ct. at 2501–02, 2504–05, 2506; *Garamendi*, 539 U.S. at 419–20; *Toll v. Moreno*, 454 U.S. 1, 16–17 (1982); *Zschernig*, 389 U.S. at 440–41; *Takahasi v. Fish & Game Comm'n*, 334 U.S. 410, 418–19 (1948); *United States v. Belmont*, 301 U.S. 324, 327 (1937); *Traux v. Raich*, 239 U.S. 33, 42 (1915); *Chy Lung*, 92 U.S. at 276. None forces a State to participate in a federal grant program that advances federal interests in those areas.

Congress may "attach conditions on the receipt of federal funds" to encourage a State to adopt a particular program. *New York v. United States*, 505 U.S. 144, 167 (1992). Anything more, however, is a prohibited invasion of a State's sovereignty. *Printz v. United States*, 521 U.S. 898, 928 (1997) (explaining that States "remain independent and autonomous within their proper sphere of authority" as an "essential attribute of sovereignty."); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) ("Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.").

Accordingly, structural provisions of the Constitution that enumerate exclusive federal powers, and thereby limit or preclude State powers, do not commandeer State participation in federal programs. So, while the Commerce Clause power precludes State regulatory discrimination against interstate and foreign commerce, it does not require States to participate in federal grant programs. Congress cannot even use its Commerce Clause power to abrogate State sovereign immunity, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001), much less to require State officials to participate in federal grant programs, *Sebelius*, 132 S. Ct. at 2608, conduct gun background checks, *Printz*, 521 U.S. at 925, or to take title and dispose of private nuclear waste. *New York*, 505 U.S. at 149, 162.

The same is surely true of the textually adjacent Naturalization power, U.S. Const. art. I, § 8 cl. 4, and the accumulation of Article I, section 8 and Article II powers that constitute the plenary federal Foreign Affairs power. *Toll v. Moreno*, 458 U.S. 1, 10 (1982), *Pink*, 351 U.S. at 244. Given the basic parameters of Our Federalism and the more specific significance of the Tenth Amendment and the anti-commandeering doctrine, these provisions cannot be understood

to require State officials to participate in refugee resettlement grant programs. Otherwise, all States would participate through the Refugee Act and there would be no need for the Wilson-Fish Act. Thus, Plaintiff's plenary-power preemption arguments are too broad to be plausible.

C. The Governor's order does not violate the Refugee Act specifically

1. The federal-state "consultation" required by the Refugee Act imposes requirements on federal officials; it does not constitute a restriction on the ability of State officials to protect public safety

For its claim that Governor Pence has exceeded the "consultation" role envisioned for States, Pl.'s PI Br. at 15–16, Exodus cites obligations on the federal government, not limitations on States. Under the Refugee Act, ORR must "consult regularly" with state governments on the "distribution of refugees among the States" before it places refugees in those States and "shall develop and implement" policies and strategies to resettle refugees in the United States "in consultation with" State government representatives. 8 U.S.C. § 1522(a)(2)(A)–(B). The federal government must take a State's recommendations into account "to the maximum extent possible." *Id.* § 1522(a)(2)(D). States can and do balk entirely at resettlement of various refugee populations. *See, e.g., Fernandez-Roque v. Smith*, 734 F.2d 576, 579, 584 (11th Cir. 1984) (federal government acceded to Florida Governor's request for no additional Cuban refugees).

In the context of Syrian refugees, at least, there may be a substantial question whether the United States has abided by its consultation obligations. Texas and Alabama, for example, are seeking federal court injunctions against resettlement of Syrian refugees in those States on account of the federal government's failure to consult with the States on the matter. *See* Part V.A, *supra* (citing Ex. EE, Compl. at 12, *Texas Health & Human Servs. Com'n v. United States*; Ex. FF, Compl. at 14, *State of Alabama, et al. v. United States, et al.*).

Regardless of the scope of the federal government's consultation obligations, or the consequences that may properly follow from its failure to adhere to them, those provisions of the code impose no independent limits on a State's authority to suspend grant payments for resettlement in the name of public safety. Imposing such limits would improperly expand the scope of implied preemption, and in the process upset the important balance of State-federal power in public safety, which has long been an area of State concern. *Whiting*, 131 S. Ct. at 1985 (noting the presumption against preemption); *Printz*, 521 U.S. at 928 (explaining that States must "remain independent and autonomous within their proper sphere of authority"). States' traditional primacy over public safety (which historically has even extended to screening immigrants for risk of public harm) should preclude an interpretation of § 1522 that preempts a Governor from temporarily suspending participation over an issue of public safety.

2. The Governor's directive is not preempted by statutory text directed to federal officials stating that "[a]ssistance and services funded under this section shall be provided to refugees without regard to . . . nationality"

Governor Pence's directive does not violate the requirements in 8 U.S.C. § 1522 and 45 C.F.R. § 400.5 mandating that federal grant assistance be provided "without regard to race, religion, nationality, sex, or political opinion."

a. First, the text of § 1522(a)(5) is addressed to the Director of ORR, not the States. All provisions in subsection (a)(1)–(4) direct a federal government official to take some action. Paragraph (5) addresses conditions for a program carried out by the Director, Secretary and other officials, which indicates that it is addressed to those officials. This understanding of paragraph (5) is supported by subsection (d)(2)(A), which frames grants as "reimbursements," and implies that states are free to make payments for resettlement on their own, but that federal officials may provide "reimbursements" only in accord with conditions prescribed in subsection (a). *See* 45

C.F.R. § 400.5). The Court would both contravene the structure of subsection (a)(1) and violate the clear-notice requirement if it held that paragraph (5) imposed an obligation on States. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (requiring that grant conditions imposed on States must be communicated with "clear notice" to be enforceable).

Understanding § 1522(a) to apply to the federal government rather than to the States is critical both in terms of the enforcement mechanisms intended by Congress and in terms of construing the meaning of each subsection. Critically, federal officials are charged with making initial determinations as to what constitutes discrimination based on "race, religion, nationality, sex or political opinion" and then acting on those determinations. That interpretive step is particularly important given the federal government's own stake in the meaning of these terms. As Exodus acknowledges, the federal government is bound by treaty obligations not to discriminate on the basis of "nationality" when deciding to take in refugees or asylees. Pl.'s PI Br. at 19. Surely if President Obama were to halt resettlement of Syrian refugees based on the threats they pose to national security, he would not be charged with violating United States treaty obligations not to discriminate on the basis of nationality. *Cf.* Ex. W, Meek, (describing an apparent alteration in the treatment of Iraqi refugee cases by the State Department following the discovery of two al-Qaeda terrorists living as Iraqi refugees in Bowling Green, Kentucky).

The federal government, therefore, has an important interest in ensuring "nationality" is defined in a way that permits it sufficient flexibility under these treaty obligations. It would be particularly inappropriate to hold that § 1522(a)(5) directly preempts States at the insistence of a local resettlement agency with no stake in collateral consequences of such a claim.

b. Second, even if it applies to States, § 1522(a)(5) precludes only discrimination undertaken for reasons owing to race or nationality as such. The Governor's directive is not of

that character. Properly understood, it does not target resettlement of Syrians as a nationality, or of any race or ethnicity of people in Syria. Resettlement of a person of Syrian birth fleeing, say, Iraq or Lebanon, would not be affected. Rather, it precludes (in a temporary and limited way) payment of grant monies on account of refugees *fleeing* Syria, regardless of race, ethnicity or nationality. Resettlement of (for example) ethnic Kurds or Armenians fleeing Syria would be treated the same as resettlement of ethnic Arabs fleeing Syria. In fact, the State has in the past paid claims to resettle native Lebanese and Jordanians fleeing Syria (Ex. A, Shields Decl. ¶ 10), which just goes to prove that being a refugee fleeing Syrian does not mean being of any particular race, ethnicity or birth nationality.

In other words, the Governor's directive has to do *not* with nationality as race or ethnicity, but with a war-torn country concerning whose inhabitants the United States has little reliable information. Ex. A, Attach 1, Directive. *Cf.* Ex. S, *Refugee Vetting*; Ex. I, *Syrian Refugee Flows* at 4 (noting these concerns). When the Governor speaks of Syrian refugees, he speaks of refugees whose country of origin is Syria because the situation in that country not only is inspiring terrorism, but also makes it impossible to determine which purported refugees might really be terrorists. The directive is designed to protect Indiana residents' safety, not to discriminate based on race, ethnicity or nationality.

Notably, Voluntary Agencies and local resettlement agencies also take account of refugees' country of origin. Both have means to designate nations whose refugees they are willing to resettle. Ex. NN, Miller Dep. 63–66. They make such decisions based on a variety of factors, including resources to address languages, LGBT issues, or mental trauma arising from local calamities. *Id.* at 36–39. Exodus did not designate refugees from Syria until FY2014. *Id.* at 67. And Exodus has explained that it might choose not to resettle individuals from a particular

region for any number of reasons, including a lack of capacity to serve the region or a lack of language services tailored to that region. *Id.* at 59. If these agencies can use a refugee's country of origin to make resettlement judgments, then the Governor can do the same for reasons of public safety. Again, it cannot be the case, as Exodus seems to suggest, that *only* the resettlement agencies can decide which refugees to resettle in Indiana. *Cf. id.* at 40–41 (describing instance where Exodus chose not to accept a resettlement case).

D. The Tenth Amendment also precludes Refugee Act preemption

As described in detail in Part II.B.4, *supra*, Tenth Amendment anti-commandeering principles must control preemption analysis. It is plain from anti-commandeering doctrine, as laid out in *Printz*, *New York*, and *NFIB*, that Congress may not require Indiana to participate in the Refugee Act resettlement grant program. That Indiana has generally chosen to participate does not negate the significance of anti-commandeering doctrine for this challenge to the Governor's directive. That directive is essentially a partial, temporary suspension of Indiana's Refugee Act participation—indeed, an informal modification of Indiana's State Plan. If ORR concludes this modification violates its regulations, it may at most deny Indiana's entire Refugee Act grant. It cannot force the State to implement a plan that Indiana does not wish to implement. In view of the Tenth Amendment, the Court should likewise forbear any such remedy.

III. Exodus Is Unlikely to Succeed on Its Equal Protection Claim

A. Exodus has no standing to assert the equal protection rights of refugees

In claiming that the Governor's actions violate the Equal Protection Clause, Exodus asserts not its own rights, but the rights of refugees. *See* Pl.'s PI Br. at 22 ("[T]he actions of the defendants here discriminate against refugees from Syria based on their nationality."). "Ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third

party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (citation omitted). A court should not "unnecessarily" allow a litigant to raise a non-party's rights because the holder of the right may not wish to assert them in court or may be able to enjoy them regardless of the outcome of the litigation. *Id.* at 113–14. Accordingly, the Supreme Court "[does] not look favorably upon third-party standing." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Litigants may assert the rights of third parties only when (1) the litigant has a "close" relation to the third party; and (2) some "hindrance" to the third party's ability to protect his or her own interests exists. *See id.*; *Massey v. Wheeler*, 221 F.3d 1030, 1035 (7th Cir. 2000) (noting that this is "a narrow exception"). Exodus cannot make either showing here.

To invoke the rights of another, a third party must, at the time of the litigation, have an ongoing relationship with, and be intimately involved in the constitutional rights of, the rights holder. *See Massey v. Helman*, 196 F.3d 727, 741 (7th Cir. 1999) (denying third-party standing for a doctor who was no longer treating the prisoner whose rights he sought to assert). As in *Kowalski* and *Helman,* Plaintiff does not now have any ongoing relationships with any Syrian refugees.

As to the family settled in another state, Exodus's relationship ended when the family was settled elsewhere; indeed, Exodus shredded its file pertaining to that family. Ex. MM, Varga Dep. 113–14. As to families or individuals that may enter the country in the future, Exodus does not now and may never have relationships with them. *See Kowalski*, 543 U.S. at 131 (finding no standing for attorney to assert rights of persons who may never be attorney's client); *Helman*, 196 F.3d at 741. At this point, all Exodus knows is that, in the relatively near future, a Voluntary Agency may notify it that some refugees from Syria may be headed to Indianapolis. Exodus has never met them and does not know their names or anything about their

resettlement preferences. Indeed, it is far from certain any will arrive, as it often happens that refugees that Voluntary Agencies originally expect to send to Exodus are, for unknown reasons, "deleted." Ex. MM, Varga Dep. 60–61; Ex. NN, Miller Dep. 48–49 (observing that deletion "happens all the time"). This has *already* happened with respect to refugees Exodus was expecting to receive, which has dwindled from 19 to 15. Ex. MM, Varga Dep. 60–61. Under these circumstances, Exodus can hardly claim intimate association with, or even devotion to any resettlement location rights of, refugees that may or may not come to Indiana someday.

Compounding the problem, while the Governor's directive may harm Exodus's economic interests, it does not harm the refugees. Exodus has said it will resettle future Syrian refugees regardless of the Governor's directive, Compl. ¶ 54–57; Pl.'s PI Br. at 11–12, and the State will continue to pay benefits directly to refugees who are resettled here (though it will not pay Exodus's social services resettlement claims). Ex. A, Shields Decl. ¶¶ 11–13, 16. And even if Exodus and its affiliates redirect to another state Syrian refugees who might have been headed to Indiana, such deletions (to use Plaintiff's term) happen frequently for a variety of reasons. Ex. NN, Miller Dep. 48–49. Such on-the-fly treatment implies that refugees suffer no injuries being resettled one place rather than another. And once they are resettled, refugees are free to move about the country like anyone else. As a result, no refugees suffer equal protection injuries for Exodus to invoke. *Cf. Singleton*, 428 U.S. at 113, 117 (permitting physicians who could not perform abortions to invoke the rights and injuries of women who could not obtain abortions); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (permitting parochial schools to invoke the rights and injuries of students who were not permitted to attend private schools); *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986) (permitting a criminal defendant to invoke the rights and injuries of an improperly struck potential juror).

Regardless, even if refugees do suffer a cognizable injury in this process, no obstacle prevents them from asserting their own rights. A litigant may assert a third party's rights only when "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). Syrians settled in other states owing to the Governor's directive are quite capable of asserting their own rights under the Fourteenth Amendment. *Thongsamouth v. Schweiker*, 711 F.2d 465, 466 (1st Cir. 1983) (class of refugees sued federal government over termination of benefits to which they were entitled under Refugee Act); *Chu Drua Cha v. Noot*, 696 F.2d 594, 595 (8th Cir. 1982) (same); *Graham v. Schweiker*, 545 F. Supp. 625, 627 (S.D. Fla. 1982) ("The injured refugees are able to bring suit for themselves, and there is no reason to confer third party standing on the State or its officials."). Accordingly, no grounds for third-party standing exist.

B. The Governor's directive does not violate anyone's equal protection rights

1. The directive is not discrimination on the basis of national origin

To the extent the Equal Protection Clause makes national origin a suspect classification, it is as a proxy for race or ethnicity. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 307 (1978) (equating national origin with ethnic origin); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (equating national origin with ancestry, not citizenship). The Court, for example, has struck down statutes drawing distinctions among citizens on the basis of Japanese descent. *Oyama v. California*, 332 U.S. 633, 646 (1948) (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

The Governor's decision to suspend, in part, State participation in the Refugee Act grant program for refugees fleeing Syria did not stem from the refugees' ethnic or racial origin, but

from the palpable threat posed by terrorists fleeing Syria (in particular) in the guise of refugees. The directive applies to all refugees coming from Syria—*i.e.*, whose "country of origin" as denoted in the refugee dossier is Syria—regardless of race, ethnicity, ancestry, or national origin. It will affect payment of grant monies to resettlement agencies for services rendered to refugees of, say, Arabic, Armenian, or Kurdish (or any other) descent originating in Syria, but will not affect grant monies payable for services rendered to refugees of those same ethnicities originating in Lebanon, Turkey, or anywhere else. *See* Ex. H, *World Factbook* (noting that people of these races live in each country); *Cf.* Ex. A, Shields Decl. ¶ 10 & Attach. 2 (noting past State participation in resettlement of refugees fleeing Syria who were born in other countries such as Lebanon and Jordan).

The Governor has directed his partial suspension of Refugee Act grants at resettlement of refugees fleeing Syria because it is those refugees for whom the federal government, according to FBI Director Comey and others, lacks information for background checks, and with respect to whom many officials and reporters have expressed concern of terrorist infiltration. *See* Ex. S, *Refugee Vetting*. This is a legitimate—nay, compelling—nondiscriminatory basis for the Governor's action.

2. The Governor's directive is justified by a compelling interest in safeguarding the security of Indiana residents

Even if the Governor's directive must be narrowly tailored to serve a compelling government interest, it survives that test as well.

First, the directive is justified by a compelling interest in protecting Indiana residents from the well-documented threat of terrorism posed by a flood of inscrutable refugees fleeing Syria. Congressional testimony and reports indicate that Islamic State terrorists are attempting to infiltrate refugee populations and already have infiltrated populations going to Europe. Ex. S,

Refugee Vetting; Ex. I, *Syrian Refugee Flows* 2–3. The fact that terrorists from Iraq once infiltrated refugee groups, resettled in Kentucky, and were preparing to engage in terrorist activities in the United States (Ex. W, Meeks), not to mention the recent arrests in California and Texas of refugees allegedly supporting Islamic State terrorist activities (Ex. U, Compl., *United States v. Aws Mohammed Younis Al-Jayab*; Ex. V, Indictment, *United States v. Omar Faraj Saeed Al Hardan*), underscores the seriousness of the threat.

Second, the Governor's directive cannot be more narrowly tailored because U.S. officials have already acknowledged that they cannot distinguish actual refugees fleeing the Syrian civil war from Islamic State terrorists impersonating refugees. Ex. S, *Refugee Vetting*; *see also Bakke*, 438 U.S. at 299. Again, the federal government's experience with al Qaeda terrorists posing as refugees from Iraq proves this point.

Furthermore, the Governor's directive is a measured response meant to deter, temporarily, resettlement of Syrian refugees in Indiana, and to prompt more thoroughgoing engagement between the federal government and the states with respect to resettlement of refugees fleeing Syria. It affects only grant monies that would go to resettlement agencies, who are proximately involved in the decision where refugees should be resettled. It does not affect direct payments to the refugees themselves once they are here, since they have little control over where they are resettled. Further, the directive is not an absolute prohibition against such resettlement, and it is not permanent. These moderating characteristics underscore the narrow tailoring of the policy.

IV. Exodus' Title VI Claim Is Unlikely to Succeed

A. Exodus has no standing to assert the rights of refugees under Title VI

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Exodus is attempting to assert a Title VI claim on behalf of refugees it serves, Pl.'s PI Br. at 20–22, but Title VI does not permit third-party rights claims. *See Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1235 (7th Cir. 1980) (denying third-party standing for a doctor because he was not an intended beneficiary of Title VI). A plaintiff must prove that it is "the intended beneficiary of, an applicant for, or a participant in a federally funded program" to establish standing in a Title VI claim. *Id.* "The legislative history of Title VI also lends strong support to the conclusion that Congress did not intend to extend protection under Title VI to any person other than an intended beneficiary of federal financial assistance." *Id.* In other words, standing is conferred only on those persons for whom Title VI was enacted. *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411, 419 (7th Cir. 1986), *overruled on other grounds*, *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487 (7th Cir. 1996).

Exodus cannot demonstrate a personal stake in the adjudication of refugees' Title VI rights or that it belongs to "the class for whose especial benefit the statute was enacted." *Id.* (citing *Nodleman v. Aero Mexico*, 528 F. Supp. 475, 480–81 (C.D. Cal.1981)). Congress enacted Title VI to protect individuals, not service providers, from discrimination, and in *St. Joseph's Hospital*, the Seventh Circuit rejected a doctor's attempt to assert the Title VI claims of his patients. The Ninth Circuit addressed the same issue and explained that in such a situation, the doctor was "only an *incidental* beneficiary of programs designed to benefit his patients," which

was insufficient to confer standing. *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994) (emphasis in original), *overruled on other grounds*, *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001). Exodus has no better standing to assert any refugees' Title VI rights, and more generally once again cannot demonstrate *jus tertii* standing for the reasons stated in Part III.A, *supra*. *See Kowalski*, 543 U.S. at 130.

B. The Governor's directive does not violate Title VI for the same reasons it does not violate the Equal Protection Clause

Title VI proscribes "only those racial classifications" proscribed by the Fourteenth Amendment. *Bakke*, 438 U.S. at 287. Therefore, Title VI prohibits discrimination on the basis of one's race, ethnicity and ancestry. *See id.* at 305, 307 (equating national origin with ethnic origin); *Espinoza*, 414 U.S. at 88 (equating national origin with ancestry, not citizenship).

Again, the Governor's directive is based not on the refugees' race, ethnicity, or ancestry origin, but rather the country they are fleeing as refugees, owing to conditions in that country that yield particular uncertainties as to their dangerousness. This is a permissible non-discriminatory rationale. *See Bakke*, 438 U.S. at 305, 307; *Espinoza*, 414 U.S. at 88. Therefore, the Governor has not discriminated against refugees on the basis of their national origin.

Further, Title VI precludes discrimination only on the same terms as the Equal Protection Clause. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (citing *Bakke*, 438 U.S. at 287). Accordingly, to the extent the justification and scope of the Governor's directive pass muster under the Equal Protection Clause, so too are they sufficient for Title VI.

PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM

In order to prevail on a motion for a preliminary injunction, Plaintiffs must establish that the denial of such an injunction will result in irreparable harm. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "'Irreparable' in the injunction context means not

rectifiable by the entry of a final judgment." *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (citations omitted). Here, Exodus is not harmed because it may continue to serve refugee families coming into Indiana, including those from Syria. In fact, Exodus has stated that it "is committed to resettling Syrian[]" refugees in Indiana in the coming months notwithstanding the State's suspension of its participation in the resettlement proceedings. Pl.'s PI Br. at 11–12.

What is more, all refugees legally in the State will receive the public benefits to which they are otherwise entitled, including cash assistance, Medicaid and food stamps, among others. Indeed, Governor Pence has stated, "I have no intention of interfering with the ordinary administration of state government relative to people that are legally within the state of Indiana[.]" Ex. PP, Brandon Smith, *Pence Defends His Stance on Syrian Refugees*, WFYI.org (Dec. 8, 2015).

Exodus claims that it "cannot afford and compensate for the loss of federal grant money passed through the State of Indiana without severe negative repercussions on its ability to provide for the families it serves, and it will be difficult, if not impossible, for Exodus to make up for the loss of these monies and other services." Pl.'s PI Br. at 26. Yet there is nothing requiring Exodus to resettle any Syrian refugees during the pendency of litigation, and it can claim grant payments for all other refugees it serves. Remarkably, the Voluntary Agencies frequently allocate refugees to States where their affiliates need additional cash flow via the Refugee Act grant program. Ex. MM, Varga Dep. 62–63. Accordingly, there is no apparent reason, aside from the desire to score political points, why they would send refugees fleeing Syria to be resettled by Exodus knowing that Exodus cannot get payment from the State for social services rendered. Nor is there any suggestion that, if it does not resettle refugees fleeing

Syria, Exodus will have no "replacement" refugees to resettle. Again, refugee placement is a highly fluid system where the Voluntary Agencies are guided as much by a desire to provide even distribution among their affiliates as anything else, *id.* at 61–64, and Exodus provides no reason to doubt the applicability of that model here. Ex. NN, Miller Dep. 35.

Moreover, Exodus has not established that its cash flow needs presuppose a particular reimbursement timetable. The mere long-term need for federal funding does not establish that Exodus depends on receiving reimbursement payments for services within any particular time frame from the date of the service. Further, Exodus is looking into receiving direct reimbursement from the federal government. Ex. MM, Varga Dep. 119. Accordingly, Exodus has established no particular urgency that would warrant the issuance of such extraordinary relief as a preliminary injunction.

In any event, what Exodus really seems to be asserting is that, to the extent Exodus provides services to refugees, but the State then refuses to pay claims based on those services, the State will be in breach of its grant agreement with Exodus. Compl. ¶¶ 53, 56–58; Pl.'s PI Br. at 10, 12. In that case, Exodus could bring a breach of contract lawsuit against the State in State court seeking payment of claims. Ind. Code § 34-13-1-1 (authorizing suits in state court for breach of contract against State). As its only injury (if any) is monetary and would be recoverable as such against the State through a contract action, there is no irreparable harm. *See, e.g.*, *Signode Corp. v. Weld-Loc Sys., Inc.*, 700 F.2d 1108, 1111 (7th Cir. 1983) ("a defendant's ability to compensate plaintiff in money damages precludes issuance of a preliminary injunction.").

PUBLIC POLICY AND THE BALANCE OF EQUITIES FAVOR THE STATE

When the party opposing the motion for a preliminary injunction is a political branch of government, the restraint for issuing such an injunction is particularly high due to public policy considerations, as "the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance." *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 157 F.3d 500, 503 (7th Cir. 1998).

As set forth throughout the brief, those public policy concerns are amplified here. The State has a compelling public safety interest in ensuring that refugees entering Indiana are thoroughly vetted, particularly when they are coming from war-torn regions held in substantial part by terrorist organizations. Again, numerous federal government officials have expressed concern over potential gaps in the vetting process for refugees from Syria. *See* Statement and Factual Background Part IV.B, *supra*. FBI officials have explained that a lack of reliable intelligence on the ground in Syria means that "the databases won't have information we need" to effectively vet refugees. Ex. R, *Countering Violent Islamist Extremism* at 46.

Furthermore, a preliminary injunction is inappropriate given that the Refugee Act contemplates a role for States in the process of resettling refugees already admitted to the United States, but largely leaves the details of that role to be worked out by the two sovereigns. By the terms of 8 U.S.C. § 1522, the federal government "shall consult regularly (not less often than quarterly) with State and local governments and private nonprofit Voluntary Agencies concerning the sponsorship process and the *intended distribution of refugees among the States* and localities *before their placement in those States* and localities." 8 U.S.C. § 1522(a)(2)(A) (emphasis added). "With respect to the location of placement of refugees within a State," the federal government "shall, consistent with [its] policies and strategies [for refugee resettlement]

and to the maximum extent possible, take into account recommendations of the State." 8 U.S.C. § 1522(a)(2)(D).

The State of Indiana, to this point, is not satisfied that the United States has adequately discharged its obligation to consult with the State concerning refugee resettlement, particularly as it relates to refugees fleeing Syria. Given the serious public security risks posed by such refugees, State officials should be afforded more access to information concerning refugees resettling here, the process by which they were designated to come here, and the extent to which it is even possible to conduct a worthwhile review of their backgrounds.

Accordingly, the Governor's directive is part of a larger effort not only to defer resettlement of Syrian refugees without better background checks, but also to persuade the United States to consult more seriously with States. Based on freedom of information requests sent to several relevant agencies on December 4, 2015, the Office of Attorney General expects to receive, on an expedited basis, documents and information concerning procedures for verifying refugees' identities, region-specific processes for refugee case review, changes to refugee case treatment following infiltration by Iraqi jihadists, and other resettlement matters. Ex. QQ, Letters from Jefferson S. Garn to U.S. Department of State, U.S. Department of Defense, Federal Bureau of Investigation, Office of the Director of National Intelligence, U.S. Citizenship and Immigration Services, and U.S. Department of Homeland Security (Dec. 4, 2015).

Such information will enable a more meaningful state-federal discussion over refugee-related security matters. This process is, in effect, a high-stakes policy negotiation between the State and the United States bearing on the safety of all Indiana residents, which weighs heavily against an injunction that would tie the Governor's hands. That collaborative process—not a

case in federal court—is the proper way to evaluate and address security risks posed by refugees fleeing Syria.

Meanwhile, enforcing the Governor's directive portends very little, if any, damage to the equities of Exodus, or even refugees themselves. There is no showing, for example, that any refugees fleeing Syria with any particular stake in resettling in Indiana (as opposed to other States) will be denied the opportunity to do so. Indeed, unless a refugee has family in a particular state, the Voluntary Agencies who decide where to send refugees seem to make those decisions based on monetary considerations as much as anything else. Ex. MM, Deposition of Cole Varga at 62–63. Accordingly, it is difficult to understand what, exactly, will be unfair to Exodus if the directive remains in place.

Therefore, enforcement of the Governor's directive pending a final decision on the merits is in the public interest, and should not be preliminarily enjoined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2016, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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