UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

EXODUS REFUGEE IMMIGRATION, INC.	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	No. 1:15-cv-1858-TWP-DKL
MIKE PENCE, Governor of the State of Indiana,	)	
JOHN WERNERT, M.D., Secretary of the Indiana	)	
Family and Social Services Administration	)	
	)	
Defendants	)	

STATEMENT OF INTEREST OF THE UNITED STATES

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PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. § 517,[1] the United States respectfully submits this Statement of Interest to advise the Court of its view that federal law bars the State of Indiana from discriminating against Syrian refugees in its distribution of Refugee Social Services Program funds. In their recently filed opposition to the plaintiff's motion for a preliminary injunction, Defs.' Mem. in Opp'n to Pl.'s Mot. for Prelim. Inj. (Defs.' Prelim. Inj. Opp'n), ECF No. 41, the State defendants declared that the State intends to withhold payments from private refugee resettlement agencies for services provided to Syrian refugees under the Refugee Social Services Program, a federally funded grant program established under the Refugee Act of 1980, 8 U.S.C. § 1522. Indiana's policy, if implemented as described in the State's filings, would violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Refugee Act of 1980.

This case implicates important federal interests. The long-established policy and practice of the United States is to welcome vulnerable refugees who have suffered persecution to the country, offer them safe haven, and help them build new lives and ultimately become self-sufficient, all while maintaining the national security of the United States. Actions by a State to discriminate against refugees based on their nationality, or deny them services intended to help them get back on their feet, thwart that policy and threaten to further marginalize refugees. The

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[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." *Id.*; *see also Pl. A v. Jiang*, 282 F. Supp. 2d 875, 882 (N.D. Ill. 2003) ("The statute ensures an avenue for the interests of the United States to be heard in cases where the government is not a party . . . ."), *aff'd sub nom. Ye v. Jiang*, 383 F.3d 620 (7th Cir. 2004).

United States also has an interest in ensuring that federal grant funds are used in accordance with the law and for the purposes for which they are intended.

Discrimination against Syrian refugees in the distribution of Refugee Social Services Program funds would violate both the Equal Protection Clause, which forbids States from discriminating based on alienage or national origin, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which bars discrimination based on national origin by any entity that receives federal funds, including a State agency. Such discrimination would be justified only if Indiana could show that it was narrowly tailored to serve a compelling state interest, and Indiana cannot make that showing.

Denying payments under the Refugee Social Services Program for services provided to Syrian refugees would also violate the Refugee Act of 1980, the statute that authorizes and governs the Refugee Social Services Program. The Refugee Act explicitly provides that federally funded assistance and services are to be provided to refugees without regard to nationality. 8 U.S.C. § 1522(a)(5). And Indiana expressly agreed to abide by this nondiscrimination requirement when it sought approval to participate in the federal refugee resettlement program. Indiana cannot now engraft conditions for private agencies to receive federal funds, where those conditions are incompatible with the governing framework.

BACKGROUND

I. U.S. law and policy relating to refugees

A refugee, in the most basic terms, is a person who has left his or her home country and is unable to return safely to that country because of a well-founded fear of persecution. The United States has a long history of welcoming refugees into the United States and helping them build new, fulfilling and productive lives. Federal law governs the admission of such refugees into the

United States and establishes programs for assisting the resettlement of refugees in the United States.

The Constitution allocates to the Federal Government the exclusive authority to regulate the "admission, naturalization and residence of aliens in the United States or the several states," leaving the States no power to "add to [or] take from the conditions lawfully imposed by Congress." *Toll v. Moreno*, 458 U.S. 1, 11 (1982) (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)). Pursuant to this authority, Congress enacted the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, a "comprehensive and complete code covering all aspects of admission of aliens to this country." *Elkins v. Moreno*, 435 U.S. 647, 664 (1978).

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, amended the INA to, among other purposes, establish "a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for [their] effective resettlement." Refugee Act of 1980 § 101(b), 94 Stat. at 102 (codified at 8 U.S.C. § 1521 note). A further purpose of the Refugee Act was to implement U.S. obligations under the Protocol Relating to the Status of Refugees (Refugee Protocol), Jan. 31, 1967, 19 U.S.T. 6223, a multilateral treaty that governs the status and treatment of refugees. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

The Refugee Act provides that the number of refugees admitted to the United States on an annual basis shall generally be "such number as the President determines, before the beginning of the fiscal year and after appropriate consultation [with Congress], is justified by humanitarian concerns or is otherwise in the national interest." 8 U.S.C. § 1157(a)(2). For federal fiscal year 2016, the President has determined, after appropriate consultations with Congress, that "[t]he admission of up to 85,000 refugees to the United States . . . is justified by

humanitarian concerns or is otherwise in the national interest." Presidential Determination on Refugee Admissions for Fiscal Year 2016, 2015 Daily Comp. Pres. Doc. 670 (Sept. 29, 2015), *available at* https://www.gpo.gov/fdsys/pkg/DCPD-201500670/pdf/DCPD-201500670.pdf.

Refugee applicants seeking to be resettled in other countries register with the United Nations High Commissioner for Refugees, which refers candidates for resettlement in the United States based on the requirements of U.S. law and the United States' criteria for resettlement consideration. *See* Federal Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction at 4, *Tex. Health & Human Servs. Comm'n v. United States*, Civil Action No. 3:15-cv-3851 (DCG) (N.D. Tex. Jan. 5, 2016), ECF No. 46 [hereinafter *Tex. HHSC* Opp'n], *available at* https://ecf.txnd.uscourts.gov/doc1/17709532284. Eligible applicants are referred for processing to one of nine PRM-funded Resettlement Support Centers located around the globe. *See id.* at 5. These Resettlement Support Centers help prepare eligible refugee applications in accordance with U.S. guidelines. *See id.* Refugees' applications are evaluated by the U.S. Citizenship and Immigration Services (USCIS), which determines whether an applicant qualifies for refugee status, coordinates necessary security checks in conjunction with the Department of State, *see infra* p. 7, and makes a final determination regarding whether a refugee can be approved for admission into the United States. *See Tex. HHSC* Opp'n at 5.

Under the Refugee Act, the Government may issue grants to and enter into contracts with State and local governments and private nonprofit agencies to provide services related to the initial resettlement of, and provide resettlement assistance to, refugees admitted to the United States. *See* 8 U.S.C. § 1522. Pursuant to this authority, the State Department Bureau of Population, Refugees, and Migration (PRM) maintains and oversees the U.S. Refugee Admissions Program (USRAP), to screen, transport, and provide resettlement services for

refugees, while safeguarding the American public from threats to our national security. *See Tex. HHSC* Opp'n at 3. The USRAP is a public-private partnership involving U.S. Government agencies, domestic nonprofit organizations, and international organizations such as the United Nations High Commissioner for Refugees. *See id.* PRM assists with the initial reception and placement of refugees in the United States through cooperative agreements with nine nonprofit resettlement agencies. *See id.* at 6–7. Before a refugee arrives in the United States, the refugee's case is matched to one of the resettlement agencies, which agrees to act as the refugee's sponsor. *See id.* The sponsoring agency works with local affiliate organizations to arrange the details of reception and placement, including determining the best location for the refugee candidate, based on such considerations as family ties, medical needs, and employment opportunities. *See id.* at 7.

The Department of Health and Human Services Office of Refugee Resettlement (ORR) is also authorized to make grants to and to contract with public and private nonprofit agencies to assist refugees in achieving economic self-sufficiency, including providing job training and English-language education. 8 U.S.C. § 1522(c). The Federal Government may also make grants to and contract with State and local governments and private nonprofit agencies, and provide reimbursement to States, to cover the costs of cash and medical assistance provided to refugees (currently eight months' worth). *Id.* § 1522(e). To receive federal funds for these purposes, a State must submit a plan that meets the requirements imposed by the INA. *Id.* § 1522(a)(6). One of these requirements is that "[a]ssistance and services funded under [§ 1522] shall be provided to refugees without regard to race, religion, nationality, sex, or political opinion." *Id.* § 1522(a)(5); *see also* 45 C.F.R. § 400.5(g) (specifying that State plans must provide for nondiscrimination).

Of the various programs administered by ORR under the authority provided by the Refugee Act, it appears from Indiana's filings that the one most directly implicated in this case is the Refugee Social Services Program. *See generally* 8 U.S.C. § 1522(c)(1); 45 C.F.R. § 400.11(a)(2); Office of Refugee Resettlement, About Refugee Social Services, http://www.acf .hhs.gov/programs/orr/programs/refugee-social-services/about. Under this program, State agencies in States that have chosen to participate, including the Indiana Family and Social Services Administration, receive federal grant funds and make payments out of those funds to local resettlement agencies for various social services provided to refugees, such as job training, child care, and English-language training. *See* 8 U.S.C. § 1522(c)(1)(A); 45 C.F.R. §§ 400.154–400.156 (specifying types of social services that may be provided under this program). Funds are allocated to each State based on the number of refugees recently arrived in the State or residing in the State. *See* 8 U.S.C. § 1522(c)(1)(B). Under the Refugee Act and ORR regulations, States that choose to participate in the program have discretion to determine precisely how funds and services are distributed, but States must comply with basic requirements established under the federal statute and regulations, including the nondiscrimination requirements set forth in 8 U.S.C. § 1522(a)(5) and 45 C.F.R. § 400.5(g). Receipt of federal funds is also conditioned on compliance with Title VI of the Civil Rights Act and its implementing regulations. *See* 45 C.F.R. pt. 80.

II. The Syrian refugee crisis and United States policy regarding Syrian refugees

The ongoing conflict in Syria has created the greatest refugee crisis in recent history. More than 12 million persons in Syria have been displaced from their homes, and more than four million have fled Syria seeking refuge in other countries. U.S. Dep't of State et al., *Proposed Refugee Admissions for Fiscal Year 2016* at iii, 49 (2015), *available at* http://www.state.gov /documents/organization/247982.pdf. In keeping with the United States' tradition of offering safe

haven to the world's most vulnerable, the United States has welcomed Syrian refugees and intends to increase Syrian resettlement this fiscal year and beyond. The President announced that at least 10,000 of the refugees admitted to the United States in fiscal year 2016 will be from Syria. Press Briefing by Press Secretary Josh Earnest, 9/10/15, The White House (Sept. 10, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/09/11/press-briefing-press-secretary-josh-earnest-91015.

All refugees who are candidates for resettlement in the United States, whether from Syria or elsewhere, must undergo a thorough and comprehensive screening process before they are admitted into the United States. *See Tex. HHSC* Opp'n at 4. That multistage process is designed to ensure that candidates meet the legal requirements for refugee status, are eligible for admission to the United States, and do not pose a threat to national security. *See id.* at 4–5. Candidates referred to the United States by the United Nations High Commissioner for Refugees are checked against numerous law enforcement and intelligence databases maintained by Federal Government agencies. *See id.* at 5. Specially trained USCIS officers further scrutinize applicants in face-to-face interviews. *See id.* Throughout this process, U.S. national security is of paramount importance. The burden of proof is on applicants to show that they qualify for refugee status and present no threat to U.S. national security. *See id.*

Syrian refugees are subject to additional security screening. *See id.* at 6. In light of the dynamics of the conflict in Syria, USCIS has developed training and review protocols and procedures for enhanced review of Syrian resettlement cases, including intelligence-driven support, threat identification, and other assistance provided to USCIS officers and decision-makers by the USCIS Fraud Detection and National Security Directorate. *See id.* The overwhelming majority of the Syrian refugees who have been or likely will be resettled in the

United States are families—particularly female-headed households—that include victims of torture, children, and persons with severe medical conditions. *See id.*

III. Indiana Governor Mike Pence's directive to "suspend the resettlement of additional Syrian refugees"

On November 16, 2015, following the terrorist attacks in Paris, Indiana Governor Mike Pence announced that he was directing Indiana State agencies to "suspend the resettlement of additional Syrian refugees":

> 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. Indiana has a long tradition of opening our arms and homes to refugees from around the world but, as governor, my first responsibility is to ensure the safety and security of all Hoosiers. 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.

Defs.' Prelim. Inj. Opp'n Ex. HH; *see also* Defs.' Prelim. Inj. Opp'n Ex. A Attach. 1 (directive issued to the Indiana Family and Social Services Administration and other Indiana agencies). However, the Government of Indiana did not articulate at the time precisely how this broad directive would be implemented.

IV. This lawsuit

On November 23, 2015, Exodus Refugee Immigration, Inc. filed this action against Governor Pence and John Wernert, Secretary of the Indiana Family and Social Services Administration, in their official capacities. Compl. for Declaratory and Injunctive Relief, ECF No. 1. The complaint seeks declaratory and injunctive relief against the State's announced policy concerning Syrian refugees. Exodus filed a motion for a preliminary injunction on November 24, 2015, and filed a memorandum in support of that motion on December 2, 2015.

The State defendants filed their opposition to Exodus's preliminary injunction motion on January 15, 2016. In their preliminary injunction opposition, the defendants offered further

elaboration of how the Governor's directive is actually being implemented. Specifically, the defendants represented that Indiana will cease making payments under the Refugee Social Services Program for services provided to Syrian refugees. *See* Defs.' Prelim. Inj. Opp'n 15 & Ex. A (Decl. of Adrienne Shields) ¶¶ 11, 16–17; *see also* Defs.' Prelim. Inj. Opp'n Ex. F (Decl. of Matthew Schomburg) ¶ 6. The defendants represented that Indiana is not making any changes in the operation of any other State Government programs or federal-State cooperative programs that serve or are available to refugees in Indiana. *See* Defs.' Prelim. Inj. Opp'n 15–16 & Ex. A (Decl. of Adrienne Shields) ¶¶ 12–13, 16–17. The defendants' memorandum and accompanying declarations further clarified that a refugee will be considered a "Syrian" refugee for purposes of Indiana's policy if the refugee's "country of origin" is identified as Syria. *See, e.g.*, Defs.' Prelim. Inj. Opp'n 36 & Ex. A (Decl. of Adrienne Shields) ¶ 9.

ARGUMENT

I. Discriminatory treatment of Syrian refugees based on their nationality would violate the Equal Protection Clause and Title VI of the Civil Rights Act of 1964

A. Discriminatory treatment of Syrian refugees is a form of national origin discrimination

Cutting off or reducing Refugee Social Services Program grant funds in the manner described in Indiana's brief amounts to unlawful discrimination against Syrian refugees based on their nationality.

Under the Equal Protection Clause, U.S. Const. amend. XIV, § 1, a regulatory classification that "classifies by race, alienage, or national origin" is presumed invalid. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Laws employing such classifications "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.*

A regulatory classification based on nationality amounts to both an "alienage" classification and a "national origin" classification. A law classifies persons based on "alienage" if it either draws distinctions between U.S. citizens and aliens or draws distinctions among different classes of aliens. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 8–9 (1977) (holding that a statute employed an alienage classification because it distinguished among aliens based on whether they had applied for citizenship or stated an intent to apply for citizenship, noting, "The important points are that [the statute] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."); *Graham v. Richardson*, 403 U.S. 365, 370–76 (1971) (analyzing a residency requirement for welfare benefits as an alienage classification even though aliens who met the residency requirement would qualify for benefits), *discussed in id.*; *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419–20 (1948) (describing a statute that applied differently to aliens eligible for citizenship and aliens ineligible for citizenship as employing an alienage classification). A law classifies persons based on "national origin" if it draws distinctions based on characteristics related to background or ancestry, including nationality. *See e.g.*, *United States v. Kras*, 409 U.S. 434, 446 (1973) (using the term "nationality" synonymously with national origin); *Graham*, 403 U.S. at 372 (same); *Jean v. Nelson*, 472 U.S. 846, 856 (1985) (discussing "national origin" in connection with "nationality-based criteria").

The Equal Protection Clause imposes different restraints on the Federal Government than it does on States with respect to classifications based on nationality. The Supreme Court has explained that the Federal Government may, in certain circumstances, draw classifications based on alienage or nationality for purposes related to foreign policy or immigration policy. State

governments, however, are not free to draw such classifications on their own. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court explained the principle this way:

> With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.

Id. at 219 n.19 (citing *De Canas v. Bica*, 424 U.S. 351 (1976)).

The United States classifies refugees by nationality for various purposes, including identifying refugees of "special humanitarian concern" and subjecting refugees of certain nationalities to additional or different security screening protocols. But there is no federal policy that would justify imposing additional burdens on Syrian refugees—or refugees of any other nationality or origin—after they have been lawfully admitted into the United States. Federal policy in that regard, as embodied in pertinent statutory provisions, is to provide equal treatment with respect to provision of federal refugee assistance to lawfully admitted refugees regardless of their country of origin. *See* 8 U.S.C. § 1522(a)(5) (explicitly requiring that federally funded refugee assistance be provided without regard to "nationality"); *cf.* Convention Relating to the Status of Refugees (Refugee Convention), art. 3, July 28, 1951, 189 U.N.T.S. 150 (requiring that the provisions of the Convention be applied to refugees without discrimination as to "country of origin")[2]; *id.* art. 7(1) (requiring that refugees generally be treated no less favorably than other aliens). Thus, State policies discriminating against lawfully admitted Syrian refugees cannot be

[2] The United States is not a party to the Refugee Convention, but it is a party to the Refugee Protocol, which incorporates Articles 2 through 34 of the Refugee Convention. *See* Protocol Relating to the Status of Refugees (Refugee Protocol) art. I, Jan. 31, 1967, 19 U.S.T. 6223.

viewed as consistent with any "federal direction." *Cf. Plyler v. Doe*, 457 U.S. at 225–26 (holding that a State policy denying public education to "illegal aliens" could not be justified based on federal disapproval of "illegal aliens" because the State policy did not "correspond[] to any identifiable congressional policy" and did not "operate harmoniously within the federal program").[3]

Accordingly, the actions described in Indiana's brief—the withholding of payments for services provided to Syrian refugees—would be subject to strict scrutiny under the Fourteenth Amendment, and would be unlawful under the Equal Protection Clause unless the State could show they were narrowly tailored to serve a compelling government interest. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). This is so regardless of whether the State's action is motivated by animus against Syrian refugees. While Indiana claims that its policy is ultimately motivated by legitimate regulatory purposes, and not a desire to harm Syrian refugees, that makes no difference under the Equal Protection Clause. *See Parents Involved in Cmty. Schs.*, 551 U.S. at 741–42 ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis."); *Johnson v. California*, 543 U.S. 499, 505–09 (2005); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225–26 (1995); *Erwin v. Daley*, 92 F.3d 521, 527 (7th Cir. 1996) (citing *Adarand*, 515 U.S. at 227).

Indiana urges that its policy is valid because it discriminates against "refugees fleeing Syria" based on their "country of origin" and not "racial or ethnic origin." Defs.' Prelim. Inj.

[3] The Supreme Court has also recognized a narrow "political function" exception permitting States to "exclude aliens from positions intimately related to the process of democratic self-government," *Bernal v. Fainter*, 467 U.S. 216, 220 (1984), such as public offices or employment as police officers, *see id.* at 220–22. That exception is not applicable here.

Opp'n 41 & Ex. A (Decl. of Adrienne Shields) ¶ 9. Such a policy, however, necessarily discriminates based on nationality, because in these circumstances a refugee's "country of origin" is based on his nationality. Indeed, the statutory definition of a refugee under the Refugee Act is a person who has fled the country of his nationality or, in the case of a stateless person (a person who has no nationality), his country of last habitual residence. *See, e.g.*, Defs.' Prelim. Inj. Opp'n 4 & Ex. A (Decl. of Adrienne Shields) ¶ 9 ("the country of citizenship or residence whose protection from persecution the refugee is unable or unwilling to seek" (citing 8 U.S.C. § 1101(a)(42)(A))); *see also* 8 U.S.C. § 1101(a)(42) (statutory provision defining "refugee" in part as "any person who is outside any *country of such person's nationality*" (emphasis added)). Thus, the only refugees whose "country of origin" is Syria are refugees who are either nationals of Syria or stateless persons who last resided in Syria. A non–Syrian national who first resided in and then fled from Syria would not have his "country of origin" identified as Syria. Such a person, depending on his ability to safely return to his home country, either would not qualify as a refugee at all or would be a refugee with his "country of origin" identified as his country of nationality. For example, a Jordanian national who fled from Syria to Turkey but was able to return safely to Jordan would not qualify as a refugee. An Iraqi national who fled from Syria to Turkey and was unable to safely return to Iraq might qualify as a refugee, but, if so, his "country of origin" would be designated as Iraq, not Syria.

B. Indiana's distinct treatment of Syrian refugees would not survive strict scrutiny because it is not narrowly tailored to serve any compelling government interest

The policy described in Indiana's filings could not survive strict scrutiny because it is not narrowly tailored to any interest that Indiana has in protecting public safety.

No one doubts that preserving safety and security is a compelling interest. But Indiana cannot show that its discriminatory acts are narrowly tailored to advance its asserted interest.

Denying services such as job training, child care, or English-language training to Syrian refugees is unlikely to advance any interest in public safety, and it is likely to harm those Syrian refugees without justification. The policy described in Indiana's filings accordingly does not exhibit the close fit required to satisfy strict scrutiny.

"Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality opinion). Indiana's stated policy bears little specific connection to public safety. Even were the Court to accept Indiana's selective assertions about the possibility that refugees may pose some risk, Indiana has not shown—nor could it—that its decision to block receipt of federal Refugee Social Services grant funds is a narrowly tailored way to address even that speculative risk. *See Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015) ("No matter how tempting it might be to do otherwise, we must apply the same rigorous standards even where national security is at stake.").

There is no reason to believe a person intent on causing harm to the United States would be deterred or impeded by losing access to federally funded job training, child care, or English-language training. The law is clear that the classification at issue must "fit with great[] precision" the compelling interest it seeks to uphold. *Wygant*, 476 U.S. at 280 n.6. Indiana has not shown that denying Syrian refugees (or any other refugees) who have resided in Indiana for three months the education and job training services funded by the Refugee Social Services grants would increase public safety.

C. Indiana's stated policy would also violate Title VI of the Civil Rights Act

The policy described in Indiana's preliminary injunction opposition also cannot survive analysis under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the ground of "race, color, or national origin" in any "program or activity

receiving Federal financial assistance." *Id.* The Supreme Court has explained that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); and *Alexander v. Choate*, 469 U.S. 287, 293 (1985)). The Indiana Family and Social Services Administration accepts federal funds in connection with the Refugee Social Services Program, as well as other federal programs, and thus is a "program or activity" covered by Title VI. *See* 42 U.S.C. § 2000d-4a (defining "program or activity" to encompass "all the operations of" a State agency when any part of that State agency receives Federal financial assistance). Consequently, national-origin discrimination by the Indiana Family and Social Services Administration would violate Title VI.[4]

II. Discrimination against Syrian refugees in the distribution of Refugee Social Services funds would violate the plain terms of the Refugee Act of 1980 and the terms of the federal grants made to Indiana under that Act

Discriminatory treatment of Syrian refugees in the distribution of Refugee Social Services funds would also violate the provisions of the Refugee Act of 1980 prohibiting discrimination based on "nationality" in the distribution of refugee assistance and services, as well as the State's own express commitment to comply with those provisions.

[4] The State defendants are incorrect when they suggest that *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), limits the concept of "national origin" to birth or ancestry. The Court held in *Espinoza* that discrimination based on "citizenship or alienage" did not qualify as "national origin" discrimination under Title VII of the Civil Rights Act of 1964. *Espinoza*, 414 U.S. at 95–96. But the Court did not hold that discrimination based on nationality does not qualify as national-origin discrimination. Indeed, the Court noted that there was no evidence the defendant in the case had discriminated against any aliens based on their "nationality," *id.* at 92 n.5, and that the plaintiff "was denied employment, *not because of the country of her origin*, but because she had not yet achieved United States citizenship," *id.* at 93 (emphasis added).

The demands of the Refugee Act could not be more plain. The statute explicitly requires that federally funded refugee assistance be provided to refugees without regard to "nationality," 8 U.S.C. § 1522(a)(5). The regulations issued by ORR similarly provide that a State receiving grants must submit a plan under which services are provided without regard to "nationality." 45 C.F.R. § 400.5(g). Indiana's State plan, accordingly, includes an express commitment that "Indiana will provide assistance and services funded under the plan to refugees without regard to race, religion, nationality, sex or political opinion." *See* Defs.' Prelim. Inj. Opp'n Ex. F Attach. 1 § I.C.5.

The State argues that § 1522(a)(5) prohibits only discrimination by the Federal Government, and leaves States free to engage in discrimination when they distribute federal funds. *See* Defs.' Prelim. Inj. Opp'n 34–35. The State's interpretation is untenable. Subsection (a)(5) governs how "[a]ssistance and services funded under this section *shall be provided* to refugees." 8 U.S.C. § 1522(a)(5) (emphasis added). This phrasing means the statute is concerned with the occurrence of an event, not the identity of the person responsible for the event. *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 572 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor . . . ."); *see also Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 773 (7th Cir. 2013) (finding that use of the passive voice indicates that "it does not matter who" performs the actions described). In the case of subsection (a)(5), that means that the statute broadly prohibits discrimination in the provision of federal assistance and services, regardless of who is perpetrating the discrimination or providing the "assistance and services."

In addition, it would make no sense to interpret § 1522 as regulating only the direct conduct of the Office of Refugee Resettlement, because ORR does not "provide[]" "assistance

and services" "to refugees" directly. The "assistance and services" funded under § 1522 are "provided to refugees" entirely through grants and contracts with States and nonprofit agencies. *See* 8 U.S.C. § 1522. The provision should be interpreted to control those downstream actors as well.

Indiana cannot plausibly argue that the terms of the statute failed to put the State on notice that the State could not practice discrimination based on nationality. Moreover, Indiana's argument fails to acknowledge or account for the parallel nondiscrimination requirement contained in ORR's regulations, 45 C.F.R. § 400.5(g), the State's own express commitment, made in Indiana's State plan, that "Indiana will provide assistance and services funded under the plan to refugees without regard to race, religion, nationality, sex or political opinion," Defs.' Prelim. Inj. Opp'n Ex. F Attach. 1 § I.C.5, or the nondiscrimination requirements of Title VI of the Civil Rights Act and the Fourteenth Amendment, as discussed above.

Indiana alternatively argues that the language in § 1522(a)(5) prohibiting discrimination based on "nationality" should be interpreted as barring only discrimination based on race, ethnicity, or birthplace, and not prohibiting discrimination against refugees based on their country of origin. *See* Defs.' Prelim. Inj. Opp'n 35–37. This argument is also untenable. In the context of the INA, the terms "nationality" and "national" reflect political and legal ties between persons and their home countries, independent of race, ethnicity, or birthplace. *See* 8 U.S.C. § 1101(a)(21) ("The term 'national' means a person owing permanent allegiance to a state."). A policy that singles out the nationals of one country for discriminatory treatment necessarily discriminates based on "nationality." As explained above, Indiana's policy discriminates against Syrian nationals, because Indiana's policy discriminates based on a refugee's "country of origin," and a refugee's "country of origin" is based on his nationality. *See supra* pp. 12–13.

Indiana also notes that the Constitution forbids the Federal Government from "commandeer[ing] a State's legislative or administrative apparatus for federal purposes," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012), and thus the Federal Government cannot force Indiana to participate in any federal grant program. But the anticommandeering principle has no application here, because Indiana has never been forced to participate in the Refugee Social Services Program or any other refugee assistance program. Rather, Indiana freely chose to participate in the program and explicitly agreed to abide by its terms. As Indiana admits, principles of federalism permit Congress to "attach conditions on the receipt of federal funds," and those conditions may include requirements that regulate the actions of State Government. *New York v. United States*, 505 U.S. 144, 167 (1992), *quoted in* Defs.' Prelim. Inj. Opp'n 32; *see also Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601–02 (noting that Congress may "grant federal funds to the States, and may condition such a grant upon the States taking certain actions that Congress could not require them to take"). No statute or regulation required Indiana to participate in the ORR grant programs, including the Refugee Social Services Program.[5] Having accepted federal refugee resettlement grants and expressly assented to the terms of those grants, Indiana cannot now disregard them, or distribute federal funds in a manner that conflicts with federal law. *See also Ameritech Corp. v. McCann*, 403 F.3d 908, 914 (7th Cir. 2005) (explaining that imposing conditions on activities that a State undertakes voluntarily does not amount to "commandeer[ing]" of State authorities).

Finally, the State points to provisions of the Refugee Act requiring the Federal Government to "consult regularly . . . with State and local governments and private nonprofit

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[5] In some States, federally funded refugee resettlement programs operate as "Wilson-Fish" programs without State government participation. *See* 8 U.S.C. 1522(e)(7); 45 C.F.R. § 400.69.

voluntary agencies" on certain resettlement issues and consult with "representatives of voluntary agencies and State and local governments" when developing "policies and strategies for the placement and resettlement of refugees within the United States." *See* Defs.' Prelim. Inj. Opp'n 33 (quoting 8 U.S.C. § 1522(a)(2)(A)–(B)). The Federal Government has complied fully with these consultation requirements, and Indiana has not offered any meaningful evidence or arguments to the contrary.[6] But even if the Federal Government were failing to comply with consultation requirements, that would not relieve the State of its obligation to comply with the unambiguous nondiscrimination provision of § 1522(a)(5). No provision or principle of law allows a State to opt out of the § 1522(a)(5) nondiscrimination requirement, or any other provision of federal law, merely because it is dissatisfied with Federal Government policies.[7]

CONCLUSION

Federal law bars Indiana from selectively denying payments to refugee resettlement agencies under the Refugee Social Services Program for services provided to Syrian refugees.

[6] Indiana references two pending lawsuits in which Texas and Alabama are challenging the Federal Government's compliance with the consultation requirements. Defs.' Prelim. Inj. Opp'n 33 (citing *Tex. Health & Human Servs. Comm'n v. United States*, Civil Action No. 3:15-cv-3851 (DCG) (N.D. Tex. filed Dec. 2, 2015), and *Alabama v. United States*, Civil Action No. 2:16-cv-00029-JEO (N.D. Ala. filed Jan. 7, 2016)). The unfounded allegations in those cases pertain to the Federal Government's consultations with those States' resettlement offices. And the only court that has considered such allegations thus far recently denied a preliminary injunction, concluding that there was no evidence of a substantial threat to public safety stemming from the resettlement of refugees. *Tex. Health & Human Servs. Comm'n v. United States*, Civil Action No. 3:15-CV-3851-N, slip op. at 2–6 (N.D. Tex. Feb. 8, 2016), *available at* https://ecf.txnd.uscourts.gov/doc1/17719612721. That underscores why Indiana's discriminatory policy cannot satisfy strict scrutiny. The court also held that the Texas Health and Human Services Commission was unlikely to succeed with its challenge because it had no valid cause of action. *See id.* at 6–10; *see also id.* at 1–2 & n.3 (noting that questions regarding "how much consultation is enough" are largely inappropriate for judicial resolution).

[7] Given that Indiana's policy as described would violate the Equal Protection Clause, Title VI of the Civil Rights Act, and the terms of the Refugee Act of 1980 and the grants made to Indiana under that Act, the United States does not address the issue of whether the policy would be preempted by federal law.

Such action would directly violate the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, the Refugee Act of 1980, federal regulations, and the explicit terms of Indiana's acceptance of federal grant funds as reflected in its State plan.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2016, a copy of the foregoing Statement of Interest of the United States was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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