No. 20-1160

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HIAS, INC.; CHURCH WORLD SERVICE, INC. ET AL.; LUTHERAN IMMIGRATION & REFUGEE SERVICE, INC.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; MICHAEL R. POMPEO, in his official capacity as Secretary of State; ALEX M. AZAR, II, in his official capacity as Secretary of Health and Human Services; CHAD WOLF, in his official capacity as acting Secretary of Homeland Security,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland (No. 8:19-cv-3346-PJM)

BRIEF OF *AMICI CURIAE* FORMER STATE DEPARTMENT OFFICIALS IN SUPPORT OF PLAINTIFFS-APPELLEES

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Amici Curiae James Nelson Purcell, Jr., Eric P. Schwartz, Arthur E. Dewey, and Anne Claire Richard ("*Amici*"),[1] by and through its undersigned attorneys, hereby submit this Brief of *Amici Curiae* in the above-captioned action:[2]

INTEREST OF *AMICI*

Amici are four former State Department officials who have served as its highest official directly responsible for overseeing refugee migration to the United States. *Amici* have served as Assistant Secretary of State for Population, Refugees, and Migration ("PRM") or its predecessor position of Director of the Bureau for Refugee Programs ("BRP") in both Republican and Democratic administrations since the 1980s. *Amici* have a special interest in ensuring that the Court has the benefit of their expertise in fully understanding: (1) the process of refugee resettlement; (2) the requirements of the Refugee Act of 1980; and (3) the interplay between federal agencies, state and local governments, and private resettlement agencies in ensuring the placement and resettlement of refugees who enter this country. *Amici* believe their experience can assist the Court in explaining how the

[1] Additional information about *Amici*'s State Department experience is set forth on Appendix A.

[2] Counsel for *Amici* authored this brief in whole. No counsel for a party authored this brief in whole or in part. No party or its counsel contributed money to fund the preparation and/or submission of the brief. All parties have consented to the filing of this amicus brief.

Sept. 26, 2019 Executive Order on Enhancing State and Local Involvement in Refugee Resettlement, Exec. Order No. 13888, 84 Fed. Reg. 52,355 (Sept. 26, 2019) ("EO") is fundamentally inconsistent with the Refugee Act and undermines the purpose that it is purported to serve.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Refugee Act of 1980 and its implementing regulations provide a comprehensive framework for refugee resettlement. In that framework, Congress has established the primacy of the federal government in matters concerning the placement of refugees.

Amici urge this Court to consider and echo the conclusions set forth in the declarations of fellow *Amicus* Eric Schwartz, former Assistant Secretary of State for PRM, and Robert Carey, former Director of the Office of Refugee Resettlement ("ORR"). As they explain, the Refugee Act requires consultation with states and localities in the placement and resettlement of refugees. The text, legislative history, and agency interpretation of the Refugee Act and the Refugee Assistance Extension Act of 1986 (the "Reauthorization") establish that Congress has spoken conclusively to the issue of how state and local concerns should be considered during resettlement. With the Refugee Act, Congress gave BRP (and later PRM) a mandate to create a national plan to distribute refugees throughout the states and base funding and placement service decisions on that plan. And when Congress

enacted the Reauthorization, it imposed new requirements to address state and local concerns, but specifically rejected giving states and localities "any veto power" over refugee resettlement. As *Amici* can attest, Congress's requirement that the federal government engage in meaningful dialogue with state and local representatives has long been carried out by PRM and ORR.

The EO contravenes this statutory framework in numerous respects. By permitting states and localities effectively to veto refugee resettlement within their borders, the EO: (1) violates intent for federal agencies to exercise ultimate authority over refugee resettlement; (2) forecloses the consultation mandated by 8 U.S.C. § 1522 ("Section 1522"); (3) prevents PRM from considering several of the factors it must weigh when making initial refugee placement decisions; (4) is, as Mr. Carey states, designed to "fix a problem that does not exist"; and (5) prevents PRM and ORR from considering and responding to the impact of secondary migration, which occurs when refugees move from their initial resettlement site to another state or locality.

The EO also will undermine PRM's and ORR's abilities to perform their statutory obligations and the resettlement agencies' abilities to provide services to refugees. In states or localities that veto refugee resettlement, the loss of funding is likely to force local affiliates of resettlement agencies and other local providers to

close or scale back services, leaving them less able to respond to unplanned secondary migration.

Nor is the EO salvaged by language purporting to foreclose any provisions that violate existing law and permitting PRM to resettle refugees in jurisdictions that refuse to consent if the Secretary of State concludes "that failing to resettle refugees within that State or locality would be inconsistent with the policies and strategies established under [Section 1522] or other applicable law." As detailed below, the central purpose of the EO – to give states and localities a veto over refugee resettlement – violates Section 1522. That is not changed by this added language, which appears designed to avoid a court challenge, but does not change the EO's meaning or impact. Either the entire EO is invalid or the EO must be interpreted in a manner that would render it a nullity. In either case, the injunction was necessary to prevent uncertainty and harm to resettlement services. This Court should likewise hold that the President cannot grant states and localities veto power over refugee resettlement.

Accordingly, for these reasons, *Amici* urge this Court to uphold the preliminary injunction.

ARGUMENT

I. The Text, Legislative History, and Implementation of the Refugee Act Already and Sufficiently Address the Concerns Purportedly Underlying the EO.

A. The Refugee Act Provides A Comprehensive Framework For Refugee Resettlement That Requires Consultation With States.

The Refugee Act of 1980 amended the Immigration and Nationality Act ("INA") to 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." Pub. L. No. 96-212, § 101(b), 94 Stat. 102, codified at 8 U.S.C. § 1521. It provides that individuals seeking admission as refugees under Section 207 of the INA are processed through the U.S. Refugee Admissions Program ("USRAP") overseen by the Department of State in cooperation with the Department of Homeland Security ("DHS") and Department of Health and Human Services ("HHS"). Through this process, PRM works closely with the United Nations High Commissioner on Refugees and other partners to identify individuals for resettlement through the USRAP. PRM also works closely with HHS' ORR to ensure that adequate services are in place for resettled refugees as governed by 8 U.S.C § 1522(b)(1).

As detailed in the Schwartz and Carey declarations, the Refugee Act establishes a comprehensive framework for resettling refugees that involves

cooperative efforts from the federal government, state and local government, and nine privately operated resettlement agencies.[3] PRM selects, enters into cooperative agreements with, and provides funding to resettlement agencies.[4] Coordinating with others as described below, PRM develops a national plan for placing refugees in locations throughout the United States after reviewing applications from agencies.[5] Those applications must detail steps taken by the agencies to consult with state and local governments.[6]

PRM meets regularly with resettlement agencies to determine where refugees will be resettled.[7] These meetings include discussions of factors such as employment opportunities, availability of affordable housing, existing ethnic and linguistic groups, public transportation, health care resources, and other factors to make the "best match between a community's resources and the refugee's needs."[8]

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[3] The government works with nine privately operated resettlement agencies: Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, U.S. Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops, and World Relief Corporation. *See* https://www.acf.hhs.gov/orr/resource/voluntary-agencies.

[4] Schwartz Decl., ¶¶ 5, 8-10.

[5] Carey Decl., ¶ 15.

[6] *Id.*, ¶ 18-19.

[7] Andorra Bruno, Congressional Research Serv., R44878, *Reception and Placement of Refugees in the United States* (June 21, 2017), https://fas.org/sgp/crs/homesec/R44878.pdf.

[8] U.S. Dep't of State, Bureau of Population, Refugees, and Migration, *The Reception and Placement Program* (2009-2017), *archived at* https://2009-

The sponsoring resettlement agency is "responsible for placing refugees with one of its affiliated offices and for providing initial services, which include housing, essential furnishings, food, necessary clothing, orientation, and assistance with access to other social, medical, and employment services during the refugee's first 30-90 days in the United States."[9]

Congress has enacted specific requirements for PRM to consider when determining initial placements. Among other factors, PRM, in consultation with ORR, should not initially place or resettle a refugee "in an area highly impacted . . . by the presence of refugees or comparable populations" unless the refugee has a close family member in that area.[10] 8 U.S.C. § 1522(a)(2)(C)(i).

2017.state.gov/j/prm/ra/receptionplacement/index.htm; U.S. Gov't Accountability Off., GAO-12-729, *Refugee Resettlement: Greater Consultation with Community Stakeholders Could Strengthen Program ("Refugee Resettlement")*, at 11-12 (July 26, 2012), https://www.gao.gov/products/GAO-12-729.

[9] U.S. Dep't of State, U.S. Dep't of Homeland Security, U.S. Dep't of Health and Human Servs., *Proposed Refugee Admissions for Fiscal Year 2019, Report to Congress in Fulfillment of the Requirements of Sections 207(D)(1) and (E) of the Immigration and Nationality Act* 17, https://www.state.gov/wp-content/uploads/2018/12/Proposed-Refugee-Admissions-for-Fiscal-Year-2019.pdf; U.S. Dep't of Health and Human Servs., *Voluntary Agencies Matching Grant Program Guidelines* 5-12, https://www.acf.hhs.gov/sites/default/files/orr/fy_2014_matching_grant_mg_program_guidelines_for_grantees.pdf (setting forth services that resettlement agencies must provide).

[10] Although the "Director" referred to in section 1522 is the Director of ORR, the statute provides that the President may direct another office to oversee initial resettlement of refugees. 8 U.S.C. § 1522(b)(1)(B). Since President Carter, that responsibility has been assigned to PRM. Because of that assignment and how the

PRM also is required to provide a mechanism for local affiliates of the resettlement agencies to "meet with representatives of State and local governments to plan and coordinate in advance of their arrival the appropriate placement of refugees among the various States and localities[.]" 8 U.S.C. § 1522(a)(2)(C)(ii). Further, in making placement decisions, PRM must "take into account – (I) the proportion of refugees and comparable entrants in the population in the area, (II) the availability of employment opportunities, affordable housing, and public and private resources (including educational, health care, and mental health services) for refugees in the area, (III) the likelihood of refugees placed in the area becoming self-sufficient and free from long-term dependence on public assistance, and (IV) the secondary migration of refugees to and from the area that is likely to occur." *Id.* § 1522(a)(2)(C)(iii).

In making placement decisions, PRM must, "consistent with such policies and strategies and to the maximum extent possible, take into account recommendations of the State." 8 U.S.C. § 1522(a)(2)(D). PRM also must periodically assess "the relative needs of refugees for assistance and services . . . and the resources available to meet such needs[.]" *Id.* § 1522(a)(3). The statute also sets out requirements for the awarding of grants and contracts for services and

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initial resettlement process works in practice, *Amici* refer to the statute as "giving" authority to PRM, despite its reference to the Director of ORR.

provides that PRM "may not delegate to a State or political subdivision" the authority to review or approve such grants or contracts. *Id*. § 1522(a)(4), (b).

After PRM determines placement, states can adopt their own refugee settlement plans. In addition to refugee placement through voluntarily adopted State Plans, refugee placement also may occur through the ORR-run Wilson-Fish program that operates in 12 states and one county or through federally-funded private-public partnerships, in which the states maintain policy and administrative oversight while resettlement agencies provide direct services to the refugees.[11]

After the initial period overseen by PRM, responsibility for federal coordination of refugee resettlement falls to ORR. As detailed by Mr. Carey, ORR reimburses states for certain refugee-related costs, such as costs relating to social services support, medical services, and language education.[12] These funds often flow through state refugee resettlement coordinators, some of whom actively oversee and meet with resettlement agencies and others who provide services directly to refugees.[13] The role of these state coordinators varies from state to

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[11] *Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 724 (S.D. Ind. 2016), *aff'd*, 838 F.3d 902 (7th Cir. 2016); Office of Refugee Resettlement, *Wilson-Fish Alternative Program*, https://www.acf.hhs.gov/orr/programs/wilson-fish; Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 Am. U.L. Rev. 353, 365 (2016).

[12] Carey Decl., ¶ 21

[13] *Id.*, ¶¶ 22-24.

state, primarily depending on the size of the refugee population in each state.[14] This gives states flexibility. They can be actively involved in refugee resettlement or they can leave matters to ORR.

ORR also oversees the placement of unaccompanied refugee minors, who are placed in state foster programs.[15] ORR works with two resettlement agencies to determine appropriate placements and provide services to these refugees.[16]

B. The Legislative History of the Refugee Act Reflects that Congress Considered How to Address State and Local Concerns and Rejected Giving Them a Veto Over Resettlement Decisions.

Congress enacted the Refugee Act to create an infrastructure to address refugee resettlement. The legislative history and context of the passage of the Refugee Act in 1980 and the Reauthorization in 1986 conclusively demonstrate that Congress rejected giving states and localities a veto over refugee resettlement in favor of centralized, federal control.

As Deputy Assistant Secretary and later Director of BRP from 1980 to 1987, *Amicus* James Purcell is particularly familiar with the passage of the 1980 and 1986 statutes and the infrastructure they created. Mr. Purcell recounts that, following World War II, Congress passed the nation's first refugee resettlement

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[14] *Id.*, ¶¶ 24-25.

[15] Office of Refugee Resettlement, *About Unaccompanied Refugee Minors*, https://www.acf.hhs.gov/orr/programs/urm/about.

[16] *Id.*

legislation, the Displaced Persons Act of 1948, to facilitate the resettlement of 400,000 displaced Europeans.[17] Subsequent laws provided for the admission of waves of refugees fleeing Communist regimes, but current resettlement mechanisms proved insufficient to coordinate the international – and interstate – effort to resettle millions of Indochinese refugees in the wake of the Vietnam War. Early attempts to address the unprecedented wave of refugees revealed a need to coordinate the efforts of many different partners, including federal agencies, state and local governments, NGOs, international and domestic private organizations, and individual citizens.[18]

This was especially true in light of local resistance to the placement of Indochinese residents. That resistance often dissipated as state and local officials realized the contributions that these refugees made to their communities over time.

> In the early years, our desks at the State Department were piled with call messages from complaining governors, mayors, social service providers, congressional staff, and others each morning. Common grievances included: "The refugees are sick, speak no English, take jobs away, and are costly." Also, "they drain state and local treasuries," or "They're dangerous."
>
> Several years later, the same people were calling with different messages: "How do we get more

[17] *See also History*, Office of Refugee Resettlement, U.S. Department of Health & Human Services (Mar. 16, 2020), https://www.acf.hhs.gov/orr/about/history.

[18] James N. Purcell Jr., *We're In DANGER! Who Will HELP Us? Refugees and Migrants: A Test of Civilization*, Ch. 5, Loc. 753 (Kindle ed. 2019); *id.* at Ch. 3, Loc. 1719.

> Indochinese refugees and immigrants? They are hard workers, industrious, good citizens, and are renewing and revitalizing our communities."[19]

Another looming issue was the phenomenon of secondary migration, which a 1979 GAO congressional report discussed:

> Refugees initially dispersed in rural areas have moved to urban areas to take advantage of job opportunities and community and cultural support which existing Indochinese refugee communities can offer. To avoid placing a burden on any one community, the volags [voluntary agencies] told us they are now making conscious efforts to disperse refugees in clusters around the country, particularly to places where job prospects are good. For instance, we found that at least one volag in San Francisco has discouraged the placement of refugee fishermen in the area because of the difficulty of entry into the Italian-dominated fishing industry there. More refugees have been placed in the San Jose area, however, where they may find jobs in the electronics assembly industry.[20]

Recognizing the importance of uniform policies amid a panoply of interests and stakeholders, the Carter Administration worked with Congress to revamp the country's resettlement infrastructure. Their plan adopted a principle that President Reagan and subsequent administrations would later endorse and amplify:

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[19] *Id.* at Ch. 30, Loc. 4019.

[20] *The Indochinese Exodus: A Humanitarian Dilemma*, Report to Congress by the Comptroller General, U.S. General Accounting Office ("GAO Congressional Report"), at 69 (Apr. 24, 1979), http://archive.gao.gov/f0302/109234.pdf.

centralization was key to the system's success.[21] Indeed, Mr. Purcell recalls that the Carter Administration was clear from the beginning that, while states and localities were to play important roles in resettlement efforts, the federal government was in the best position to assess the totality of state and local needs. Therefore, it would have final authority. As Mr. Carey and Mr. Schwartz both explain, this centralized approach is still a cornerstone of PRM's national placement plans.[22]

In two years of contentious congressional hearings, Congress considered the views of many stakeholders, including states and localities.[23] From these efforts emerged the Bureau for Refugee Programs ("BRP"), created in 1979, and the

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[21] *See, e.g.*, *id*. at 79 ("Federal assistance for resettlement of certain refugees in the United States is provided under several different, specific programs. * * * The difference in regulation governing each program, and the absence of resettlement programs for other refugees coming to the United States, illustrate the lack of consistency and basic equity in current U.S. refugee-resettlement policies."); *id.* at 81 ("Achieving consistency in the Indochina refugee program . . . is only part of a broader need to bring consistency to what is currently a patchwork of different Federal programs for different refugee groups in the United States. Volags dealing with all refugee groups state that it is difficult to keep track of these separate programs and, most importantly, that such program differences are basically inequitable. Federal and State refugee program staffs have also noted this problem.").

[22] Carey Decl., ¶ 15; Schwartz Decl., ¶ 7.

[23] Purcell, *supra* note 18, at Ch. 16, Loc. 2094; *see also* GAO Congressional Report, *supra* note 20, at 67 ("[W]e were able, through our field work in the States of California, Washington, and New York, to formulate general impressions of resettlement through interviews with refugees, volags, refugee sponsors, and Federal and State officials handling refugee programs.").

Refugee Act of 1980, which, as discussed above, concentrated resettlement decision-making authority into federal hands by creating ORR.

Congress would address state and local participation concerns with the Reauthorization in 1986. It established new requirements for detailed congressional reports and for ORR to consult with states and consider their populations, resources, and secondary migration data *before* making resettlement decisions.[24] The purpose of these requirements was to "strengthen[] the consultation requirement . . . to consult regularly with State and local governments . . . on the sponsorship and placement process," to "ensure their input into the process," and to "improve their resettlement planning capacity."[25] However, Congress stated unambiguously that the new "requirements are not intended to give States and localities any veto power over refugee placement decisions[.]"[26]

The functions of BRP were later elevated in importance through the establishment of PRM in 1993.

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[24] Summary of H.R. Rep. No. 1452, Refugee Assistance Extension Act of 1986, 99th Cong. (1985-1986), https://www.congress.gov/bill/99th-congress/house-bill/1452. Congress also improved the prior legal framework by authorizing reimbursement of state and local governments for three years of refugee assistance costs and requiring an annual consultation between the President and the states' congressional representatives. Purcell, *supra* note 18, Ch. 16, Loc. 2123.

[25] H.R. Rep. No. 99-132, at 19 (1985).

[26] *Id*.

As this historical context reveals, Congress deliberately chose how states and localities participate in the refugee resettlement process. It therefore has spoken to the very issue the EO purports to address.[27] The President cannot subvert Congress's well-considered statutory framework under the auspices of addressing what Congress conclusively addressed decades earlier.

C. In Implementing the Refugee Act and the Reauthorization, BRP and PRM Made State and Local Concerns A Fundamental Aspect of Refugee Resettlement.

Congress's statutory solution to addressing state and local concerns is not limited to the text or legislative history of the Refugee Act and the Reauthorization: how the agencies implemented those laws since 1980 and have developed the offices and mechanisms authorized by Congress address the EO's pretextual issue in practice. In *Amici*'s experience and as set forth in Mr. Schwartz's and Mr. Carey's declarations, meaningful consideration of state and local concerns was a fundamental and universally recognized focus of refugee resettlement long before the EO.[28] Such considerations played a key role in *Amici*'s deliberations with

[27] After PRM was formed in 1993, the Refugee Coordinator position was eliminated and its role assumed in the newly created position of Assistant Secretary of State for PRM. The Government might argue that this change suggests the Refugee Coordinator failed to perform as Congress intended, but that does not change the fact that Congress intended for there to be dialogue with states and localities, and *Amici*'s experience proves BRP and PRM fulfilled Congress's intent by communicating with states and localities.

[28] Carey Decl., ¶¶ 27-30 (concluding, as referenced above, that this stated purpose "is belied by my experience and understanding of how the consultation process

ORR, in *Amici*'s recommendations to the Secretary of State (which were also coordinated with ORR), and in the Secretary of State's recommendations to the President on annual refugee admissions levels.

During James Purcell's tenure, BRP provided the Department of State and HHS regular reports on state and local problems and BRP's efforts to resolve them. These efforts were largely successful because BRP communicated regularly with state and local contacts to reach consensus on placement decisions. In fact, Mr. Purcell cannot remember any state lodging a formal disagreement.[29] During this time, BRP brokered mediations and rearranged resettlements in response to issues such as sexual harassment charges against refugee sponsors in Northern Virginia, complaints that refugee fishermen were overfishing the Gulf Coast, and overcrowding concerns in Chicago. BRP gave so much weight to state and local officials that, in the mid-1980s, it nearly acceded to demands from Minnesota's

works in practice"); *id.* at ¶ 31 (noting Mr. Carey's "extensive outreach to state and local government representatives," including regularly meeting with representatives in California, Arizona, Massachusetts, New York, North Carolina, Washington, Michigan, and Illinois).

[29] Mr. Purcell's experience parallels that of Mr. Carey. *See* Carey Decl., ¶ 32 ("Not once did a state or local government representative tell me that they believed the state and local governments wanted 'a more clearly defined role.' To the contrary, state and local government representatives . . . appreciated the flexibility of the current consultation and coordination system, which accounts for the diversity of state and local experience, and recognizes that different state and local government representatives wish to have different levels of engagement in refugee resettlement activities.").

senator to stop Hmong resettlement in the state (that senator subsequently revoked the request when Minnesota religious, business, and political leaders objected).

Eric Schwartz also devoted considerable time while Assistant Secretary of State for PRM addressing state and local stakeholders, including traveling regularly with PRM staff to maximize the agency's understanding of state and local concerns.[30] These trips were instrumental in developing PRM's understanding of the "totality of the circumstances" that, as Mr. Schwartz and Mr. Carey both discuss, formed the foundation of a national placement plan.[31] Although it was understood that no state or locality could refuse to accept refugees or dictate the terms of resettlement, PRM often made adjustments in response to legitimate concerns.[32] Mr. Schwartz's discussions with state and local stakeholders

[30] Schwartz Decl., ¶¶ 15-16 (describing frequent travels to meet "with state and local officials and service providers to discuss refugee resettlement" and how they "appreciated the opportunity to meet with me"); Carey Decl., ¶ 33 ("At ORR, I frequently traveled with my colleagues at PRM to meet with government representatives to discuss refugee resettlement and to encourage participation.").

[31] Schwartz Decl., ¶ 7; *see id.* at ¶ 8 ("[E]ach Resettlement Agency's application proposes how a portion of the overall incoming refugee population is to be distributed among the states and localities."); *id.* at ¶ 11 ("Local consultations bring together stakeholders who include state and local officials . . . ."); Carey Decl., ¶ 16 ("To develop a national plan, PRM must consider the totality of the circumstances. . . .").

[32] Schwartz Decl., ¶¶ 4-5, 12-13, 17.

also informed his decision to double the reception and placement grant for new refugees to increase the capacity of state-based providers.[33]

Consistent with Mr. Schwartz's recollection of his and his staff's regular communications with state and local officials,[34] Anne Richard recounts ordinary consultations between PRM admissions staff and state and local stakeholders. During Ms. Richard's tenure, these consultations evolved in breadth and exposure in the summer and fall of 2015, when refugees from Syria and elsewhere migrated in large numbers to Europe and refugees were erroneously blamed for terrorist attacks in Paris. These events placed a political spotlight on refugee resettlement issues, frequently prompting PRM actions to address concerns from governors and members of Congress.

For example, Ms. Richard and federal officials met with the Governor of Kansas and Kansas law enforcement officials to explain the vetting process in depth. The Kansas representatives proposed to receive personal data on resettled refugees, but the federal team argued this was unnecessary, as these Kansas residents were thoroughly screened before resettlement and resettled refugees had proven to be overwhelmingly law-abiding. Another meeting, with the South

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[33] *See* Eric Schwartz, Assistant Secretary of State for PRM, *Doing Right by Newly Arriving Refugees*, U.S. Dept. of State (Jan. 22, 2010), https://2009-2017.state.gov/j/prm/releases/letters/2010/181284.htm.

[34] Schwartz Decl., ¶ 16 (noting that Mr. Schwartz's staff at PRM "communicated regularly" with state and local officials).

Carolina Congressional delegation, prompted Ms. Richard to visit city and county officials in Spartanburg, South Carolina, where she communicated agency plans and listened carefully to a wide range of views. At the request of Senator Bob Corker, Ms. Richard traveled to Nashville, Tennessee to meet with Governor Bill Haslam and Attorney General Herbert Slatery shortly before they announced support for the resettlement program.

Ms. Richard made a concerted effort to visit other cities during her tenure, including Cleveland, Pittsburgh, Miami, Detroit and its suburbs, Philadelphia, Raleigh, Baltimore, Louisville, Bowling Green (Kentucky), Seattle, Palo Alto, Portland (Oregon), and Portland (Maine). Other senior PRM officials visited refugee programs in U.S. cities. PRM further consulted with state and local officials remotely, including holding one-on-one calls with the mayor of Rutland, Vermont and participating in a White House-organized virtual conference with 34 governors[35] to listen to concerns and provide updates on refugee admissions policies and security measures.

Arthur Dewey's experience also encompassed listening to and weighing state and local concerns when making resettlement decisions. He recalls meeting with the Governor of Kansas who resisted Somali Bantu resettlement, and with the mayor of Utica, New York, who enthusiastically encouraged the resettlement of the

[35] Carey Decl., ¶ 26.

same group. He also met with the mayor of Erie, Pennsylvania who sought placement of more refugees to meet pressing community needs. In Utica, Mr. Dewey saw firsthand the significant contributions refugees made toward the revival of a distressed city – renovating a boarded house in a blighted neighborhood, starting businesses like repair shops and restaurants – that led the mayor to seek the placement of more refugees into the community.[36]

Amici led BRP and PRM during much of "the refugee resettlement infrastructure [that was] built nationwide over decades."[37] Their collective experience illustrates that the federal government did not merely pay lip service to state and local concerns; meaningful and transparent dialogue with state and local representatives has always been a feature of refugee resettlement, just as Congress intended. As Mr. Carey states, the EO "purports to fix a problem that does not exist."[38]

II. The EO Is Inconsistent With The Refugee Act's Mandates.

The EO would require each "State and locality" to consent in advance to the resettlement of refugees within its jurisdiction. That requirement – as well as the grounds purporting to justify the new requirement – contravene the express

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[36] Mr. Dewey's experience supports Mr. Carey's assertion that "[m]ayors of cities that are large resettlement sites," such as Utica, "are often particularly involved in coordination efforts." Carey Decl., ¶ 19.

[37] *Id.*, ¶ 38.

[38] *Id.*, ¶¶ 27-30.

requirements of the Refugee Act, its implementing regulations, and the comprehensive system for refugee resettlement that has developed over the past four decades. The language and structure of the statute grant ultimate authority over refugee resettlement to the federal government by requiring only that the federal government consult with states and localities in making placement decisions. Granting veto power to states and localities reverses the statutory framework.

First, the EO is inconsistent with Congress's intent to give the federal government ultimate authority to decide where refugees are resettled. Section 1522 provides for consultation with state and local governments and requires that PRM to "the maximum extent possible, take into account recommendations of the State[,]" but the final decision is plainly left to the federal government. Indeed, as two federal courts have recognized, "the consultation requirement is 'not intended to give States and localities any veto power over refugee placement decisions, but rather to ensure their input into the process and to improve their resettlement planning capacity.'"[39]

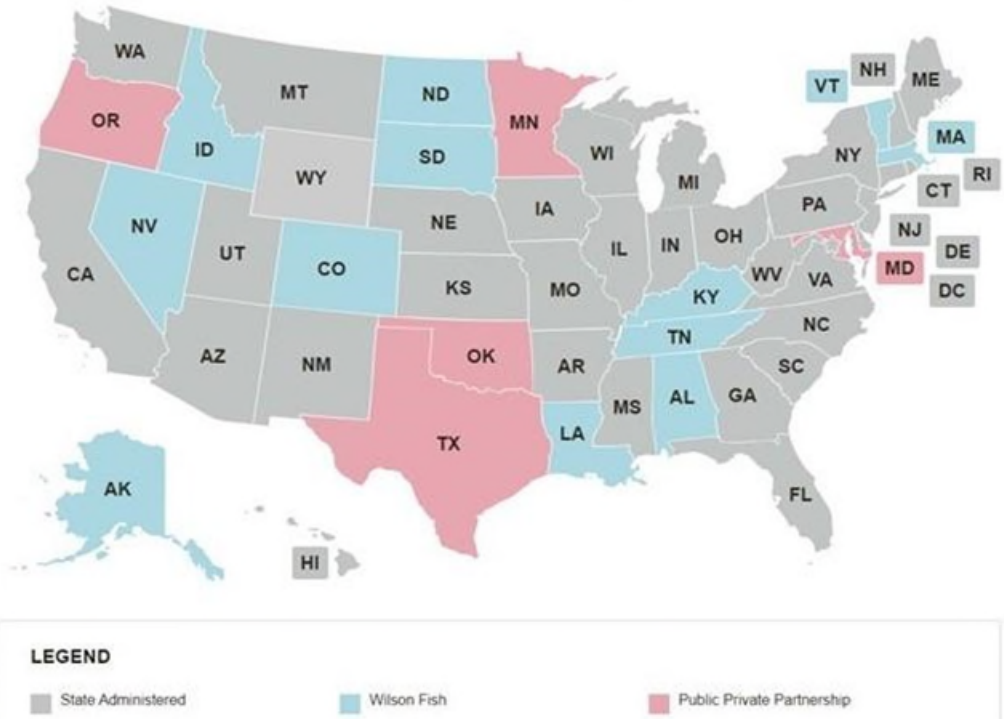
Second, by providing states and localities with an effective veto of resettlement, the EO forecloses required consultation mandated by Section 1522

[39] *Texas Health & Human Servs. Comm'n v. United States*, 193 F. Supp. 3d 733, 741 (N.D. Tex. 2016) (quoting H.R. Rep. No. 99-132, at 19 (1985)); *Alabama v. United States*, 198 F. Supp. 3d 1263, 1272 (N.D. Ala. 2016) (quoting same).

for initial placement decisions with states and localities that exercise a veto. *See, e.g.*, 8 U.S.C. § 1522(a)(2)(A) (requiring the federal government to "consult regularly" with state and local governments concerning sponsorship and distribution of refugees); *id.* § 1522(a)(2)(B) (requiring consultation with state and local governments to develop "policies and strategies for the placement and resettlement of refugees"); *see also id*. § 1522(a)(2)(C)(ii) (requiring the federal government to provide a mechanism for resettlement agencies to meet with state and local governments to plan and coordinate resettlement). If states and local governments can refuse all refugees, these consultation provisions are meaningless. There would be no point to consultation with states and localities that have prohibited refugee resettlement in their jurisdictions.

Third, broad exclusions of entire states or cities and counties would prevent PRM from considering certain factors it must weigh in making initial placement decisions. 8 U.S.C § 1522(a)(2)(C)(iii). For example, although PRM must consider the "availability of . . . public and private resources (including educational, health care, and mental health services) for refugees," *id*. § 1522(a)(2)(C)(iii)(II), PRM could not consider resources in a state or locality that has vetoed refugee resettlement. Limiting available locations for placement places a greater burden on states and cities that accept refugees, rather than avoiding placement in areas already highly impacted by refugees. *Id*. § 1522(a)(2)(C)(i).

Fourth, the EO is founded on an assumption that does not square with the reality of refugee resettlement. The EO reasons that "[s]tate and local governments are best positioned to know the resources and capacities they may or may not have available to devote to sustainable resettlement, which maximizes the likelihood refugees placed in the area will become self-sufficient and free from long-term dependence on public assistance." Exec. Order No. 13888, 84 Fed. Reg. 52,355, at § 1 (Sept. 26, 2019). Not only does this ignore that Congress expressly directed the federal government to ascertain the resources and capabilities of potential placement sites, but it fails to account for the fact that many states have eschewed administrating their own resettlement programs, leaving them instead to ORR's Wilson-Fish program or to public-private partnerships. The following map illustrates this disparity:



Source: ORR, https://www.acf.hhs.gov/orr/state-programs-annual-overview

It defies logic to assume that state or local officials with no involvement in refugee resettlement are better positioned to assess the needs of prospective refugees than officials directly tasked with making those assessments, who regularly meet with the resettlement agencies that work with refugees and provide those services, and make placement decisions on an individualized basis. Nor are state and local governments left out of that process. Both historically and at present, PRM makes nuanced, detailed placement decisions that consider state and local data, assess the needs and capacities of both the resettlement agencies and communities, and discuss refugee resettlement with state and local officials.[40]

Fifth, in effectively preventing PRM from placing refugees in jurisdictions that exercise a veto, the EO defeats PRM's efforts to take into account secondary migration of refugees, *i.e.*, when refugees leave their initial placement site and move to another location. 8 U.S.C. § 1522(a)(2)(C)(iii)(IV). Most refugees have family or other ties to individuals lawfully residing in the United States.[41] Once placed, refugees are free to move within the United States from their initial placement location.[42] Academic studies from 2012 and 2013 showed that between

[40] Schwartz Decl., ¶¶ 10-13, 15-16.
[41] Declaration of Mark Hetfield ("Hetfield Decl."), ¶ 57.
[42] Bruno, *supra* note 7, at 2.

16 and 17% of refugees moved to another state within eight months of their initial placement.[43] ORR has found that refugees relocate for numerous reasons, including "better employment opportunities, the pull of an established ethnic community, more welfare benefits, better training opportunities, reunification with relatives, or a more congenial climate."[44]

As this data shows, states and localities that veto initial refugee resettlement may nonetheless become home to refugees through secondary migration. It is particularly likely that refugees will move to jurisdictions where they have ties to family or other individuals lawfully residing in the United States.[45]

This is not a mere hypothetical concern. As detailed in the Declaration of Mark Hetfield, PRM takes secondary migration seriously, because it has substantial costs for individual refugees, resettlement agencies, and the governments that

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[43] Jeffrey Bloem & Scott Loveridge, *The Costs of Secondary Migration: Perspectives from Local Voluntary Agencies in the USA*, 19 Int. Migration & Integration 233, 235 (2018), https://link.springer.com/article/10.1007%2Fs12134-018-0538-4; *see also* Nadwa Mossad et al., *In Search of Opportunity and Community: The Secondary Migration of Refugees in the United States* 3 (Sept. 2019), http://dx.doi.org/10.2139/ssrn.3458711 (finding 17% of refugees had moved from their initial state of resettlement by the time they applied for lawful permanent resident status, which usually occurs shortly after completing one year in the United States).

[44] *Refugee Resettlement*, *supra* note 8, at 20-21; *but see* Mossad et al., *supra* note 23, at 8 (finding little correlation between secondary migration and higher welfare benefits).

[45] Hetfield Decl., ¶¶ 57, 60.

provide financial support to refugees.[46] As a result of a veto, there may be no refugee resettlement infrastructure to assist those refugees. Refugees would face a dilemma between (1) moving to a location with better job options or members of their ethnic community but without support from resettlement agencies, and (2) remaining in a less-desirable location. This is the kind of result the statute was designed to prevent.

Permitting refugees to move to locations where they have *both* family or other ties and refugee support is the best way for refugees to integrate into society. A study by the GAO identified numerous indicators of and barriers to the integration of refugees in society.[47] Indicators of integration included factors such as civic participation, employment, refugee culture, involvement with the host community, and social connections.[48] Among the ways to facilitate integration, the GAO identified: "[c]ommunity organizing of refugee groups"; "[a]vailability of public service providers to educate community about refugees' cultures (and vice versa)"; "[p]reparation of the community to receive newcomers"; [b]ilingual and culturally competent staff at agencies serving refugees"; "[c]ommunity events to celebrate refugees' cultures"; and "[s]ocial support from other refugees."[49] Some

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[46] *Id.*, ¶¶ 61-64.

[47] *Refugee Resettlement*, *supra* note 8, at 35-36.

[48] *Id.*

[49] *Id.*

of those factors are present in communities with members of a refugee's family or ethnic group, while others depend on financial and other resources provided by resettlement agencies. Preventing refugees from being placed in locations without both types of support would increase the difficulty of integrating those refugees into society.

III. The EO Will Undermine the Federal Government's and Resettlement Agencies' Ability To Serve Refugees.

Funding for refugees after arrival is based on the allocation of refugees per state.[50] If states or localities veto resettlement, those funds will not be allocated to those states, and refugees who move there after resettlement will not receive timely and necessary services. As the GAO has found, "federal funding does not necessarily follow [refugees] to their new communities, even though refugees continue to be eligible for some resettlement services for 5 years after arrival."[51] Further, even when ORR provides funding to communities and states affected by secondary migration, that funding may not be provided until a year after refugees move to the affected community.[52] Because funding based on secondary migration is far less predictable and expedient than funding for initial resettlement, the

[50] Office of Refugee Resettlement, Dear Colleague Letter 19-05, *FY 2019 Refugee Support Services Formula Allocation* (Sept. 5, 2019), https://www.acf.hhs.gov/orr/resource/fy-2019-refugee-support-services-formula-allocation.

[51] *Refugee Resettlement*, *supra* note 8, at 21.

[52] *Id.* at 21-22.

elimination of the latter will, in states and localities that reject refugees, compromise the ability of agencies to address the immediate needs of refugees who come to such a jurisdiction through secondary migration.

Undoubtedly, resettlement agencies will direct their efforts away from such communities. Local affiliates and other local agencies and organizations providing services to refugees will scale back operations or close entirely. Consequently, refugees who move from their initial placement site to such locations will have little to no resettlement support upon arrival. And the impact from the veto may leave those communities without the necessary infrastructure or the expertise and experience to revive resettlement services. The provision mandating that the federal government consider secondary migration was enacted to avoid this result.

IV. An Exception Purportedly to Permit Resettlement Despite a State or Locality's Veto Does Not Cure the EO's Defects.

The EO contains a provision stating that "[n]othing in this order shall be construed to impair or otherwise affect: (i) the authority granted by law to an executive department or agency, or the head thereof." Exec. Order No. 13888, 84 Fed. Reg. 52,355, § 3. It also includes a provision that purportedly permits the federal government to resettle refugees in jurisdictions that refuse refugees if the Secretary of State concludes "that failing to resettle refugees within that State or locality would be inconsistent with the policies and strategies established under [Section 1522] or other applicable law." *Id.*, § 2(b). As discussed above, however,

the very purpose of the EO – to permit states and localities to veto refugee resettlement – contravenes numerous statutory mandates in Section 1522. Section II, above. This is true with or without language in the EO that appears designed to avoid a court challenge but does nothing to change the EO's meaning or impact. Regardless, this Court should uphold the injunction. Leaving the EO intact creates uncertainty about whether states and localities can veto refugee resettlement and how PRM and ORR can simultaneously comply with the EO and Section 1522. Any attempt by agencies to comply with the EO is likely to harm resettlement agencies and undermine their ability to serve refugees.

CONCLUSION

For the foregoing reasons, *Amici* request that this Court affirm the order granting the preliminary injunction.

Dated: June 2, 2020

Respectfully submitted,

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ADDENDUM A

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- USA for IOM, Chairman of the Board of Directors, 1999-present
- Director General, UN International Organization for Migration, 1988-1998
- Director, Bureau for Refugee Programs, 1982-1987
- Deputy Assistant Secretary, Bureau for Refugee Programs, 1979-1982

Eric P. Schwartz
- President, Refugees International, 2017-present
- HIAS, Inc., Member of the Board of Directors, 2011-present
- Professor and Dean, Hubert H. Humphrey School of Public Affairs, University of Minnesota, 2011-2017
- Assistant Secretary of State for Population, Refugees, and Migration Affairs, 1993-2001
- Senior Director for Multilateral and Humanitarian Affairs, U.N. National Security Council, 1998-2001
- Special Assistant to the President for National Security Affairs, 1998-2001

Arthur E. Dewey
- Assistant Secretary of State for Population, Refugees, and Migration Affairs, 2002-2005
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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rules of Appellate Procedure ("FRAP") 29(a)(5) and 32(a)(7)(B), and Fourth Circuit Rule 32(b), the attached brief is double spaced, uses a proportionally spaced typeface of 14 points or more, and, exclusive of the sections provided by FRAP Rule 32(f), contains a total of 6,489 words, based on the word count program in Microsoft Word.

Dated: June 2, 2020

/s/ Steven H. Schulman
Steven H. Schulman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on June 2, 2020.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 2, 2020

s/ Steven H. Schulman
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