YES, IT’S THE FEDERAL GOVERNMENT’S DUTY TO CONTROL FOREIGN AFFAIRS, BUT WHAT ABOUT THE PRESIDENT? HUMANITARIAN CONCERN AND REFUGEE RESETTLEMENT IN THE WAKE OF HATE

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Cite as: Rebecca Horgan, Yes, It’s the Federal Government’s Duty to Control Foreign Affairs, but What About the President? Humanitarian Concern and Refugee Resettlement in the Wake of Hate, 12 SEVENTH CIRCUIT REV. 334 (2017), at www.kentlaw.iit.edu/Documents/Academic Programs/7CR/12-l/horgan.pdf.

INTRODUCTION

The principle of federalism is enshrined in the United States governmental framework.¹ Federalism embraces the idea that both the federal government and state governments are sovereigns.² When two separate sovereigns exist, it follows that conflict between the laws of each may arise.³ As such, the Supremacy Clause of Article VI of the United States Constitution gives Congress the authority to preempt state law.⁴ The drafters mandated:

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² Id.

³ Id.

⁴ U.S. CONST. art. VI, cl. 2; California v. ARC Am. Corp., 490 U.S. 93, 100 (1989).
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\(^5\)

The practical function underlying the preemption doctrine is that the Supremacy Clause invalidates state laws that interfere with or are contrary to federal laws enacted by Congress, particularly where Congress has expressed its intent to occupy an entire field of law.\(^6\) Foreign relations and international affairs, including refugee resettlement, are fields in which the Constitution and Congress have specifically intended the national government to occupy.\(^7\) Therefore,

> [W]here the federal government, in the exercise of its superior authority in these fields, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.\(^8\)

Part II of this article will address the basic principles of the preemption doctrine that were present, somewhat discussed, but not adequately analyzed, in the Seventh Circuit Court of Appeal’s decision, *Exodus Refugee Immigration, Inc. v. Pence*.\(^9\) That Part will

\(^5\) U.S. CONST. art. VI, cl. 2.


\(^8\) Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941).

\(^9\) 838 F.3d 902 (7th Cir. 2016).
explain conflict and field preemption doctrines and their place in matters involving foreign relations and international affairs.

Part III of this article will discuss the Refugee Act of 1980, a comprehensive regulatory scheme enacted by Congress to establish a detailed framework for refugee resettlement in the United States. That Part will further discuss the ways in which Congress divided power related to refugee resettlement among the Executive Branch, federal agencies and even the states. As follows, Part IV will discuss the implementation of the Act and provide background on the stringent, comprehensive resettlement procedures, facilitated by federal agencies.

Part V of this article will address the Seventh Circuit’s decision in Exodus Refugee Immigration, Inc. v. Pence in which the court correctly upheld the district court’s decision to grant Exodus Refugee Immigration, Inc.’s preliminary injunction against former Governor and current Vice President Mike Pence. But while the Seventh Circuit ultimately reached the correct conclusion, that Part argues that the court’s preemption analysis was inadequate. Part VI will then explain the ways in which Pence’s directive was preempted by federal law. That Part will explain the court’s missed opportunity to directly discuss the important preemption issues underlying the Refugee Act, including the ways in which Congress divided power under the Act. Had the Seventh Circuit more directly addressed the preemption doctrine in its decision, Congress may have been tipped off to the current, and very controversial, actions of President Trump’s administration related to refugee resettlement policy.

This article concludes with Part VII, which suggests that Congress should consider amending the Refugee Act to redistribute its current power balance, as the Refugee Act’s original, humanitarian purpose is being thwarted and replaced by unverified fear and discrimination.

THE PREEMPTION DOCTRINE ARTICULATED BY THE SUPREMACY CLAUSE

The preemption doctrine, flowing from the Supremacy Clause, nullifies state laws that conflict with, or are otherwise contrary to,
established federal law. There are four traditional ways in which preemption occurs: (1) express preemption, (2) implied preemption, (3) conflict preemption and (4) field preemption. This article will specifically analyze conflict preemption and field preemption in the context of refugee resettlement policy. Despite the differences between these traditional forms of preemption, the court’s “sole task is to ascertain the intent of Congress” when analyzing any form of preemption.

A. A State Law that Interferes with or is Contrary to Federal Law is Conflict Preempted

A state law is preempted when it conflicts with federal law. A state law conflicts with federal law where “compliance with both federal and state regulations is a physical impossibility” . . . [and] where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[].’ If a state law is either inconsistent with or impairs the operation of federal law, “state law must yield[].”

In analyzing a claim of conflict preemption, a court may consider the relationship between the state and federal law both as they are written, and as they are applied. In line with broad concepts of federalism, courts should not assume that the state’s power is

10 U.S. CONST. art. VI, cl. 2.
15 Hines, 312 U.S. at 67.
superseded unless that was the “clear and manifest purpose of Congress.” But the Supreme Court has also cautioned that “there can be no one crystal clear distinctly marked formula” to determine whether a state law conflicts with a federal law. Rather, the court’s primary function is to make a fact-based determination consistent with the specific circumstances of each case. In considering whether a state law conflicts with federal law, courts look to whether state law is “conflicting; contrary to; occupying the field; repugnant[t]; different[t]; irreconcilable; inconsistent[t]; [in] violation; [in] curtailment; and [in] interference” with established federal law.

To determine whether an obstacle exists sufficient to nullify a state law, the court uses its judgment, which is informed by “examining the federal statute as a whole and identifying its purpose and intended effects.” If the state law is contrary to the federal law’s purpose and intended effects, as gleaned from the text, structure and history of the federal law, the state law is invalid and must yield.

B. A State Law that Interferes with an Area of Law Exclusively Occupied by the Federal Government is Field Preempted

Aside from conflict preemption, a state directive, or other law, is preempted where federal law “so thoroughly occupies a legislative field” that one may reasonably infer that Congress left no room for the states to supplement it. “[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”

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18 Arizona, 132 S. Ct. at 2501 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 240 (1947)).
19 Hines, 312 U.S. at 67.
20 See id.
21 Id.
23 See Arizona, 132 S. Ct. at 2496.
24 U.S. CONST. art. VI, cl. 2.
25 Arizona, 132 S. Ct. at 2501.
A court may infer Congressional intent to preempt state law in a particular legal arena in two relevant ways. First, Congress intended to preempt state law if it enacted a regulatory scheme that is so all encompassing of a certain area. Second, Congress intended to preempt state law if the federal interest in the regulated area is so dominant to state interests that there is simply no room for additional state action.

To determine whether a federal regulatory scheme is so sweeping of an entire area so as to preempt state laws that impermissibly touch on that area, the court’s focus is wholly centered on Congress’s intent underlying the regulatory scheme. Courts analyze the “depth and breadth” of the scheme. Then, they determine whether the state law would frustrate that federal scheme. If the state law would frustrate the federal regulatory scheme, it is invalid as preempted.

Further, a state law is field preempted if the federal interest at stake in the regulated area overrides state interests that may be at play, leaving no room for state action. The importance to the state of its own law is immaterial to field preemption analysis. Thus, if the federal interest is so dominant that no room exists for state action, the state law is void and field preempted.

As the preemption doctrine has existed since the nation’s founding, there is extensive case law on the subject. The United States Supreme Court has addressed conflict and field preemption on numerous occasions, in particular, as the doctrine operates in relation to the fields of foreign relations and international affairs, as discussed in the following section.

27 U.S. CONST. art. VI, cl. 2; S. Union Gas Co., 306 F. Supp. 2d at 133.
28 U.S. CONST. art. VI, cl. 2; S. Union Gas Co., 306 F. Supp. 2d at 133.
32 U.S. CONST. art. VI, cl. 2; S. Union Gas Co., 306 F. Supp. 2d at 133.
34 U.S. CONST. art. VI, cl. 2; S. Union Gas Co., 306 F. Supp. 2d at 133.
C. United States Supreme Court Jurisprudence Supports the Proposition that State Laws Are Conflict or Field Preempted if the Law Imperm issibly Interferes with Federal Law in the Areas of Foreign Relations and International Affairs

1. Conflict Preemption

In American Insurance Association v. Garamendi, the Court held that California’s passage of the Holocaust Victim Insurance Relief Act of 1999 (“HVIRA”) interfered with and acted as an obstacle to the federal government’s established policy for resolving Holocaust-era insurance claims; therefore, the Court invalidated the California law as preempted. In that case, California enacted HVIRA, which required all insurance companies doing business within the state to publicly disclose all policies sold to people in Europe between 1920 and 1945, including all policy owner names and the status of each policy. The purpose of HVIRA was to facilitate and resolve Holocaust-era insurance claims by California residents. If that information was not disclosed, HVIRA mandated regulatory sanctions.

Consequently, the plaintiffs, a trade organization and other American and European insurance companies, filed suit against the state, arguing, in part, that HVIRA was conflict preempted. Specifically, the plaintiffs asserted that HVIRA’s mandatory regulatory sanctions for nondisclosure interfered with the policies adopted by the federal government and established by President Clinton in negotiating postwar settlement agreements with Germany, Austria and France. In particular, the agreements negotiated by the President encouraged those governments to volunteer settlement

36 Id. at 409–10.
37 Id. at 410–11.
38 Id. at 423.
39 Id. at 412.
40 Id. at 422–23.
funds, rather than proceed to litigation or mandated sanctions.\textsuperscript{41} Therefore, the plaintiffs argued, HVIRA directly interfered with policies established by the President and was preempted.\textsuperscript{42}

The Court agreed.\textsuperscript{43} The Court explained that the President expressly established the federal government’s stance on this issue in the negotiated agreements, amongst other public statements.\textsuperscript{44} But, HVIRA took a much tougher position, which directly conflicted with established federal policy.\textsuperscript{45} Therefore, because California sought “to use an iron fist where the President ha[d] consistently chosen kid gloves[,]” the Court held that HVIRA was conflict preempted.\textsuperscript{46}

The Supreme Court most recently addressed the preemption doctrine in its landmark decision, \textit{Arizona v. United States}. In \textit{Arizona}, the Court held that sections 5(c) and 6 of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, were conflict preempted because both sections stood as obstacles to established federal regulations.\textsuperscript{47} There, Arizona essentially enacted its own immigration enforcement policy to ‘discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.’\textsuperscript{48} Specifically, section 5(c) of S.B. 1070 created a new state offense, making it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona.\textsuperscript{49} Section 6 of S.B. 1070 gave state officers authority to arrest, without a warrant, a person “‘the officer ha[d] probable cause to believe . . .

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\textsuperscript{41} \textit{Id.} at 421.
\textsuperscript{42} \textit{Id.} at 413.
\textsuperscript{43} \textit{Id.} at 427.
\textsuperscript{44} \textit{Id.} at 421–23.
\textsuperscript{45} \textit{Id.} at 423–24.
\textsuperscript{46} \textit{Id.} at 427.
\textsuperscript{47} \textit{Arizona v. United States}, 132 S. Ct. 2492, 2501 (2012).
\textsuperscript{48} \textit{Id.} at 2497 (citing Note following \textit{ARIZ. REV. STAT. ANN.} § 11–1051 (2012)).
\textsuperscript{49} \textit{Id.} at 2497 (citing Note following \textit{ARIZ. REV. STAT. ANN.} § 13–2928(C) (2010)).
\end{center}

The federal government asserted that section 5(c) created an obstacle to the federal government’s regulation and control of unauthorized employment of illegal aliens.\footnote{Arizona, 132 S. Ct. at 2503.} In enacting the Immigration Reform and Control Act of 1986 (“IRCA”), Congress “made a deliberate choice” not to impose criminal penalties on illegal aliens who were not authorized to work in the country.\footnote{Id. at 2504.} However, section 5(c) imposed criminal penalties on such persons.\footnote{Id.} Consequently, the Court determined that section 5(c) was contrary to and conflicted with IRCA.\footnote{Id. at 2505.} Thus, the section was conflict preempted, as it created an obstacle to the federal government’s enforcement of its chosen regulatory scheme.\footnote{Id.}

Moreover, the federal government argued that section 6 of S.B. 1070 was also conflict preempted by the illegal alien removal system enacted by Congress.\footnote{Id. at 2506.} Congress created federal regulations that denote the situations in which trained federal immigration officers may arrest illegal aliens during the removal process.\footnote{Id. at 2505–06.} In addition, Congress articulated circumstances in which state officials are to “cooperate” with the federal government in such arrest and removal.\footnote{Id. at 2506.}

Nonetheless, section 6 provided state officers with even more authority to arrest illegal aliens on the basis of possible removability than Congress entrusted to its trained officers, in contravention of established federal policies.\footnote{Id.} Therefore, the Court held that section 6 was conflict preempted because it created an obstacle to Congress’s

\footnotesize{\begin{itemize}
  \item 51 Arizona, 132 S. Ct. at 2503.
  \item 52 Id. at 2504.
  \item 53 Id.
  \item 54 Id. at 2505.
  \item 55 Id.
  \item 56 Id. at 2505.
  \item 57 Id. at 2505–06.
  \item 58 Id. at 2506.
  \item 59 Id.
\end{itemize}}
established protocol for the arrest of aliens based on potential removability. 60

2. Field Preemption

In *Hines v. Davidowitz*, the Court held that a Pennsylvania law, regulating immigration, naturalization and deportation, was field preempted, as Congress intended for the federal government to occupy the entire field of immigration regulation. 61 In 1939, Pennsylvania passed the Alien Registration Act (“the state Act”), which required every alien over 18 years old to register once each year, provide any requested information, pay an annual registration fee and receive an alien identification card. 62 In addition, the state Act required aliens to carry the identification card at all times, showing the card whenever demanded by law enforcement. 63 Failure to register resulted in a fine and potential imprisonment. 64 Failure to carry or show the identification card also resulted in a fine and possible imprisonment. 65

But, one year after the state Act’s passage, Congress enacted the federal Alien Registration Act (“the federal Act”), which differed from the state Act. 66 The federal Act also contained certain registration requirements, but did not require aliens to carry an identification card or show any form of identification to law enforcement officers. 67 Finally, the federal Act only criminally sanctioned the willful failure to register. 68

Subsequently, Bernard Davidowitz, and other Pennsylvania residents, citizens and taxpayers, filed an injunction against enforcement of the state Act, arguing, in part, that the state Act was field preempted by federal law because the power to restrict, limit,

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60 *Id.* at 2507.
62 *Id.* at 56.
63 *Id.*
64 *Id.* at 56–60.
65 *Id.*
66 *Id.* at 60.
67 *Id.* at 60–61.
68 *Id.*
regulate and register aliens is a field that the federal government entirely occupies. The Court agreed. The Court explained the importance of advancing “collective interests” and approaching foreign nations as “one people, one nation, one power.” Harkening back to the Federalist Papers and the Constitution, the Court recognized the longstanding principle of federalism, that the national government has supreme power in the field of foreign affairs, including immigration, naturalization and deportation. Therefore, in analyzing the federal Act, the Court determined that Congress, with its superior authority, enacted the federal Act with the purpose of providing a complete regulatory system in this area. Thus, the state Act was field preempted, as it interfered with the federal government’s exclusive occupation of the field of immigration regulation.

Further, in Crosby v. National Foreign Trade Council, the Court held that a Massachusetts statute interfered with the federal government’s occupation over the field of foreign relations, specifically its ability to impose sanctions on Burma. Therefore, the Court struck down the Massachusetts statute as field preempted. In that case, Massachusetts passed the Massachusetts Burma Law, which barred state entities from buying goods and services from any person doing business with Burma that was placed on a “restricted purchase list.” The Law broadly defined “doing business with Burma” and only allowed for three narrow exceptions to its ban.

Three months after Massachusetts passed its Burma Law, Congress enacted a statute related to United States relations with Burma. First, the federal statute imposed mandatory and conditional

69 Id. at 61.
70 Id. at 68–69.
71 Id. at 63; Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).
72 Hines, 312 U.S. at 62–63.
73 Id. at 73–74.
74 Id.
76 Id.
77 Id. at 367.
78 Id. at 367–68.
79 Id. at 368.
sanctions on Burma. Second, the federal statute delegated power to
the President to develop a comprehensive strategy to improve human
rights practices in Burma. Third, the federal statute required the
President to report to Congress on the development of his strategies.
Fourth, the federal statute gave the President authority to waive
sanctions under circumstances in which the imposition of sanctions
would be contrary to American national security interests.

Subsequently, the National Foreign Trade Council, a nonprofit
corporation whose clients engaged in foreign commerce, sought
declaratory and injunctive relief against Massachusetts state officials,
arguing, in part, that the state statute was field preempted by the
federal government’s foreign affairs power. The Court recognized
that Congress clearly intended to confer great power to the Executive
in passing the federal regulation, which placed power over the
imposition of sanctions on Burma directly in the President’s hands.
The Court explained that it was implausible that Congress would so
clearly define the President’s broad sanction power if it was willing to
hinder his effectiveness by allowing a state statute to lessen the
consequences of the President’s action, which “is just what the
Massachusetts Burma law would do in imposing a different, state
system of economic pressure against the Burmese political regime.”

Therefore, the Court held that the Massachusetts Burma Law was field
preempted.

The case law, discussed infra Part II(C)(1) and (2), reflects a well-
established understanding that when state law interferes with federal
law related to foreign relations and international affairs, federal law
will prevail and preempt the conflicting state law. With these
principles in mind, this article turns to the Refugee Act of 1980 and its

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80 Id. at 368–69.
81 Id. at 368.
82 Id. at 369.
83 Id.
84 Id. at 371.
85 Id. at 374–76.
86 Id. at 376.
87 Id. at 373–74.
distribution of power over refugee resettlement between the federal government and state government.

**THE REFUGEE ACT OF 1980 AND ITS DISTRIBUTION OF POWER**

In 1980, Congress took control of the United States’ unevenly implemented and confusing refugee resettlement policy by enacting the Refugee Act of 1980 (the “Act”), which amended the Immigration and Nationality Act of 1952. The stated purpose for the legislation was to welcome refugees and reflect the United States’ “commitment to human rights and humanitarian concerns.”

In establishing the process, Congress adopted the internationally recognized definition of a “refugee.” The Act defines a refugee as:

> [A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is 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.

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The Act confers power to oversee the resettlement program as a whole to the Executive Branch. The Act provides that the President shall determine the number of refugees who may be admitted to the United States before the beginning of each fiscal year and after appropriate consultation with Congress based on that which is “justified by humanitarian concerns or is otherwise in the national interest.” The President has total discretion to change that number if unforeseen circumstances arise.

After the President consults with Congress, the President issues a Presidential Determination, which authorizes that number of refugees to resettle in the United States. The President’s annual determination considers the country’s foreign policy goals, family reunification, domestic immigration objectives, pressure from private special interest groups and humanitarian concerns. However, the President’s determination also undeniably hinges on the current political and social happenings around the world.

While the President is the ultimate authority over the refugee resettlement program, federal agencies are responsible for facilitating the actual resettlement process. Congress specifically defined the role of the federal government and its agencies in determining which refugees would be resettled in the United States and how that process would proceed. Even before going through the stringent vetting procedures used to resettle refugees in the country, an applicant for refugee resettlement must establish that: (1) they are a refugee within the definition of the Act; (2) they are coming from a region or country of special humanitarian concern; (3) they have not become firmly

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93 8 U.S.C. § 1157(a)(2); Lunn, supra note 91, at 842.
95 Id. at § 1157(b); Lunn, supra note 91, at 842.
97 Lunn, supra note 91, at 837–38.
98 Id.
99 Id. at 842.
100 8 U.S.C. § 1522.
101 See infra Part IV.
resettled in any foreign country; and (4) they are admissible as immigrants under the Act.\textsuperscript{102}

In the same vein, Congress defined the role of the States in the refugee resettlement process.\textsuperscript{103} Congress identified ways in which a state may elect to participate in the federal refugee resettlement program.\textsuperscript{104} To participate, a state must submit a plan to the Director of the Office of Refugee Resettlement (ORR), detailing the state’s procedures for facilitating refugees placed within the state by the federal government.\textsuperscript{105} Once approved, the state receives grants directly from the federal government to provide various assistance to refugees within the state.\textsuperscript{106} Further, a participating state receives grant money from the federal government that is passed on to local resettlement agencies to reimburse those agencies for monies expended on refugee assistance and assimilation services.\textsuperscript{107} The State of Indiana elected to participate in the program when it submitted and had approved its plan.\textsuperscript{108}

No state is required to participate in the federal refugee resettlement program.\textsuperscript{109} Rather, where a state does not submit or have a plan approved by the Director, the Wilson-Fish Program may be instituted.\textsuperscript{110} The Wilson-Fish Program is “an alternative to traditional state-administered refugee assistance programs,”\textsuperscript{111} in which the federal government directly distributes grants to local resettlement

\textsuperscript{102} Lunn, \textit{supra} note 91, at 837–38.
\textsuperscript{103} \textit{8 U.S.C.} § 1522(a)(2)(A).
\textsuperscript{104} \textit{Id.} at § 1522(a)(6).
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} at § 1522(a)(4)(B).
\textsuperscript{107} \textit{Id.} at § 1522(c).
\textsuperscript{108} Brief of Plaintiff-Appellee at 1, Exodus Refugee Immigration, Inc. \textit{v.} Pence, 838 F.3d 902 (7th Cir. 2016) (No. 16-1509); \textit{see infra} Part V.
\textsuperscript{109} \textit{8 U.S.C.} § 1522(a)(6).
\textsuperscript{110} \textit{Id.} at § 1522(e)(7); 45 C.F.R. § 400.69.
\textsuperscript{111} 89 NO. 33 Interpreter Releases 1645, 1646 n.39.
agencies, rather than distributing the funds through the non-participating state. 112

In defining the ways in which a state may or may not participate in the federal refugee resettlement program, Congress specifically described the state’s role as “consultative.” The Act states: “The Director, together with the Coordinator, shall consult regularly 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.” 113 Thus, as is clearly stated, Congress delegated only a consultative role to states that participate in the program. 114

Congress’s intent in assigning such a role to the States was made even clearer by the 1982 Senate Report addressing the Act and its implementation at that time. 115 Soon after passage of the Act, State and local government officials criticized the federal government’s failure to consult them about refugee placement decisions. 116 While the Report acknowledged the shortcomings of communications at that time, the Report referred to meetings between state and federal government officials merely as a “free exchange of views.” 117 The Report made clear, once again, that the state was to consult, not make decisions about the program and its implementation.

112 8 U.S.C. § 1522(e)(7); Brief for American Jewish Committee as Amicus Curiae Supporting Appellees at 7, Exodus Refugee Immigration, Inc. v. Pence, 838 F.3d 902 (7th Cir. 2016) (No. 16-1509).
114 Id.; Brief for American Jewish Committee, supra note 112, at 19.
116 Id.
117 Id.
Refugees seeking entry to the United States undergo a scrutinizing vetting process prior to entry.\textsuperscript{118} Federal agencies exclusively facilitate this process.\textsuperscript{119} The United States’ process and vetting procedures are divided into seven steps: registration and data collection, initial security checks, Department of Homeland Security (DHS) interview, biometric security check, cultural orientation and medical check, assignment to domestic resettlement locations and travel to the United States.\textsuperscript{120}

First, the United Nations High Commissioner for Refugees (UNHCR) collects applications for resettlement and other initial documentation.\textsuperscript{121} Then, the UNHCR refers refugees in need of protection to the United States and other countries.\textsuperscript{122} Refugee information of those referred to the United States is then transferred to a Resettlement Support Center (RSC), a division of the State Department.\textsuperscript{123} The RSC conducts in-depth interviews of each applicant, and the refugee’s information is entered into the State Department’s Worldwide Refugee Admission Processing System (WRAPS), which cross-references and verifies all information received throughout the application process.\textsuperscript{124} Thereafter, all applicant information is sent to other federal agencies for background checks.\textsuperscript{125}


\textsuperscript{120} THE REFUGEE PROCESSING AND SCREENING SYSTEM, supra note 118, at 1–7.

\textsuperscript{121} Id. at 1.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} Id.
Second, the refugee applicant goes through initial security checks by United States national security agencies, including the National Counterterrorism Center, Federal Bureau of Investigation (FBI), DHS, Department of Defense (DOD), State Department and the intelligence community.\textsuperscript{126} Those agencies receive background information from an RSC and screen applicants for security threats.\textsuperscript{127}

Third, those results are sent to the DHS and State Department.\textsuperscript{128} Subsequently, DHS officers trained in refugee vetting review the screening results and conduct in-person interviews of refugees that may be resettled in the United States.\textsuperscript{129} DHS officers collect biometric data, confirm prior information collection, enter new information into WRAPS and conduct ongoing security checks based on any additional information collected throughout the process.\textsuperscript{130} After the DHS officer completes all interviews and security checks, the DHS decides whether the refugee’s application process will continue.\textsuperscript{131}

Fourth, refugee applicants are fingerprinted, and their fingerprints are screened against several federal agency databases, including FBI, DHS, and DOD databases.\textsuperscript{132} Fifth, refugee applicants complete a cultural orientation designed to teach refugees American culture and customs.\textsuperscript{133} At this stage, refugee applicants must also undergo medical screenings to ensure that they do not transmit any suspect diseases into the country.\textsuperscript{134}

Sixth, the RSC sends refugee applicant information to one of nine United States resettlement agencies to review and determine where each refugee is going to be resettled within the United States.\textsuperscript{135} Once placement is determined, the refugee applicant is notified and the

\textsuperscript{126} Id. at 2.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 3.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 3–4.
\textsuperscript{131} Id. at 3.
\textsuperscript{132} Id. at 4.
\textsuperscript{133} Id. at 5.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 6.
International Organization for Migration coordinates refugee travel accommodations.\textsuperscript{136} Still, prior to entry to the United States, refugees undergo Customs and Border Protection and Transportation Security Administration screening.\textsuperscript{137} Seventh, and lastly, refugees arrive in the United States and are welcomed by representatives of a resettlement agency.\textsuperscript{138}

Each of those nine resettlement agencies continue to provide various services to newly arrived refugees, and the agencies partner with local nonprofit refugee resettlement organizations that aid in the assimilation effort.\textsuperscript{139} Exodus Refugee Immigration, Inc. ("Exodus") is just one local refugee resettlement agency that participates in refugee resettlement work.\textsuperscript{140}

Clearly, Congress has established the most careful screening processes that refugees must undergo prior to resettlement in the United States. And even aside from the federal agencies already mentioned, other federal agencies have “broad responsibilities for separate functions and services” related to refugee resettlement in the United States.\textsuperscript{141} For instance, the Department of Health and Human Services handles employment and social services concerns related to refugee resettlement.\textsuperscript{142} Moreover, the Immigration and Naturalization Service is responsible for issues related to legal status, conferral of

\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 7; \textit{Voluntary Agencies, OFFICE OF REFUGEE RESETTLEMENT} (July 17, 2012), https://www.acf.hhs.gov/orr/resource/voluntary-agencies (naming as the nine not for profit resettlement agencies: Church World Service, Ethiopian Community Development Council, Episcopal Migration Ministries, Hebrew Immigrant Aid Society, International Rescue Committee, US Committee for Refugees and Immigrants, Lutheran Immigration and Refugee Services, United States Conference of Catholic Bishops and World Relief Corporation).
\textsuperscript{140} \textit{About Us, EXODUS REFUGEE IMMIGRATION}, https://exodusrefugee.org/aboutus.html (last visited April 3, 2017).
\textsuperscript{141} Fredriksson, \textit{supra} note 119, at 758–59.
\textsuperscript{142} \textit{Id.}
citizenship and immigration benefits.\textsuperscript{143} In addition, the Department of Labor concentrates on labor migration issues related to refugee resettlement.\textsuperscript{144} The list goes on and on.\textsuperscript{145} But, if one thing is certain, it is that Congress has created a system for refugee resettlement entirely controlled and facilitated by the federal government, as it is a matter of foreign affairs and international relations.\textsuperscript{146}

\textit{EXODUS REFUGEE IMMIGRATION, INC. v. PENCE}

\textbf{A. Factual Background}

On November 16, 2015, former Governor of Indiana and current Vice President Mike Pence issued a state directive, mandating all state agencies to suspend resettlement of Syrian refugees. Pence stated:

\begin{quote}
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.\textsuperscript{147}
\end{quote}

\begin{flushright}
\textsuperscript{143}\textit{Id.}\textsuperscript{144} \textit{Id.}\textsuperscript{145} \textit{Id. at 758.}\textsuperscript{146} Brief for American Jewish Committee, supra note 112, at 13; see also Zschernig v. Miller, 389 U.S. 429, 436 (1968).\textsuperscript{147} Complaint at 19, Exodus Refugee Immigration, Inc. v. Pence, no. 1:15-cv-01858 TWP-DKL, (S.D. Ind. Nov. 23, 2015), 2015 WL 7567921.
\end{flushright}

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Consequently, a family of Syrian refugees scheduled to arrive in Indiana that same day was diverted to resettle in Connecticut.\textsuperscript{148} As a result of the Pence’s directive, state agencies refused to assist Syrian refugees resettle within the state.\textsuperscript{149} One such state agency was the Family and Social Services Administration, which is the Indiana agency that receives and disburses refugee resettlement monies from the federal government to nonprofit agencies under contract with the state.\textsuperscript{150}

As mentioned in Part III, \textit{infra}, Indiana elected to participate in the federal refugee resettlement program by submitting a state plan to the Director of the ORR.\textsuperscript{151} Indiana’s plan was approved, as it complied with the Act’s requirements.\textsuperscript{152} As such, the state received grants from the federal government to spend on refugee assistance in accordance with its plan.\textsuperscript{153} Even further, under its plan, the state received grant money from the federal government to disburse to local resettlement agencies that it contracted with to provide assistance to newly arrived refugees.\textsuperscript{154} Exodus is one of three local resettlement agencies under contract with the state.\textsuperscript{155} Consequently, under Pence’s directive, Exodus was not reimbursed by the state for monies spent on its resettlement efforts.\textsuperscript{156} However, Exodus continued to receive assignments from the federal government to resettle Syrian refugees within the state.\textsuperscript{157} Thus, Exodus continued to expend money, time and other resources to resettle the incoming Syrian refugees.\textsuperscript{158} Yet, it was

\textsuperscript{148} \textit{Id.} at 52.
\textsuperscript{149} Brief for American Jewish Committee, \textit{supra} note 112, at 13.
\textsuperscript{151} Brief of Plaintiff-Appellee, \textit{supra} note 108, at 1.
\textsuperscript{152} \textit{Id.}; 8 U.S.C. § 1522(a)(6)(A)(B) (providing state plan requirements for approval).
\textsuperscript{153} Brief of Plaintiff-Appellee, \textit{supra} note 108, at 1.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 12.
\textsuperscript{157} Brief for American Jewish Committee, \textit{supra} note 112, at 13.
\textsuperscript{158} \textit{Id.}
also forced to expend additional money, time and resources to make up for the funds cut off by state following Pence’s directive.\textsuperscript{159}

Consequently, on November 23, 2015, Exodus filed a Complaint for Declaratory and Injunctive Relief against Mike Pence, in his official capacity as Governor of the State of Indiana, and John Wernert, M.D., in his official capacity as the Secretary of the Indiana Family and Social Services Administration.\textsuperscript{160} Exodus’s Complaint alleged that it was entitled to injunctive relief.\textsuperscript{161} In particular, Exodus argued that the denial of constitutional rights was irreparable harm by itself.\textsuperscript{162} In the alternative, it argued that Pence’s actions caused Exodus irreparable harm by impeding its ability to serve the Syrian refugee community.\textsuperscript{163} Further, Exodus’s harm was significant in comparison to the state’s harm in disbursing federal funds it was not entitled to withhold, and therefore, the balance of harms weighed in Exodus’s favor.\textsuperscript{164} Finally, the public interest would be served by defending against violations of the Constitution, federal law and immigration policy.\textsuperscript{165} The district court agreed, and granted Exodus’s motion for preliminary injunction.\textsuperscript{166}

\textsuperscript{159}Id.
\textsuperscript{161}Memorandum in Support of Motion for Preliminary Injunction, supra note 150, at Introduction.
\textsuperscript{162}Id. at Part II(A) (referencing Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 578 (6th Cir. 2002)).
\textsuperscript{163}Memorandum in Support of Motion for Preliminary Injunction, supra note 150, at Part II(A).
\textsuperscript{164}Id. at Part II(B).
\textsuperscript{165}Id. at Part II(C).
B. The Seventh Circuit’s Decision

Accordingly, Pence appealed the district court’s decision to the Seventh Circuit Court of Appeals.167 The Seventh Circuit affirmed the district court’s decision.168 However, the Seventh Circuit’s analysis only directly concentrated on the Equal Protection Clause and Title VI arguments, despite the overwhelmingly important preemption issues present in the matter. In so limiting its analysis, the court missed important opportunities to delve into timely concepts of federalism, to clarify, or remind, important state and federal actors of their respective roles in this complex regulatory scheme, and to foreshadow for Congress the policies instituted by the Trump administration.

The Seventh Circuit’s opinion begins with an acknowledgment that the “regulation of immigration to the United States, including by refugees . . . is a federal responsibility codified in the Immigration and Nationality Act, 8 U.S.C. §§ 1101 et seq.”169 Further, the opinion alludes to the state’s role as a consultant to the federal government with regard to the federal refugee resettlement program.170 Yet, these are the only instances in which the court somewhat directly recognized the significant preemption issues at play in the case. Instead, the court’s short opinion focused more on the factual circumstances of the matter, the refugee vetting and resettlement process and on an Equal Protection and Title VI analysis.

With regard to the Equal Protection and Title VI claims, Pence contended that the directive did not announce a policy of excluding Syrian refugees from the State of Indiana on the basis of their national origin; rather, Pence asserted the policy was based on the threat Syrian refugees pose to the safety of Indiana residents.171 The Court rightfully mocked this argument and explained that the policy instituted by the

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167 Brief of Defendant-Appellant at 1, Exodus Refugee Immigration, Inc. v. Pence, 838 F.3d 902 (7th Cir. 2016) (No. 16-1509).
168 Exodus Refugee Immigration, Inc. v. Pence, 838 F.3d 902, 905 (7th Cir. 2016).
169 Id. at 903.
170 Id. at 904.
171 Id.
directive discriminated against Syrian refugees because they are Syrian.\textsuperscript{172}

Consequently, though, the court applied strict scrutiny, as it found the directive discriminated against Syrian refugees on the basis of national origin, and analyzed whether Pence’s directive was narrowly tailored to achieve a compelling government interest.\textsuperscript{173} Pence asserted that Indiana had a compelling interest in “protecting its residents from the well-documented threat of terrorists posing as refugees to gain entry into Western Countries.”\textsuperscript{174} The court rightfully, again, expressed its confusion and disagreement with this argument.\textsuperscript{175} It explained that neither Pence nor public sources provided evidence of such a threat even existing.\textsuperscript{176} Thus, the court determined that the asserted state interest was not compelling or narrowly tailored.\textsuperscript{177} Because Pence’s directive failed on both Equal Protection and Title VI grounds, the court affirmed the lower court’s decision.\textsuperscript{178}

Notwithstanding the fact that the court’s reasoning and ultimate conclusion were correct, the court’s opinion was simply incomplete. The court cited to the Act’s implementation provision, which bars participating states from aiding refugees on the basis of, among other things, national origin.\textsuperscript{179} But, the court never directly stated that the directive was conflict preempted on that basis, failing to address head on the critical preemption issues at stake. Specifically, the court missed the vital opportunity to address the ways in which Pence’s directive was both conflict preempted by established federal law and field preempted by the federal government’s exclusive occupation over foreign relations and international affairs. Had the court more directly analyzed the preemption doctrine in conjunction with the Act, Congress might have had notice of its opportunity to reconsider the

\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 905.
\textsuperscript{179} 8 U.S.C. § 1522(a)(5).
way in which power is distributed among the states and throughout the federal government under the Act.

**Pence’s Directive was Conflict and Field Preempted by Federal Law**

**A. Pence’s Directive was Conflict Preempted**

Pence’s directive conflicted with federal law and was therefore preempted. First, Pence’s directive discriminated against refugees on the basis of nationality in conflict with the Act and its implementation regulations. The Act specifically states that “[a]ssistance and services funded under this section shall be provided to refugees without regard to race, religion, nationality, sex, or political opinion.” Moreover, the Act mandates that participating states implement approved plans in the same manner – “without regard to race, religion, nationality, sex, or political opinion.”

Pence’s directive directly violated these portions of the Act. Pence’s directive outright withheld federal funds based on nationality. As recognized by the Seventh Circuit’s opinion, refugees entering the United States from Syria are considered Syrian nationals. Therefore, by refusing to disburse federal funding to Exodus for its efforts to resettle Syrian refugees, Pence’s directive conflicted with both provisions of the Act.

Second, Pence’s directive implemented its own screening procedures based on unverified security threats in conflict with the national government’s vetting procedures. Pence’s directive is analogous to the state laws in *Garamendi* and *Arizona*, as the directive implemented its own vetting procedures that interfered with established federal policy. As noted, and derided by the Seventh Circuit, Pence failed to cite any evidence suggesting that Syrian

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180 Brief for American Jewish Committee *supra* note 112, at 14.
182 45 C.F.R. § 400.5(g).
183 *Exodus Refugee Immigration, Inc.*, 838 F.3d at 903.
184 Brief for American Jewish Committee, *supra* note 112, at 17.
refugees posed a security threat to the residents of Indiana. In fact, available evidence suggested otherwise. The former United States Secretaries of Homeland Security, former Commissioner of the United States Immigration and Naturalization Service and former United States Ambassador to Afghanistan, Pakistan, Iraq, Syria, Kuwait and Lebanon all attested to the country’s stringent vetting processes in light of concerns related to admission of Syrian refugees. As described in detail infra Part IV, the Act established scrutinizing procedures for refugee admission. Because Pence’s directive established a vetting procedure specific to Indiana, the directive conflicted with federal law.

Third, the directive conflicted with Congress’s conferral of power to the Executive Branch to determine the number of refugees, and in particular, Syrian refugees who may enter the country. As noted in Part III, infra, and whether proper or not, Congress conferred power to the Executive to determine the number of refugees that the country admits each fiscal year. The President’s determination is based on various considerations, but the number is meant to focus on humanitarian concerns and the national interest. As such, and in light of those concerns, President Obama determined that during fiscal year 2016, up to 85,000 refugees would be admitted to the United States with at least 10,000 of those admitted being Syrian refugees. Because Pence’s directive attempted to effectively block Syrian refugees from resettling in Indiana, it directly conflicted with the President’s authority under the Act.

Finally, the directive conflicted with the federal government’s placement of refugees within the State of Indiana and its process for determining refugee placement. As described in Part IV, infra, the federal government established procedures for determining where

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185 Brief of Plaintiff-Appellee, supra note 108, at 8–9.
186 Brief for American Jewish Committee, supra note 112, at 18.
188 Id. at § 1157(a)(2)(B).
189 Brief of Plaintiff-Appellee, supra note 108, at 3.
190 Brief for American Jewish Committee, supra note 112, at 19.
arriving refugees were to be placed within the United States. While each participating state consults with the ORR to determine whether refugees should be placed within the state, no state has authority to make that decision on its own. Rather, the state may merely make recommendations to the ORR in consultative meetings. Therefore, Pence’s directive directly conflicted with the Act’s procedures because it had the effect of blocking Syrian refugees from being placed within the State of Indiana.

Because Pence’s directive conflicted with the Act in each of the aforementioned ways, it was conflict preempted by federal law. Nevertheless, regardless of conflict preemption analysis, Pence’s directive was preempted by the federal government’s exclusive occupation of foreign affairs and international relations, including refugee resettlement, as discussed in the next section.

B. Pence’s Directive was Field Preempted

Pence’s directive was also field preempted because it interfered with the federal government’s primary authority over foreign relations and international affairs. “[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration . . . is made clear by the Constitution[,] was pointed out by authors of The Federalist in 1787, and has since been given continuous recognition by [the Supreme] Court.” Congress holds constitutional authority to regulate dealings with other nations in its war and foreign commerce power and the President has a “degree of independent authority to act” in foreign affairs.

As such, Congress used its authority to create a comprehensive regulatory scheme for refugee resettlement and conferred broad power...

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191 The Refugee Processing and Screening System, supra note 118, at 6.
193 Id.
194 Brief for American Jewish Committee, supra note 112, at 19.
to the Executive to handle the federal refugee resettlement program.\(^\text{197}\)

Certainly, the Act is a comprehensive regulatory scheme enacted by Congress with the purpose of regulating refugee policy across-the-board.\(^\text{198}\) In creating the Act, Congress demonstrated its intention – refugee resettlement is an area of foreign affairs in which the federal government is to exclusively occupy.\(^\text{199}\)

As noted by the Seventh Circuit, refugee resettlement policy falls squarely within the federal government’s purview over foreign affairs and international relations.\(^\text{200}\) In particular, Pence’s directive interfered with the federal government’s exclusive occupation of refugee resettlement policy because it undercut President Obama’s decision to admit at least 10,000 Syrian refugees during fiscal year 2016, as mention in Part VI(A) infra.\(^\text{201}\) In addition, Pence’s directive impermissibly interfered with the federal government’s creation of uniform laws to approach and develop relationships with foreign nations, in protection of American interests abroad.\(^\text{202}\)

Pence’s directive disrupted the uniformity of refugee resettlement policy.\(^\text{203}\) Power over foreign affairs and international relations, including refugee resettlement, was allocated to the federal government in the interest of creating uniform laws when dealing with foreign nations.\(^\text{204}\) “In our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.”\(^\text{205}\)

\(^\text{199}\) Exodus Refugee Immigration, Inc. v. Pence, 838 F.3d 902, 903 (7th Cir. 2016).
\(^\text{200}\) Id.
\(^\text{201}\) Brief of Plaintiff-Appellee, supra note 108, at 3.
\(^\text{202}\) Brief for American Jewish Committee, supra note 112, at 23.
\(^\text{203}\) Id.
Further, the federal government’s interests related to refugee resettlement override any state interest that may be at play; thus, there is no room for state action by Indiana or any other state. \(^{206}\) “One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” \(^{207}\) Past occurrences demonstrate that “international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.” \(^{208}\)

In deciding to admit up to 10,000 Syrian refugees in fiscal year 2016, President Obama was encouraging American allies to follow suit and aid the Syrian refugee effort. \(^{209}\) Pence’s directive disrupted that effort and impermissibly interfered with the nation’s ability to speak with “one voice” \(^{210}\) to foreign nations by instituting its own policy of ousting, rather than admitting, Syrian refugees. Therefore, Pence’s directive interfered with the federal government’s exclusive occupation of refugee resettlement policy and was preempted.

**CONGRESS SHOULD CONSIDER AMENDING THE REFUGEE ACT IN LIGHT OF CURRENT POLITICAL CIRCUMSTANCES**

As discussed above, the federal government occupies the field of refugee resettlement for vital reasons related to the country’s foreign relations and international affairs. But, in light of that importance, Congress arguably divested too much power in the President alone. \(^{211}\) While Congress, numerous federal agencies and even the states are involved in the refugee resettlement program, the President has almost

\(^{206}\) Id. at 233; Zschernig v. Miller, 389 U.S. 429, 436 (1968).
\(^{207}\) Hines v. Davidowitz, 312 U.S. 52, 64 (1941).
\(^{208}\) Id.
\(^{209}\) Brief for American Jewish Committee, supra note 112, at 24–26.
unfettered discretion to determine the number of refugees admitted each fiscal year. 212

When the Act was initially created, humanitarian concern and national interests were the sole, important factors in determining the number of refugees admitted to the United States each fiscal year. 213 However, now, unverified security concerns and religious bias are being masked as national interests, and have become the sole factors in determining the number of refugees admitted to the United States. 214

On January 27, 2017, just a week after his inauguration, President Trump issued an executive order, limiting the number of refugees to be admitted to the United States in fiscal year 2017 to less than 50,000. 215 By way of context, during fiscal year 2016, 84,994 refugees were admitted to the United States. 216 Even more alarming, and similar to Pence’s directive, President Trump issued two executive orders attempting to ban refugees from seven Muslim-majority countries, including Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen from resettling in the United States. 217

While an amendment to the Act would not totally retract the President’s constitutional authority over international affairs, the President’s power specifically over the arena of refugee resettlement would better defined and controlled, just like Congress’s conferral of power to the Executive in Crosby. Even further, while an amendment to the Act may not have altered President Trump’s ability to issue the

213 Lunn, supra note 91, at 838.
aforementioned executive orders, an amendment to the Act redistributing power over refugee resettlement would certainly alter the President’s ability to have the only and final say over refugee resettlement in the United States.

Pence’s directive and President Trump’s executive orders are just the beginning of an ever-growing problem. Therefore, Congress should consider amending the Act to ensure that the Act’s original purposes, humanitarian concern and actual national interests, are upheld.

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218 Washington v. Trump, 847 F.3d 1151, 1161 (9th Cir. 2017) (stating that the courts owe substantial deference to the President’s foreign relations determinations, but that it is the judiciary’s role to interpret the law, resolving any allegations that the President has acted unconstitutionally).

219 Id. (stating that the President does not have unreviewable authority to make decisions related to foreign relations) (emphasis added).