STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

November 30, 2015

Opinion No. 15-77

Authority of the State of Tennessee to Refuse Resettlement of Refugees

Question 1

May the legislative branch or the executive branch of the State of Tennessee refuse to accept for resettlement within the State individuals whom the federal government has processed and admitted to the United States as refugees?

Opinion 1

No. Such a refusal would impinge on and conflict with the federal government's authority to regulate the admission of aliens to the United States and thus would violate the Supremacy Clause of the U.S. Constitution.

Question 2

May such a refusal be based solely on the individual's country of origin?

Opinion 2

Because the answer to Question 1 is no, this question is rendered moot and requires no separate response.

Question 3

May such a refusal be based solely on the individual's religion?

Opinion 3

Because the answer to Question 1 is no, this question is rendered moot and requires no separate response.

ANALYSIS

You have asked in essence whether the State of Tennessee has authority to refuse to accept for resettlement within the State individuals whom the federal government has processed and admitted to the United States as refugees. To provide context for our legal analysis in response to that question, we begin with a description of the federal regulatory scheme governing the

admission and placement of refugees in the United States and applicable Tennessee law concerning refugees.

I. Federal Law Governing the Admission of Refugees

Federal law defines "refugee" to mean, generally, "any person who is outside any country of such person's nationality . . . 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." 8 U.S.C. § 1101(a)(42)(A). The admission and resettlement of refugees in the United States is governed by the federal Immigration and Nationality Act, as amended by the Refugee Act of 1980. *See generally* 8 U.S.C. §§ 1157, 1521-1524.

The President is responsible for determining the total number of refugees that will be admitted to the United States each year and for allocating that number among specific regions of "special humanitarian concern." *See* 8 U.S.C. § 1157(a)(2)-(3).[1] Subject to those numerical limitations, the U.S. Citizenship and Immigration Services within the Department of Homeland Security processes applications for refugee status and determines whether to admit an individual to the United States as a refugee. *See id.* § 1157(c)(1); 8 C.F.R. pt. 207.

The Director of the Office of Refugee Resettlement within the Department of Health and Human Services, or another officer that the President designates, has authority to "make grants to, and contracts with, public or private nonprofit agencies for initial resettlement (including initial reception and placement with sponsors) of refugees in the United States." 8 U.S.C. § 1522(b)(1)(A); *see also id.* § 1522(b)(1)(B) (allowing the President to designate another officer to exercise such authority). Pursuant to this grant of authority, the Department of State's Bureau of Population, Refugees, and Migration has entered into cooperative agreements with nine national voluntary agencies to resettle refugees. The Bureau assigns each admitted refugee to one of the nine resettlement agencies. The agency then decides where in the United States the refugee will be placed, subject to final approval from the Bureau. *See* U.S. Gov't Accountability Office, GAO-12-729, Refugee Resettlement: Greater Consultation with Community Stakeholders Could Strengthen Program 4-5, 7 (2012) (hereinafter "Refugee Resettlement"); *see also* U.S. Dep't of State, The Reception and Placement Program, *available at* http://www.state.gov/j/prm/ra/receptionplacement/index.htm (last visited Nov. 30, 2015).

Both the Director of the Office of Refugee Resettlement and the Bureau are required to "consult regularly (not less often than quarterly) with State and local governments and private nonprofit voluntary agencies concerning the sponsorship process and the intended distribution of refugees among the States and localities before their placement in those States and localities." 8 U.S.C. § 1522(a)(2)(A). The Director is further charged with "develop[ing] and implement[ing], in consultation with representatives of voluntary agencies and State and local governments, policies and strategies for the placement and resettlement of refugees within the United States." *Id.* § 1522(a)(2)(B). Such policies and strategies must

[1] The President may increase the number of refugees to be admitted in a given year if he determines that an "unforeseen refugee situation exists" and certain other conditions are met. 8 U.S.C. § 1157(b).

> (i) insure that a refugee is not initially placed or resettled in an area highly impacted (as determined under regulations prescribed by the Director after consultation with such agencies and governments) by the presence of refugees or comparable populations unless the refugee has a spouse, parent, sibling, son, or daughter residing in that area,
>
> (ii) provide for a mechanism whereby representatives of local affiliates of voluntary agencies regularly (not less often than quarterly) 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, and
>
> (iii) 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 . . . 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). And Congress has also instructed that, "[w]ith respect to the location of placement of refugees within a State," the Bureau "shall, consistent with such policies and strategies and to the maximum extent possible, take into account recommendations of the State." *Id.* § 1522(a)(2)(D).

The Office of Refugee Resettlement makes federal funds available to states to support the resettlement of refugees within their borders. *See* 8 U.S.C. §1522; 45 C.F.R. pt. 400. The State of Tennessee previously received these funds and administered Tennessee's refugee resettlement program directly, but the State withdrew from the grant program in 2008. *See* 2011 Tenn. Pub. Acts, ch. 316, pmbl. Federal funds now flow to refugees in Tennessee through an alternative federal grant program that is administered by Catholic Charities rather than directly by the State. *See id.*; 8 U.S.C. §1522(e)(7); 45 C.F.R. § 400.69.

II. Tennessee Law Concerning Refugees

In 2011, the Tennessee General Assembly enacted the Refugee Absorptive Capacity Act. *See* 2011 Tenn. Pub. Acts, ch. 316. Among other things, the Act requires Tennessee's office of refugees, which is currently run by Catholic Charities, to coordinate with local governments regarding the placement of refugees in advance of the refugees' arrival. *See* Tenn. Code Ann. § 4-38-103. The Act also allows the legislative body of a local government to adopt a resolution "request[ing] a moratorium on new refugee resettlement activities" by "documenting that the host community lacks absorptive capacity and that further resettlement of refugees in the host community would result in an adverse impact to existing residents." *Id.* § 4-38-104(a).[2] Any such request is forwarded to Tennessee's office of refugees, which may then forward the request to the U.S. Department of State. *Id.* § 4-38-104(b). The U.S. Department of State "may thereafter suspend additional resettlement of refugees in that community, until the state refugee coordinator and the local government have jointly determined that absorptive capacity for refugee resettlement exists to implement any further refugee resettlement activities in the host community." *Id.* § 4-38-104(c).

III. Legal Analysis

Question 1. The first question is whether the legislative branch or the executive branch of the State of Tennessee may refuse to accept for resettlement in the State individuals whom the federal government has processed and admitted to the United States as refugees. For the reasons explained below, it is our opinion that such a refusal would impinge on and conflict with the federal government's authority to regulate the admission of aliens to the United States and thus would violate the Supremacy Clause of the U.S. Constitution.

The Supremacy Clause of the U.S. Constitution "provides a clear rule that federal law '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." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (quoting U.S. Const. art. VI, cl. 2). It follows from this clear rule that "Congress has the power to preempt state law." *Id.* There are three kinds of preemption: express preemption, field preemption, and conflict preemption. *See id.* at 2501. As relevant here, field preemption occurs when Congress has determined to exercise exclusive authority and "displace state law altogether" in a particular field. *Id.* at 2501. Conflict preemption, as the name suggests, occurs when state law "conflict[s] with federal law." *Id.* at 2501.

It is the opinion of this Office that the State of Tennessee is precluded under principles of both field preemption and conflict preemption from refusing to allow refugees to resettle within the State's borders. While the U.S. Supreme Court has "never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted," *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), it has found field preemption with respect to certain

[2] A community's "absorptive capacity" is determined by evaluating factors such as the availability of affordable or housing, the capacity of local schools, and the ability of the local economy to absorb new workers. *See* Tenn. Code Ann. § 4-38-102(1).

core areas of immigration law. *See Arizona*, 132 S. Ct. at 2502 (concluding that "the Federal Government has occupied the field of alien registration"); *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (holding that "where the federal government, in the exercise of its superior authority in this field, has enacted . . . 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"). In *DeCanas*, the Court stated that the "[p]ower to regulate immigration," which it described as the power to "determin[e] who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," is "unquestionably exclusively a federal power." 424 U.S. at 354-55; *see also Arizona*, 132 S. Ct. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Toll v. Moreno*, 458 U.S. 1, 11 (1982) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States . . . ." (internal quotation marks omitted)); *Hines*, 312 U.S. at 62 (recognizing "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation").[3] That means that only the federal government has the authority to decide which aliens should be admitted to the United States as refugees. Such determinations are binding on the State of Tennessee, and the State is precluded from adopting its own policy regarding which aliens are entitled to be present within its borders. *See Arizona*, 132 S. Ct. at 2502 ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

Principles of conflict preemption also preclude the State of Tennessee from refusing to allow refugees to resettle within the State. Such a refusal would essentially deem inadmissible to Tennessee individuals whom the federal government—specifically the Department of Homeland Security—has already determined are entitled to refugee status and admission to the United States. Indeed, if every State decided to refuse the resettlement of refugees within its borders, the federal government's decision to grant an alien refugee status would be without effect. The State's determination would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and therefore would be preempted. *Hines*, 312 U.S. at 67; *see also Arizona*, 132 S. Ct. at 2514 (Scalia, J., concurring in part and dissenting in part) (accepting "as a given that State regulation [of immigration] is excluded by the Constitution when . . . it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit").

A similar analysis applies if the refusal to allow refugees to resettle in the State is viewed as a policy regarding the initial placement of refugees, rather than a policy regarding their admissibility. As explained above, the federal government, in coordination with the nine voluntary resettlement agencies with whom it contracts, determines the initial placement of refugees in the United States. While states are entitled to be consulted about the federal government's placement decisions, *see* 8 U.S.C. § 1522(a)(2)(A)-(D), they are not given veto authority. If the federal

[3] The federal government's authority over "the subject of immigration and the status of aliens" stems in part from its "inherent power as a sovereign to control and conduct relations with foreign nations." *Arizona*, 132 S. Ct. at 2498. As the U.S. Supreme Court has explained, "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Id.*

government determines that refugees should be placed in Tennessee, principles of conflict preemption preclude the State from adopting a contrary policy.

It bears noting that, while the State of Tennessee must respect the federal government's determination that particular aliens are entitled to refugee status and admission to the United States, the State is not precluded from communicating with the federal government about concerns relating to the placement of refugees within the State. Federal law specifically requires the agencies that are responsible for refugee resettlement to consult with State and local governments concerning "the intended distribution of refugees among the States and localities before their placement in those States and localities." 8 U.S.C. § 1522(a)(2)(A); *see also id.* § 1522(a)(2)(B). And those agencies are required, to the extent possible, to "take into account recommendations of the State." *Id.* § 1522(a)(2)(D). Tennessee law, too, recognizes the importance of communication between the State and the federal government; it establishes a process for Tennessee's office of refugees to request a moratorium from the federal government on refugee resettlement in localities that lack "absorptive capacity." *See* Tenn. Code Ann. § 4-38-104.

Question 2. The second question is whether the State may refuse to admit refugees based solely on their country of origin. No separate response to this question is required because our conclusion that the State may not refuse to admit refugees as a general matter renders this second question moot.

Question 3. The third question is whether the State may refuse to admit refugees based solely on their religion. No separate response to this question is required because our conclusion that the State may not refuse to admit refugees as a general matter renders this third question moot.

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