

No. 19-1031

IN THE

Supreme Court of the United States

ERIN CAPRON; JEFFREY PENEDO;
CULTURAL CARE, INC., d/b/a CULTURAL CARE AU PAIR,
Petitioners,

v.

OFFICE OF THE ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS;
MAURA T. HEALEY, in her capacity as Attorney Gen-
eral of the Commonwealth of Massachusetts,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF OF CURRENT AND FORMER
AU PAIRS AS *AMICI CURIAE* IN SUPPORT
OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici are current and former participants in the federal au pair exchange program: Maria Arano Toral, Desirè Del Chiaro, Ziyanda “Zee” Mdletshe, Lea Pitou, and Torben van Vliet. *Amici* come from countries around the world, and they have varied backgrounds and reasons for participating in the program. They include recent high-school graduates seeking to expand their horizons and experience the world, as well as advanced-degree recipients looking to deepen their cultural understanding and language fluency in pursuit of their careers. In their time in the United States, these au pairs have not only served as cultural ambassadors for their own countries—they have also become important members of the American families who host them. *Amici* speak of the au pair program as their own personal American Dream.

Amici share one overriding interest: their firm belief that the federal au pair exchange program—as it has operated under exclusive federal governance for decades—is a deeply meaningful program for global cultural exchange that strikes a fair, necessary, and carefully calibrated balance between cultural connection, education, family duty, and compensation. Interjecting a patchwork of state regulation would

¹ The parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution to fund the preparation or submission of the brief.

undermine and likely destroy the program as it is currently and always has been conceived.

INTRODUCTION AND SUMMARY OF ARGUMENT

The au pair program is a unique creation of federal immigration and foreign-affairs law, and it has long been governed exclusively by those laws. The First Circuit's decision in this case threatens to upend this federal program by permitting states and localities to impose their own requirements on participation. In doing so, the First Circuit decided an important and sensitive question of federal law and introduced state-by-state disuniformity into a program intended to provide uniform access and benefits. Certiorari should be granted to address this important question and restore nationwide standards.

Already, friends and colleagues of *amici* have been faced with an intolerable choice. They agreed to participate in the program under terms designed by federal statutes and regulations. With that understanding, they uprooted their lives and embarked on an adventure in a country known worldwide as a land of opportunity for newcomers and entrepreneurs. Now, the Commonwealth of Massachusetts has unilaterally attempted to change the terms governing these au pairs' participation in the program, substantially increasing the financial and administrative burdens on host families. For those au pairs whose families cannot accommodate or afford the new requirements, au pairs must choose whether to seek out a new host family capable of meeting these new burdens or else face early return to their home country.

In such cases, the United States has not upheld its end of the bargain it struck with au pairs—and au pairs face the very real possibility of losing out on the opportunity they traveled across the world to pursue.

As explained in the stories that follow, *amici* are enterprising young women and men pursuing dreams that are familiar to any American. In telling their stories, *amici* hope to convey the unique character of the exchange program, its impact on their lives as global citizens and on the lives of their American hosts, and the urgent need for this Court’s review.

ARGUMENT

I. THE AU PAIR PROGRAM STRIKES A CAREFULLY CALIBRATED BALANCE OF CHILDCARE, EDUCATION, CULTURAL EXCHANGE, AND COMPENSATION AT THE NATIONAL LEVEL

A. The au pair program is an important initiative of federal foreign-affairs and immigration law. It provides a rich educational and cultural exchange program, and it does so by relying on uniform nationwide rules. The First Circuit’s decision threatens to fatally disrupt that scheme by injecting incoherence and uncertainty.

Congress enacted the Fulbright-Hays Act “to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange.” 22 U.S.C. § 2451. The Act authorized the United States

Information Agency (USIA)—subsumed by the United States Department of State in 1999—to provide for “educational exchanges . . . between the United States and other countries of students, trainees, teachers, instructors, and professors.” 22 U.S.C. § 2452(a)(1)(B)(ii). The au pair program is one of several exchange programs established by USIA and now administered by the State Department.

For more than 30 years, the au pair program has furthered the goals of the Act by affording young foreign nationals “the opportunity to live with an American host family and participate directly in the home life of the host family.” 22 C.F.R. § 62.31(a). Au pairs provide up to 45 hours per week of child care for the host family, *see id.*, but the child-care component of the program, though central and important, is only one “limited” aspect of what is “primarily a cultural and educational exchange program.” 60 Fed. Reg. 8547, 8548 (1995). While some exchange programs established under the Act focus on the educational benefits of having foreign nationals teach in American schools or serve as camp counselors, *see* 22 C.F.R. §§ 62.24, 62.30, the au pair program is premised primarily on the idea that “the family context provides a unique opportunity for the host family and au pair to learn about each other’s cultures and values.” 60 Fed. Reg. 8548. In this way, the program serves to “strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations.” 22 U.S.C. § 2451.

B. *Amici's* stories, gathered in interviews and presented below, illustrate and reaffirm the wisdom of this idea. At the core of each of these stories is a brave and enterprising adventurer who took the bold step of leaving behind the only country and family they had ever known to become part of an American family. These young people did not take this courageous step just for the opportunity to provide child care here, as significant as that part of the experience is. Rather, they sought an overarching and immersive cultural experience—the chance, as one put it, “to learn all I can about America, its people, and its culture.”

Maria Arano Toral is an au pair living with her host family in Winchester, Massachusetts. Originally from Mexico, Maria graduated with a degree in chemical engineering and a passion for travel. After school, she worked as a travel agent in her home country. Having been educated bilingually at a British school in Mexico, Maria began to consider graduate education in an English-speaking country. In the American au pair program, Maria saw an opportunity to polish her English skills—and thus qualify for English-language graduate programs—while exploring a new country and culture. As she describes it, the program was an opportunity she was not going to find in any kind of job available to her at home, and it presented a unique challenge that would help her grow as a person.

Maria considered au pair programs in a variety of regions but found that, compared to the U.S., other countries provide little to no oversight or regulation. As a result, au pairs must navigate those programs with a careful eye to their safety and security, given

the prevalence of fraud and even human trafficking. In the American program, Maria could be matched with a compatible host family through a formal matching process, which gave her confidence that she would have the support necessary to succeed.

Maria's host family has welcomed her as one of their own. They share meals, visit local museums together, and gossip about the latest celebrity news. Because Maria and her family love to cook, sharing homemade dishes has been one important way they have bonded and learned about each other's culture. The family has also encouraged Maria to take advantage of the program's educational component, and Maria is currently enrolled in a film-history class. That class has advanced Maria's academic and social goals for the au pair program by introducing her to the American education system and connecting her with local peers who share her interests.

To be sure, like many au pairs, Maria's experience has not been free of challenges. After her initial match did not work out, Maria relied on the sponsor organization to help her find her current placement where she could be a full and genuine part of the host family.

With her initial experience in the rear-view mirror, Maria understands the concerns about properly regulating and overseeing the au pair program. "We are not just workers: we are parts of the family, and we come here for a cultural-exchange experience." As she sees it, any program like this must evolve with the times and provide for the needs of its participants in a changing world. But the modest program-wide re-

forms Maria envisions—like ensuring that educational offerings are affordable in light of the au pairs’ budgets—will not come to pass if states are permitted to impose their own requirements in a way that renders the program accessible only to the most well-off families.

Ultimately, Maria believes that when the program works—by achieving an appropriate mix of childcare, education, and cultural connections—it is “so worth it.” “You grow as a human; you develop as a person. It makes you stronger. You believe in yourself.”

Desirè Del Chiaro, a 20-year-old au pair from Sicily, Italy, came to the U.S. looking to travel and fully immerse herself in American culture. “But I can’t do those things if I’m just a worker or student.” Desirè hoped for a meaningful “cultural experience” with an American family that would treat her as one of their own rather than “a domestic worker.” She reports that her current host family in Boston has exceeded her expectations. “My host mom is my mom, not my boss. She supports me, and I can tell her anything.” With her host family, Desirè has traveled throughout the United States to New York, Florida, Colorado, Michigan, San Francisco, Indiana, and Iowa. She learned how “not only the landscape but also the people, the food, and the traditions change from one state to another.”

In addition to soaking up the culture, Desirè has nearly mastered English. “When I came here,” she

says, “I couldn’t speak much English, but now I’m doing so well that I can keep up with my studies and communicate easily.” After completing English courses last year, Desirè now studies occupational and environmental health and psychology at Tufts University. When asked about the children she cares for—a 6-year-old boy and 8-year-old girl—Desirè says “they are my brother and sister. I’m not ready to leave them.” And the cultural exchange experience is not limited to American culture. Desirè reports that because of the program, she now has friends among her fellow au pairs from Germany, Brazil, China, Australia, Ecuador, and Colombia and understands “much more about their countries, traditions, language, and culture.”

Ziyanda “Zee” Mdletshe from Durban, South Africa, turned to the au pair program as a way to “experience a different culture” and merge her love of travel with her passion for children. The daughter of a university lecturer and independent businessman, Zee chose the United States because as a native English speaker, she would be able to focus on learning the culture without the added struggle of learning a new language. Her host mother, a single mom to a 6-year-old boy in Newburyport, Massachusetts, has gone “above and beyond” to make her feel at home. “I am not a worker; I am a family member. I’m included in all holidays and family gatherings.” Zee has enjoyed learning the “unique culture” of various states, including New Hampshire, Maine, Washington, D.C., Connecticut, and her favorite place, New Orleans, Louisiana. “New Orleans is beautiful; it has its own

culture. The people are so different than on the East Coast.” Zee is constantly amazed by the differences between the U.S. and her home in South Africa. “Everything is different here, and I’m learning so much about the food, people, and even smaller things like recycling, road rules, and way of life.”

To fulfill her education requirement, Zee’s host mom paid for her to travel to a course at the University of California at San Diego. “I learned so much about American history, politics, and cultural diversity.” Zee has no regrets about participating in the au pair program and says she will return to her home country a totally different person. “This experience means so much to me, especially coming from my background. I’m the first in my family to even leave South Africa. This opportunity means more than anything. It was never about a job. It was about experiencing a different culture, and being so far away from home but still feeling at home. This program is about the culture.”

Lea Pitou is a 22-year old aspiring graphic designer from Paris, France. After completing post-secondary studies in marketing and communications, Lea’s love of exploration and discovering new things attracted her to the au pair program. “It has always been my dream to go to America, and I love children and traveling, so the au pair program was a good fit.” Lea chose a family in Boston with two children, ages 4 years and 21 months. From the beginning, Lea’s host family has treated her as part of the family, making her comfortable enough to joke around and work

on her English. “They teach and correct my English, which is really funny sometimes.” Lea recently vacationed with her host family and is included in all family outings and events. While she enjoys learning about America, Lea takes special joy in sharing her culture with her host children. “I love seeing them grow up every day! I share my values and my culture with them.”

Lea is taking English classes to fulfill the educational requirement. “I would like to work in graphic design for an American company in France. I will need my English skills, so the education is important to me.” Lea believes that the program has been successful for her. “I’m so proud of myself for adapting. I did not come here to be just a worker; I wanted to be part of the family and the culture. And that’s what happened for me.”

Torben van Vliet is a 19-year-old au pair from northern Germany, now living with his host family in Cohasset, Massachusetts. Torben represents a milestone for the au pair exchange program: he is the second generation of his family to come to the United States through the program, encouraged by his aunt’s experience in the program’s early years.

After graduating from secondary school, Torben began to consider applying to be an au pair. He enjoys caring for children and had long been fascinated by American culture, dreaming that one day he would have the chance to live here. In just a few months, his family and classes have brought Torben around the

United States. He has studied public policy with other au pairs in Washington, D.C., and hit the ski slopes with his host family in Colorado. (He is pleased to report that the U.S. looks exactly like it does in the movies.)

Most importantly, Torben has fast become a member of the family. They share meals together, recount their days at work or school, and explore the outdoors—whether high up in the Rockies or in their own Bay State backyard. Beyond his host family, Torben has befriended a network of other local au pairs, which has provided support, camaraderie, and more opportunities to explore local cultural offerings.

As he finished high school, Torben faced a dilemma many of his American peers know all too well. Without the independent means to fund travel or unpaid internships, Torben looked for ways to broaden his horizons and explore career paths while supporting himself. For him, the au pair program has provided an opportunity to continue to learn and grow that he would not otherwise have been able to afford. In that way, the program has struck a positive and unique balance for Torben between education, family duties, and compensation. He notes that this balancing is important for the host families, as well, many of whom could not afford to participate under more burdensome requirements. Torben fears that the au pair program, which has opened new and exciting doors for him, will be closed to the next generation of au pairs if this delicate balance struck by federal law is undone.

II. STATES SHOULD NOT BE PERMITTED TO DISRUPT THE FEDERAL AU PAIR PROGRAM WITH THEIR OWN REQUIREMENTS

As *amici*'s stories demonstrate, the au pair exchange program is a genuine hybrid of childcare and learning, an economic and educational opportunity not easily aligned with our traditional notions of work and school. *Amici* unquestionably provide important child-care support to their hosts, but they also become integral parts of their American families. They share meals and vacations together, experience achievements and setbacks together, and live and learn together as all American families strive to do.

This is precisely what the Fulbright-Hays Act and the federal au pair program intended: to “increase[e] mutual understanding between Americans and others through people-to-people contact.” 60 Fed. Reg. 8547. With this goal in mind, the federal government has carefully weighed and established regulations that govern childcare hours, living conditions, training, education, and compensation. See 22 C.F.R. § 62.31. Under these balanced rules, the au pair program has flourished. Scores of au pairs like *amici* have experienced American culture and shared their unique cultures with their host families, in an exchange that greatly benefits everyone involved.

If allowed to stand, Massachusetts' attempt to impose its own regulations on the au pair program would undermine—and potentially destroy—the program. State-by-state regulation of the au pair program threatens the deliberate balance struck by the federal

government, emphasizing instead labor and compensation at the expense of the program’s core educational and cultural components. *Amici* fear the result would be a program that caters only to those families who can meet the increased financial and administrative burdens—or even no program at all in such states.

This Court has not hesitated to “invalidate[] the States’ attempts to second-guess the reasonableness of” federal regulations. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016). It should not hesitate to do so now, especially where, as here, the federal program relies on nationwide uniformity to achieve its extraordinarily worthy goals.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment below.

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