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 GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondents.

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

BRIEF IN OPPOSITION

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
ROBERT E. TOONE*
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
robert.toone@mass.gov
(617) 963-2178
**Counsel of Record*

QUESTION PRESENTED

Whether federal law preempts the application of state worker-protection laws to au pairs, where Congress did not intend to preempt such laws, no applicable federal law or regulation mentions preemption or exclusive remedies, the federal regulation on compensation of au pairs requires compliance with the expressly non-preemptive Fair Labor Standards Act, and as recently as 2015 the State Department publicly stated that au pair program sponsors must "comply with all other applicable federal, state, and local laws, including any state minimum wage requirements."

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

A. Legal and Regulatory Background 3

1. The Fulbright-Hays Act 3

2. Creation and criticism of the au pair program 3

3. USIA's 1995 and 1997 regulations 4

4. Permanent authorization and the State Department's 2014 regulations 6

5. Massachusetts's Domestic Workers and Fair Wage Laws 7

B. Procedural History 9

REASONS TO DENY THE WRIT 11

I. This Case Does Not Present a Split of Authority. 11

II. This Case Is an Improper Vehicle for Resolving Au Pair Sponsors' Complaint About Liability. 12

III. The First Circuit's Decision Is Correct and Consistent with This Court's Precedent. 14

A. In the Absence of Congressional Intent to Preempt, Petitioners' Policy Interests Are Insufficient to Preempt State Law. 15

Page

B. State Worker-Protection Laws Are Not Preempted Simply by Virtue of Protecting Participants in a Cultural Exchange Program. 18

C. The Applicable Federal Regulations Contemplate Complementary State Regulation. 21

D. The First Circuit Properly Rejected the State Department's Revised Views on Preemption. 26

CONCLUSION 32

Page

TABLE OF AUTHORITIES

Cases

Arizona v. United States,
567 U.S. 387 (2012)....................15, 17-19, 28-30

Baker v. Flint Eng'g & Constr. Co.,
137 F.3d 1436
(10th Cir. 1998)..13

Beltran v. InterExchange, Inc.,
176 F. Supp. 3d 1066
(D. Colo. 2016)..11-13

Beltran v. InterExchange, Inc.,
No. 14-cv-03074-CMA-KMT,
2018 WL 3729505
(D. Colo. Aug. 6, 2018) 12

Buckman Co. v. Plaintiffs' Legal
Committee, 531 U.S. 341 (2001) 20

Cal. Coastal Comm'n v.
Granite Rock Co.,
480 U.S. 572 (1987)....................................22-24

Christensen v. Harris County,
529 U.S. 576 (2000)..27

Crosby v. National Foreign Trade
Council, 530 U.S. 363 (2000) 28-29

De Canas v. Bica,
424 U.S. 351 (1976)...19

Exelon Generation Co., LLC v.
Local 15, Int'l Bhd. of Elec.
Workers, AFL-CIO,
676 F.3d 566 (7th Cir. 2012)...........................29

Page

Garcia v. San Anthonio Metro. Transit Auth., 469 U.S. 528 (1985) 26-27

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) 25

Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28 (1961) 5

Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707 (1985) 2, 21

Hines v. Davidowitz, 312 U.S. 52 (1941) 18

Kansas v. Garcia, 140 S. Ct. 791 (2020) 1-2, 15, 18, 20, 28

Kisor v. Wilkie, 139 S. Ct. 2400 (2019) 27

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 15

Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) 1, 21, 26

Oneok, Inc. v. Learjet, Inc., 575 U.S. 373 (2015) 18

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 15, 20, 23

United States v. Ortiz, 422 U.S. 891 (1975) 13

Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) 1, 15, 21, 28

Wyeth v. Levine, 555 U.S. 555 (2009) 20, 26

Page

Constitutional Provisions

U.S. Const., Art. I, § 8, cl. 3 9

U.S. Const. Art. VI, cl. 2 9

Statutes and Rules

5 U.S.C. §§ 701 *et seq.*
Administrative Procedure Act 27

8 U.S.C. § 101(a)(15)(J) 3

22 U.S.C. § 2451 *et seq.*
Mutual Educational and Cultural
Exchange Act of 1961
("Fulbright-Hays Act") 3-4, 9, 15, 17

22 U.S.C. § 2460(c) 16

29 U.S.C. § 201 *et seq.*
Fair Labor Standards Act of 1938 .... *passim*

29 U.S.C. § 206(a)(1) 22

29 U.S.C. § 218 9

29 U.S.C. § 218(a) 22-23

Pub. L. No. 87-256, 75 Stat. 527 (1961) 3

Pub. L. No. 100-461, 102 Stat. 2268 (1988) 4

Pub. L. No. 101-454, 104 Stat. 1063 (1990)
Eisenhower Exchange Fellowship
Program 4

Pub. L. No. 103-415, 108 Stat. 4299 (1994)
State Department: Technical
Amendments 4

Page

Pub. L. No. 104-72, 109 Stat. 776 (1995)
Au Pair Programs Extension....................5-6, 16

Pub. L. No. 105-48, 111 Stat. 1165 (1997)
Extension of Au Pair Programs........................6

Pub. L. No. 105-277, 112 Stat. 2681 (1998)
Foreign Affairs Reform and
Restructuring Act 3

Mass. Gen. Laws ch. 93A, § 4..............................13-14

Mass. Gen. Laws ch. 149, §§ 190-191
Massachusetts Domestic Workers'
Bill of Rights .... *passim*

Mass. Gen. Laws ch. 149, § 190(o) 8

Mass. Gen. Laws ch. 151
Massachusetts Fair Wage Law .... *passim*

Mass. Gen. Laws ch. 151, § 1 7

Mass. Gen. Laws ch. 151, § 1A...................................7

Mass. St. 1912, ch. 706 7

Mass. St. 2014, ch. 148, § 3 7

Regulations

22 C.F.R. §§ 62.1-62.32...22

22 C.F.R. § 62.9(c)...7

22 C.F.R. § 62.10(b)(9) 7, 22

22 C.F.R. § 62.11(a) 7, 22

22 C.F.R. § 62.31(j) .... *passim*

22 C.F.R. § 62.32(i)(1)...30

Page

22 C.F.R. § 62.60(f) 7

22 C.F.R. § 514.32(e) (1999, superseded).................30

940 Mass. Code Regs. § 32 8

940 Mass. Code Regs. § 32.02 ....8, 25

940 Mass. Code Regs. § 32.03(1) 8

940 Mass. Code Regs. § 32.03(2) 8, 25

940 Mass. Code Regs. § 32.03(5) 8

940 Mass. Code Regs. § 32.03(6) 8

940 Mass. Code Regs. § 32.04(2) 8

940 Mass. Code Regs. § 32.04(4) 8

940 Mass. Code Regs. § 32.04(7) 8

940 Mass. Code Regs. § 32.05(2) 8

Other Authorities

Exchange Visitor Program,
59 Fed. Reg. 64,296
(Dec. 14, 1994)..4

Exchange Visitor Program,
60 Fed. Reg. 8547
8550-51 (Feb. 15, 1995).................... 5-6, 15-17

Exchange Visitor Program,
62 Fed. Reg. 34,632
(June 27, 1997)..6, 17

Exchange Visitor Program—
Summer Work Travel,
77 Fed. Reg. 27,593
(May 11, 2012)..30

Page

Exchange Visitor Program—
General Provisions,
79 Fed. Reg. 60,294 (Oct. 6, 2014)................6-7

Executive Order No. 13132, § 4(e),
64 Fed. Reg. 43,255 (1999) 28

Katie Lannan, *Massachusetts Au Pair Agency Reaches Settlement to Rebate Host Families*,
State House News Serv.
(Feb. 10, 2020),
https://tinyurl.com/yc6fdw99..........................14

Office of Info. & Regulatory Affairs,
Pending EO 12866 Regulatory Review,
RIN 1400-AF12 (May 12, 2020),
https://tinyurl.com/y734en2b..........................28

Kate Taylor, *A Court Said Au Pairs Deserve Minimum Wage*,
N.Y. Times (Jan. 8, 2020),
https://tinyurl.com/y94szb4m....................13-14

Sam Tabachnik, *Judge Approves Landmark $65.5 Million Settlement for Child-Care Workers: The Settlement Will Compensate Nearly 100,000 Au Pairs Around the Country*, Denver Post (July 18, 2019),
https://tinyurl.com/ya5putsy 12

U.S. Gen. Accounting Office,
GAO/NSIAD-90-61,
U.S. Information Agency:
Inappropriate
Uses of Educational and Cultural
Exchange Visas (1990)..................................4-5

INTRODUCTION

Recent rulings by this Court have reiterated that policy preferences and "brooding federal interests" are insufficient to preempt state law. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (lead opinion of Gorsuch, J.). Rather, "only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect," and any evidence of preemptive purpose must be "sought in the text and structure of the statute at issue." *Id.* at 1907 (citations omitted); *see also Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (same). In all cases, the purpose of Congress remains "the ultimate touchstone" in determining whether federal law preempts state law, *Virginia Uranium*, 139 S. Ct. at 1912 (Ginsburg, J., concurring in the judgment) (citation omitted), and a federal agency has no power to "pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it," *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (citation omitted).

This petition flies in the face of those rulings. There is not the slightest evidence of congressional intent to preempt the application of state worker-protection laws to au pairs. Congress did not delegate to the State Department or any other agency authority to preempt such laws. There is no federal law or even regulation applicable to au pairs that mentions preemption or exclusive remedies. To the contrary, Congress permanently authorized the au pair program only after requiring that au pairs be treated

as protected workers, and current State Department regulations require that au pairs must be compensated in compliance with the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*—a law that by its own terms sets a floor, not a ceiling, for worker protections. Accordingly, in 2015, the State Department informed au pair sponsors and the public at large that sponsors must "comply with all other applicable federal, state, and local laws, including any state minimum wage requirements." Pet. App. 68. And last year, petitioner Cultural Care, Inc. and other sponsors agreed to pay au pairs $65 million to resolve a nationwide class action lawsuit that included claims for nonpayment of minimum wages required by Massachusetts and other states.

This petition presents no split in authority; the only other court to address this claim of preemption reached the same result. The First Circuit carefully applied this Court's precedent on implied preemption, which presumes that laws addressing traditional subjects of state regulation "can constitutionally coexist with federal regulation." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985). Unable to identify any congressional intent to preempt or an actual, irreconcilable conflict between federal and state law, petitioners instead argue for "federal preemption *in vacuo*" based on a variety of policy concerns unmoored from any rule of law. *Kansas*, 140 S. Ct. at 801 (citation omitted). Their petition should be denied.

STATEMENT

A. Legal and Regulatory Background

1. The Fulbright-Hays Act

The Mutual Educational and Cultural Exchange Act of 1961 (also called the "Fulbright-Hays Act") was intended to promote understanding between the United States and other countries by means of educational and cultural exchanges. Pub. L. No. 87-256, 75 Stat. 527 (1961) (codified at 22 U.S.C. § 2451 *et seq.*). The Act established the "J visa" by adding section 101(a)(15)(J) to the Immigration and Nationality Act. 8 U.S.C. § 101(a)(15)(J).

Oversight of exchange programs conducted pursuant to the Fulbright-Hays Act was initially the responsibility of the U.S. Information Agency ("USIA"). In 1999, USIA was abolished and responsibility for exchange programs was transferred to the Department of State. Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

2. Creation and criticism of the au pair program

USIA created the first au pair programs in 1986. They were designed to be pilot programs lasting two years. Pet. App. 7-8. USIA soon determined that these programs were unauthorized and inconsistent with the Fulbright-Hays Act because they constituted full-time domestic employment that did not meet the educational and cultural requirements of the statute. Pet. App. 8.

While allowing the au pair programs to continue in fiscal years 1989 and 1990, Congress directed the U.S. General Accounting Office ("GAO") to examine whether "the participants in programs of cultural exchange receiving [J visas] are performing activities consistent with" congressional intent. Pub. L. No. 100-461, 102 Stat. 2268 (1988). In 1990, the GAO determined that the pilot au pair programs violated the intent of the Fulbright-Hays Act. Pet. App. 8 (quoting U.S. Gen. Accounting Office, *GAO/NSIAD-90-61, U.S. Information Agency: Inappropriate Uses of Educational and Cultural Exchange Visas* (1990)). The GAO cited the concern of the U.S. Department of Labor that the "au pair program violates the spirit of the J-visa statute" because "a 40-hour week constitutes full-time employment" and "would normally be subject to [the Labor Department's] administrative review and certification." Pet. App. 8-9.

3. USIA's 1995 and 1997 regulations

In 1990, Congress directed USIA to continue implementing the au pair programs "until [they] could be transferred to a more appropriate federal agency." Exchange Visitor Program, 59 Fed. Reg. 64,296, 64,296-97 (Dec. 14, 1994); *see* Eisenhower Exchange Fellowship Program, Pub. L. No. 101-454, 104 Stat. 1063 (1990). In 1994, Congress directed USIA to promulgate regulations on au pair placements. State Department: Technical Amendments, Pub. L. No. 103-415, 108 Stat. 4299, 4302 (1994). USIA published interim final regulations governing the au pair program in 1994. 59 Fed. Reg. at 64,297. After considering the interests of au pairs, host families, and au pair sponsors, USIA published new regulations

in 1995. Exchange Visitor Program, 60 Fed. Reg. 8547 (Feb. 15, 1995).

As part of that process, USIA reviewed the GAO's findings that the au pair program was "inconsistent with the statutory grant of authority and its underlying legislative intent." 60 Fed. Reg. at 8547-48. It also noted concerns raised by Congress, the Department of Labor, and the Immigration and Naturalization Service—including the program's "failure to comply with the Fair Labor Standards Act and its requirements governing the payment of minimum wage." *Id.* at 8548.

On whether "au pairs are employees subject to the provisions" of the FLSA, USIA "sought the views and guidance of the Department of Labor." *Id.* at 8550. The Department "specifically advised the Agency that an employment relationship is established," and USIA found that it was appropriate "to defer to Department of Labor in this area." *Id.* USIA then set forth, "[t]o assist the public in their understanding of this matter," an analysis of why au pairs qualify as "employees" under the FLSA. *Id.* Applying this Court's ruling in *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961), USIA explained that because host families exercise "pervasive control" over the work performed by au pairs, "an employment relationship" is clearly established and "an au pair is an employee." 60 Fed. Reg. at 8550-51.

In December 1995, Congress extended the au pair program through fiscal year 1997. Au Pair Programs, Extension, Pub. L. No. 104-72, 109 Stat. 776 (1995). Congress also directed USIA to report in detail on "the compliance of all au pair organizations with

regulations governing au pair programs as published on February 15, 1995." *Id.*

In June 1997, USIA issued a final rule to "enhance the Agency's oversight of au pair programs" and "ensure that there is no future confusion regarding the payment of minimum wage." Exchange Visitor Program, 62 Fed. Reg. 34,632, 34,633 (June 27, 1997). While USIA's 1995 regulations had required compensation of au pairs "at a rate of not less than $115.00 per week," 60 Fed. Reg. at 8553, the 1997 regulations abandoned any reliance on a minimum weekly stipend, and instead provided that au pair sponsors "shall require that au pair participants . . . [a]re compensated at a weekly rate based upon 45 hours per week and paid in conformance with the requirements of the [FLSA] as interpreted and implemented by the United States Department of Labor," 62 Fed. Reg. at 34,634. This rule is codified in the State Department regulations at 22 C.F.R. § 62.31(j)(1).

4. Permanent authorization and the State Department's 2014 regulations

Congress permanently authorized the au pair program in 1997. Extension of Au Pair Programs, Pub. L. No. 105-48, 111 Stat. 1165 (1997). In 1999, USIA was abolished and the State Department assumed responsibility over the program. In 2014, the Department promulgated final regulations to address "public diplomacy and foreign policy concerns, including the Department's ability to monitor sponsors to protect the health, safety, and welfare of foreign nationals who come to the United States as exchange visitors." Exchange Visitor Program—General Provisions, 79 Fed. Reg. 60,294, 60,294 (Oct.

6, 2014). Those regulations require au pair sponsors to appoint and maintain officers who are "thoroughly familiar" with "all federal and state regulations and laws pertaining to the administration of their exchange visitor program(s)." 22 C.F.R. § 62.11(a). Officers must have "a detailed knowledge of federal, state, and local laws pertaining to employment, including the [FLSA]." *Id.* Sponsors must provide "clear information and materials" to assist au pairs "to prepare for their stay in the United States," including "employee rights and laws, including workman's compensation." *Id.* § 62.10(b)(9). Each sponsor "must remain in compliance with all local, state, and federal laws, and professional requirements, necessary to carry out the activities for which it is designated, including accreditation and licensure, if applicable." *Id.* § 62.9(c); *see also id.* § 62.60(f) (sponsor's designation may be terminated for failure to comply with these requirements).

5. Massachusetts's Domestic Workers and Fair Wage Laws

Massachusetts's minimum wage protections—enacted 26 years before the FLSA, Mass. St. 1912, ch. 706—are codified in the Massachusetts Fair Wage Law, Mass. Gen. Laws ch. 151. All employers must pay the minimum wage (now $12.75 per hour) "unless the commissioner has expressly approved or shall expressly approve the establishment and payment of a lesser wage." Mass. Gen. Laws ch. 151, § 1. And employees must generally be paid at least one and one-half times their hourly rate for all hours worked in excess of 40 per week. *Id.* § 1A.

The Massachusetts Domestic Workers' Bill of Rights ("DWBOR"), Mass. St. 2014, ch. 148, § 3, was

enacted in July 2014, went into effect on April 1, 2015, and is codified at Mass. Gen. Laws ch. 149, §§ 190-191. The law does not supplant the Fair Wage Law's minimum wage protections, but rather clarifies the obligations of employers and sets forth additional protections for a particular class of employees who may be more vulnerable to exploitation due to language barriers, immigration status, or fear of reprisal. Pursuant to her authority to enforce the law, Mass. Gen. Laws ch. 149, § 190(o), the Attorney General promulgated regulations that went into effect on August 28, 2015. 940 Mass. Code Regs. § 32.

DWBOR and its regulations apply to any individual or entity that employs one or more domestic workers. The definition of "domestic worker" includes persons who are paid "to provide any service of a domestic nature within a household," with certain exceptions not relevant here. 940 Mass. Code Regs. § 32.02. The law and regulations ensure that domestic workers, among other things: receive reasonable rest periods, *id.* § 32.03(1); are compensated for time they are required to be on the employer's premises or on duty, *id.* §§ 32.02 (definition of "working time"), 32.03(2); do not have their wages reduced for food, beverages, and lodging expenses except under certain specified conditions, *id.* § 32.03(5); and have a right to privacy in their living area and in their correspondence with friends, family and others, *id.* § 32.03(6). The law and regulations also clarify employers' obligations to maintain payroll records, *id.* §§ 32.04(2), (4), (7), and prohibit retaliation against workers who assert their rights under the law, *id.* § 32.05(2).

B. Procedural History

Petitioners filed their lawsuit on August 31, 2016, claiming that the DWBOR and supporting regulations are preempted by federal law under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and seeking declaratory and injunctive relief. Pet. App. 2, 17.[1] The District Court granted the Attorney General's motion to dismiss on August 1, 2017. Pet. App. 73-99. It dismissed petitioners' field preemption claim because "[n]othing in the Fulbright-Hays Act or the federal regulations suggests that states may not supplement federal protections provided to *au pairs* or that the goals of cultural exchange would be thwarted by additional labor protections by the states"; in fact, those regulations mandate compliance with the FLSA, which, "in turn, allows states to impose more stringent protections than those offered at the federal level." Pet. App. 84-85 (citing 22 C.F.R. § 62.31(j)(1) and 29 U.S.C. § 218). The court further examined each alleged conflict between federal and state law and explained why they did not support a preemption claim. Pet. App. 87-94.

On December 2, 2019, the First Circuit unanimously affirmed. Pet. App. 1-72. It agreed with petitioners that their preemption claims encompassed challenges to both the DWBOR and Fair Wage Law. Pet. App. 17-19. On the issue of field preemption, the court rejected petitioners' argument that the presumption against preemption did not apply, but also held that they would lose even if there were no

---

[1] Petitioners also claimed that the DWBOR and its regulations violate the dormant Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. CA. App. 26-29. The District Court dismissed this claim, Pet. App. 94-99, and petitioners forfeited it on appeal.

presumption. Pet. App. 21, 24-26. The court found that the au pair program was not intended to preempt generally applicable state laws, and it was "hardly evident that a federal foreign affairs interest in creating a 'friendly' and 'cooperative' spirit with other nations is advanced by a program of cultural exchange that, by design, would authorize foreign nationals to be paid less than Americans performing similar work." Pet. App. 26-31. As for conflict preemption, the First Circuit noted that petitioners had waived any claim of impossibility preemption, Pet. App. 31 n.10, then concluded that petitioners failed to show that the state worker-protection laws stood as an obstacle to the purposes and objectives of the program, Pet. App. 31-62. Again, their claim failed "even if the presumption against preemption does not apply." Pet. App. 33-34. Observing that the federal au pair regulations refer to "the expressly non-preemptive" FLSA while saying nothing about preemption of state law, Pet. App. 45, the court rejected petitioners' argument that the regulations established "a federal regulatory ceiling that limits the wage and hour protections that states may provide to au pair participants," Pet. App. 34. Petitioners' assertions about the impact that state worker-protection laws would have on the program were "cast in conspicuously speculative terms" and, in any event, entailed an improper inquiry into the intention of the federal agency that was unsupported by the regulatory text. Pet. App. 59-62.

Finally, the First Circuit addressed the arguments in the amicus brief filed by the State Department. Pet. App. 62-70. While the court gave "respectful deference" to the Department's views of its regulations, it could not defer to the Department's conclusion that state law was preempted, Pet. App. 66-

67, and it found the agency's arguments unpersuasive. The agency "seize[d] on certain phrases" in its regulatory history "in isolation" while ignoring "the plain text of the regulations." Pet. App. 65-66. Furthermore, the agency's announcement in 2015 (three years before it filed its brief) that au pair sponsors must "comply with all other applicable federal, state, and local laws, including any state minimum wage requirements" and that it was "communicating with au pair sponsors to confirm that they are aware of their obligations under the regulations" refuted any contention that the application of state worker-protection laws to au pairs was "unthinkable." Pet. App. 68-69.

REASONS TO DENY THE WRIT

I. This Case Does Not Present a Split of Authority.

There is no division among the lower courts on whether federal law preempts the application of state worker-protection laws to au pairs. The First Circuit's ruling "accords with the only other precedent to address the issue." Pet. App. 3 n.1 (citing *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1083-84 (D. Colo. 2016)). No other circuit has yet faced this issue. Review is therefore unwarranted under this Court's Rule 10.

The petition does not even acknowledge the sole other court decision to address this question. *See* Pet. viii. In *Beltran*, a nationwide class of au pairs brought federal and state minimum wage and overtime claims (among others) against petitioner Cultural Care and other au pair sponsor companies. *See* 176 F. Supp. 3d

at 1080-85. In 2016, the district court ruled that the federal laws and regulations governing the au pair program do not preempt state wage laws. *Id.* at 1083-84. Those regulations "expressly provide[] that the *au pair* program *must* conform with the FLSA, *without exception*," and the FLSA in turn "explicitly provides that, if a state sets a higher minimum wage than that mandated by the FLSA, employees within that state are entitled to receive that higher wage." *Id.* at 1084 (emphasis in original). Thus, the au pairs' state wage law claims were "not, in fact, preempted by some kind of amorphous 'federal framework.'" *Id.* In 2018, the court reaffirmed this ruling in granting plaintiffs summary judgment on the issue of preemption. *Beltran v. InterExchange, Inc.*, No. 14-cv-03074-CMA-KMT, 2018 WL 3729505, at *6 (D. Colo. Aug. 6, 2018). And in 2019, the *Beltran* court approved a settlement to compensate plaintiff class members. Sam Tabachnik, *Judge Approves Landmark $65.5 Million Settlement for Child-Care Workers: The Settlement Will Compensate Nearly 100,000 Au Pairs Around the Country*, Denver Post (July 18, 2019), https://tinyurl.com/ya5putsy.

Because the First Circuit is the only appellate court to have addressed this preemption issue, and because the only two courts at any level to reach the issue are entirely in agreement, there is no need for this Court to review the question.

II. This Case Is an Improper Vehicle for Resolving Au Pair Sponsors' Complaint About Liability.

Unable to identify a split in authority, petitioners claim that the First Circuit's decision has resulted in "disruption" and "chaos," including new state

employment lawsuits against au pair sponsors. Pet. 17, 36 (quoting Kate Taylor, *A Court Said Au Pairs Deserve Minimum Wage*, N.Y. Times (Jan. 8, 2020), https://tinyurl.com/y94szb4m). But this petition is not an appropriate vehicle for determining sponsors' potential liability as joint employers—an issue not raised by petitioners below.

The issue of au pair sponsors' liability for nonpayment of state minimum wages was litigated in *Beltran*. The district court in that case found that the plaintiffs had stated a plausible claim that Cultural Care and the other defendant sponsors were joint employers of au pairs under Tenth Circuit law. 176 F. Supp. 3d at 1079-80 & n.15 (citing *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1439 (10th Cir. 1998)). The defendants chose not to contest this issue further, but rather agreed to a settlement to compensate plaintiff class members.

Petitioners cannot relitigate that issue here. As the First Circuit noted, petitioners "did not develop an argument in support of [their] preemption claims that depends on the state law measures being enforced against Cultural Care, as a sponsor." Pet. App. 19 n.5. Instead, they challenged Massachusetts law broadly, seeking a declaration that "any interpretation of the MA Act and MA Regulations that applies them to a federal cultural exchange program" was preempted. CA. App. 8-9. This Court should decline to consider an issue "raised for the first time in the petition for certiorari." *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Since the First Circuit's ruling, the Attorney General has exercised her authority under the Massachusetts Consumer Protection Law, Mass. Gen.

Laws ch. 93A, § 4, and other laws to bring the au pair programs administered by Cultural Care and other sponsors into compliance. That includes providing relief to host families whom Cultural Care misled into believing they did not have to pay their au pairs minimum wage. *See* Katie Lannan, *Massachusetts Au Pair Agency Reaches Settlement to Rebate Host Families*, State House News Serv. (Feb. 10, 2020), https://tinyurl.com/yc6fdw99. Indeed, much of the supposed disruption and chaos cited by petitioners has resulted from the failure of companies like Cultural Care to advise their clients about the courts' rejection of their litigation position. *See* Taylor, *supra* ("The lawsuit, which was brought in 2016, had been working its way through the courts for several years, but it appeared that many au pair agencies had not warned host families about the pending case or the possibility that the domestic workers rules might apply.").

In short, issues concerning sponsor liability for minimum wage violations are not presented here. The only matter preserved for this Court's review is the facial, pre-enforcement preemption claim that petitioners filed, *see* Pet. App. 18-19 & n.4, and that claim does not warrant certiorari.

III. The First Circuit's Decision Is Correct and Consistent with This Court's Precedent.

This Court's review is unwarranted for the further reason that the decision below is correct. Petitioners' preemption claim is without support in any statute, or even a regulation. Their focus on policy arguments that it is "onerous" and "expensive" to apply state worker-protection laws to au pairs, Pet. 26-27, only demonstrates how far their claim diverges from this

Court's preemption jurisprudence. *See Kansas*, 140 S. Ct. at 801; *Virginia Uranium*, 139 S. Ct. at 1901.

A. In the Absence of Congressional Intent to Preempt, Petitioners' Policy Interests Are Insufficient to Preempt State Law.

There is no reference to the preemption of state worker protections in the Fulbright-Hays Act or any other relevant federal law. Unable to claim express preemption, petitioners rest their claim on "principles of field, conflict, and obstacle preemption." Pet. 17. Regardless of their theory, the "ultimate touchstone" for any preemption claim is the intent of Congress, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations omitted), and "the historic police powers of the States" are presumed not to be superseded "unless that was the clear and manifest purpose of Congress," *Arizona v. United States*, 567 U.S. 387, 400 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That standard reflects that "the States are independent sovereigns in our federal system" and "the historic primacy of state regulation of matters of health and safety." *Medtronic*, 518 U.S. at 485.

No "clear and manifest purpose" to preempt is evident in the Fulbright-Hays Act. To begin with, there is nothing about the Act's purpose of increasing mutual understanding and promoting international cooperation that remotely requires the preemption of state worker-protection laws. Pet. App. 30-31. Without citation, petitioners assert that the au pair program "is an international cultural exchange program and not an employment program." Pet. 18. In fact, federal law has long treated au pairs as *both* exchange visitors and protected employees. *See, e.g.*, 60 Fed. Reg. at 8550 (explaining that au pairs have

"employee status" and "an employment relationship" with host family employers). Indeed, Congress reauthorized the program in 1995 on the condition that au pair sponsors comply with USIA's regulations recognizing au pairs as employees. Au Pair Programs, Extension, Pub. L. No. 104-72, 109 Stat. 776 (1995).[2]

Nor must state laws be preempted to promote supposed federal interests in host-family diversity, affordable child care, or uniformity in compensation furthered by the Act or other federal laws. Petitioners cite a statute directing the President to ensure that programs under the authority of the Bureau of Educational and Cultural Affairs are balanced and "representative of the diversity of American political, social, and cultural life," *see* Pet. 27 (citing 22 U.S.C. § 2460(c)), but they do not even try to argue that that directive indicates any congressional intention to preempt state law. Moreover, it hardly follows from § 2460(c) that the affordability of child care is an overriding federal interest that requires au pairs to be denied the protections of state law. Petitioners have made no representation in this case as to the relationship between au pair compensation, "the overall program fees incurred by host families," and "the costs of alternative child care," but, in any event,

---

[2] While Congress did place primary responsibility over the au pair program in USIA (and, later, the State Department), Pet. 19, that agency "sought the views and guidance of the Department of Labor" in determining whether au pairs are protected employees, 60 Fed. Reg. at 8550; deferred to the Labor Department's determination that they are protected and "an employment relationship is established," *id.*; and required that the compensation of au pairs conform "with the requirements of the [FLSA] as interpreted and implemented by the United States Department of Labor," 22 C.F.R. § 62.31(j)(1).

the affordability of child care under the au pair program is "not a goal of the Fulbright-Hays Act." Pet. App. 92.[3] Similarly, petitioners' argument that the au pair program depends on the "uniformity" provided by a fixed stipend, Pet. 3, 7-8, 16-17, 24, is "misplaced" and "unavailing." Pet. App. 85, 93. As the First Circuit explained at length, Pet. App. 9-11, 50-58, while USIA's 1995 regulations had required that au pairs be paid at least $115 per week, 60 Fed. Reg. at 8553, the 1997 regulations abandoned this approach and instead provided that au pair sponsors "shall require that au pair participants . . . [a]re compensated at a weekly rate based upon 45 hours per week and paid in conformance with the requirements of the [FLSA]," 62 Fed. Reg. at 34,634. USIA made that change specifically to ensure "that there is no future confusion regarding the payment of minimum wage." *Id.* at 34,633.

Petitioners thus can point to no statute demonstrating the requisite "clear and manifest purpose" on the part of Congress to preempt state worker-protection laws with respect to au pairs. *Arizona*, 567 U.S. at 400.

---

[3] As the First Circuit observed, because the DWBOR and Fair Wage Law apply to all domestic workers, "there is simply no way for such families to obtain such services from anyone—au pair participants or not—in Massachusetts without incurring the costs" imposed by such laws. Pet. App. 60.

B. State Worker-Protection Laws Are Not Preempted Simply by Virtue of Protecting Participants in a Cultural Exchange Program.

Nor are Massachusetts's laws preempted because the au pair program operates "in two fields that are the exclusive province of the federal government: foreign relations and immigration." Pet. 18. This case does not involve alien registration, the only field involving foreign relations or immigration that this Court has found subject to implied field preemption. *See Kansas*, 140 S. Ct. at 805-06; *Arizona*, 567 U.S. at 400-01 (discussing *Hines v. Davidowitz*, 312 U.S. 52 (1941)). Nor does it involve an effort to displace the conduct of foreign affairs. *See Chamber of Commerce v. Whiting*, 563 U.S. 582, 604 (2011). The DWBOR and Fair Wage Law do not bring Massachusetts into contact with any foreign government, comment on foreign affairs, or otherwise intrude on foreign policy. Petitioners argue that cultural exchange programs have "foreign relations objectives," such as assisting in "the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world," Pet 19-20, but, again, those laudable objectives do not preclude au pairs from receiving the benefits of state worker-protection laws.

In preemption cases, courts consider "the target at which the state law aims," because laws aimed at "subjects left to the States to regulate" are usually not subject to preemption. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385-87 (2015). The DWBOR and Fair Wage Law are just such laws of general applicability, focused on traditional subjects of state regulation. They neither "override the terms and conditions on

which a J-1 visa is issued," Pet. 16, nor "impose [Massachusetts's] own conditions on a J-1 visa program," Pet. 20. Rather, the DWBOR regulates working conditions for a class of persons, some of whom are au pairs, who perform a type of labor that renders them particularly vulnerable to exploitation and abuse, and the Fair Wage Law sets a floor for the compensation of workers across the Commonwealth's economy. Because these laws are an exercise of Massachusetts's "broad authority under [its] police powers to regulate the employment relationship to protect workers within the State," their preemption may not be inferred in the absence of "a demonstration that complete ouster of state power . . . was 'the clear and manifest purpose of Congress.'" *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) (citation omitted).

Indeed, this Court has long recognized that worker protection is a quintessential area of state regulation that cannot be preempted simply because its application includes non-citizens. *See De Canas*, 424 U.S. at 356-57. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," this 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 by this constitutional power, whether latent or exercised." *Id.* at 354-55.[4]

---

[4] Petitioners attempt to distinguish *De Canas* by noting that "federal immigration law today 'is substantially different from the regime that prevailed when *De Canas* was decided.'" Pet. 30-31 (quoting *Arizona*, 567 U.S. at 404). In *Arizona*, this Court observed that, after *De Canas*, Congress became more involved in regulating the employment of undocumented aliens, *see* 567 U.S. at 403-06 (discussing Immigration Reform and Control Act

Nor is there any basis here for forgoing the presumption against implied preemption in this traditional state-law area on the ground that the au pair program is "'inherently federal in character." Pet. 18, 20, 25, 31 (citing *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-48 (2001)). Unlike the case on which petitioners rely, the laws here are not ones in which "federal enactments are a critical element." *Buckman*, 531 U.S. at 353.[5] Rather, the state laws here apply broadly to all domestic workers in Massachusetts. No federal enactment is cited in the laws, and au pairs are not singled out for special treatment. In any event, as the First Circuit repeatedly held (but petitioners do not acknowledge), their preemption claim fails even if no presumption is applied. Pet. App. 21, 24-26, 33-34.

Petitioners thus cannot meet their burden to show preemption under field, obstacle, or any other theory.

---

of 1986), and proceeded to strike down certain state laws that essentially sought to enforce federal immigration law, *see id.* at 393-94; *see also Kansas*, 140 S. Ct. at 797. Here, by contrast, the Massachusetts laws under attack aim to protect workers, not enforce federal immigration law, and, as discussed below, the applicable federal regulations contemplate the application of state worker protections to au pairs.

[5] Specifically, *Buckman* involved a state-law claim for fraud against a federal agency. As this Court observed, "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.'" 531 U.S. at 347 (quoting *Rice*, 331 U.S. at 230). This Court has applied the presumption against preemption in fields with a history of state law regulation, even if there is also a history of federal regulation. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

C. The Applicable Federal Regulations Contemplate Complementary State Regulation.

As discussed, petitioners' claim fails because Congress did not intend to preempt the application of state worker-protection laws to au pairs or delegate that authority to the State Department. No constitutional text or federal statute displaces state law, *Virginia Uranium*, 139 S. Ct. at 1901, and Congress has not conferred on the Department the power to "preempt the validly enacted legislation of a sovereign State," *Albrecht*, 139 S. Ct. at 1679. That failure is reinforced by the State Department's own au pair regulations, which, far from carrying out an instruction from Congress to preempt, contemplate that au pairs will be protected by background state worker-protection laws.

Those regulations give no hint that the State Department or its predecessor USIA intended them to preempt state law. Petitioners emphasize the "detailed" and "comprehensive" nature of those regulations, Pet. 14, 31, but this Court has warned that inferring preemption "whenever an agency deals with a problem comprehensively" would be "inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." *Hillsborough Cty.*, 471 U.S. at 717. Furthermore, "because agencies normally address problems in a detailed manner and can speak through a variety of means," courts should "expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.* at 718. Here, because the Department's regulations "not only are devoid of any expression of intent to pre-empt state law," but in

fact contemplate that regulated entities "will comply with state laws," the First Circuit appropriately declined to conclude that "the mere volume and complexity of its regulations" demonstrate the agency's intent to preempt. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987) (citation omitted); *see* Pet. App. 26-28.

While petitioners assert that the federal government "chose" not to incorporate state law into the regulations governing cultural exchange programs, Pet. 21 (citing 22 C.F.R. §§ 62.1-62.32), the regulations tell another story. For example, they require au pair sponsors to appoint and maintain officers who are "thoroughly familiar" with "all federal and state regulations and laws pertaining to the administration of their exchange visitor program(s)." 22 C.F.R. § 62.11(a). Officers must have "a detailed knowledge of federal, state, and local laws pertaining to employment." *Id.* Sponsors must also provide "clear information and materials" to assist au pairs "to prepare for their stay in the United States," including "employee rights and laws, including workman's compensation" (*i.e.*, programs generally created and administered by the states). *Id.* § 62.10(b)(9).

Furthermore, the State Department's regulations require au pair sponsors to ensure that au pairs are "compensated at a weekly rate in conformance with the requirements of the [FLSA] as interpreted and implemented by the United States Department of Labor," 22 C.F.R. § 62.31(j)(1)—a statute that explicitly sets a floor, not a ceiling, for worker protections. Pet. App. 64-65. The FLSA provides not only that employees must be paid at least the federal minimum wage, 29 U.S.C. § 206(a)(1), but also that it

will not excuse noncompliance with state laws that establish a higher minimum wage, *id.* § 218(a). While petitioners conceded in their complaint that 22 C.F.R. § 62.31(j) incorporates the FLSA and that "the FLSA requires that employers pay workers the higher of federal and state minimum wages," CA. App. 16, they now mischaracterize § 62.31(j) as requiring a "uniform, national minimum stipend," Pet. 22, even though it nowhere refers to either uniformity or a stipend. *See supra* at 17. As the party challenging a state worker-protection law, petitioners bear the burden of showing a framework of federal regulation "so pervasive" that there is "no room for the states to supplement it." *Rice*, 331 U.S. at 230. They simply cannot do that where the applicable regulation references "the expressly non-preemptive FLSA" and says "nothing similarly express to indicate that the au pair exchange program regulations preempt independently conferred wage and hour rights that the FLSA does not itself preempt." Pet. App. 45.

Nor, contrary to petitioners' contentions, is there any conflict between the regulations and the requirements of Massachusetts law. Petitioners conceded in the First Circuit that "impossibility preemption" is inapposite here because "it is possible for sponsors, au pair participants, and host families alike to comply with each of the state law measures at issue while also complying with each of the federal ones." *See* Pet. App. 31 n.10.[6] Nevertheless, they now

[6] In their complaint, petitioners listed various provisions of the DWBOR that, they contended, "contradict existing [State Department] requirements." CA. App. 22-23. Isolated examples would not have sufficed to show there is "no possible set of conditions" under which state law "would not conflict with federal

refer to "various conflicts between the federal regulations and the requirements Massachusetts seeks to impose." Pet. 14, 27-28. None of the supposed conflicts is real.

First, as discussed, there is no regulation that establishes a "uniform minimum stipend," but rather a mandate that au pairs be paid in compliance with the FLSA, which expressly contemplates compliance with state law as well. The fact that state wage protections may be more generous than federal law is fully consistent with the regulatory floor that the FLSA sets and does not warrant a finding of conflict preemption.

Second, while petitioners refer repeatedly to "burdensome recordkeeping requirements," Pet. 16, 33, they did not argue to the First Circuit that this claimed burden itself actually triggers preemption, *see* Pet. App. 33 n.11. Further, as the First Circuit explained, there is no indication that USIA "intended to eliminate the imposition of independently imposed recordkeeping burdens on host families," and in fact a variety of recordkeeping requirements imposed by federal law continued to apply to host families under those regulations. Pet. App. 54; *see also* Pet. App. 92-93 (observing that FLSA does not "excuse any party from complying with any recordkeeping or reporting requirement" imposed by state law).

law"—the prerequisite for a facial challenge like this one, *see Granite Rock*, 480 U.S. at 580—but, in any event, the District Court carefully examined each of petitioners' purported conflicts and explained why they do not support their preemption claim, Pet. App. 88-94.

Third, the definition of "working time" under Massachusetts law is not, in fact, "completely incompatible with a cultural exchange program in which the program participant is required to live with the host family." Pet. 27-28. As the First Circuit ruled, Pet. App. 59, and even the State Department conceded, State Dep't Br. 14,[7] no such conflict exists. While the DWBOR provides that "all meal periods, rest periods, and sleep periods shall constitute working time" when a domestic worker is on duty for 24 consecutive hours or more (unless otherwise provided by a written agreement), 940 Mass. Code Regs. § 32.03(2), au pairs can never be on duty for a 24-hour period, *see* 22 C.F.R. § 62.31(j)(2), and time spent sleeping or eating does not count as "working time" under state law in the absence of assigned work duties, 940 Mass. Code Regs. § 32.02. Petitioners claim that the Attorney General "appear[s] to acknowledge" that these state regulations conflict with federal law, Pet. 28, but that is false. The Attorney General has always construed state requirements in this manner, and the First Circuit properly credited her construction as binding in the

[7] Acknowledging that the Commonwealth "disavow[ed] a reading of its regulations that would require host families to pay au pairs for time spending eating and sleeping," the State Department nevertheless argued that "if a state claimed" that such time was compensable, "that state law would be preempted." State Dep't Br. 14. Even assuming that is correct, the Massachusetts laws being challenged in this case cannot be preempted based on hypothetical conflicts involving imaginary laws in other states. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884-85 (2000) (conflict preemption "turns on the identification of [an] 'actual conflict[]'" and should not be found "too readily in the absence of clear evidence of a conflict").

context of this facial preemption challenge. Pet. App. 59.

In sum, consistent with the silence from Congress on this score, the State Department's regulations do not evince any intent to preempt state worker-protection laws and, indeed, are fully consistent with the challenged Massachusetts laws.

D. The First Circuit Properly Rejected the State Department's Revised Views on Preemption.

Lastly, petitioners object to the First Circuit's decision not to adopt the views offered by the amicus State Department, complaining that the court did not address the agency's views until "[n]early 70 pages into its opinion," Pet. 14, and had the temerity to reject them after soliciting them, Pet. 16. Why those complaints warrant certiorari is left unexplained. In any event, the First Circuit carefully considered the State Department's views in its decision, Pet. App. 62-70, even though they contradicted the views the Department articulated three years earlier. Although courts "may not defer to an 'agency's conclusion that state law is preempted,'" Pet. App. 62 (quoting *Wyeth*, 555 U.S. at 576), the First Circuit nevertheless gave "respectful deference" to the Department's views, Pet. App. 66.[8] It ultimately rejected them, for many of the reasons already described.

[8] If anything, the First Circuit afforded more deference to the State Department's views than they were due. Preemption is a question of law, *Albrecht*, 139 S. Ct. at 1679-80, and deference to an agency's view that its regulation impliedly preempts state law would usurp the role of courts and undermine constitutional protections for states, *see Garcia v. San Antonio Metro. Transit*

In short, the State Department's brief interpreted 22 C.F.R. § 62.31(j) to mean something it plainly does not say. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Under its interpretation, the au pair regulations were "drawn" not only "to allow what they permit"—application of the federal minimum wage, but also "to bar what they prohibit"—state and local minimum wage laws. State Dep't Br. 10. The Department based this interpretation on the false premise that the regulations "require host families to pay a weekly stipend that is based on the federal minimum wage" but "contain no such requirement concerning state or local minimum wages." State Dep't Br. 6, 11. In fact, § 62.31(j) does not refer to a stipend, set a specific hourly wage, or provide that au pairs shall be paid the federal minimum wage to the exclusion of state or local minimum wages. Instead, it simply requires compliance with "the requirements of the [FLSA]"—which, as already discussed, expressly allows state law to require a higher wage. To date, the State Department has not published any proposal to

---

Auth., 469 U.S. 528, 550-51 (1985). It would also undermine the procedural safeguards of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, by allowing federal agencies to curtail state police powers by interpretative fiat, without the benefit of notice-and-comment rulemaking in which states and other stakeholders could participate. Deference would be particularly inappropriate here because the key regulation on au pair compensation, 22 C.F.R. § 62.31(j), is not "genuinely ambiguous," *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019); that regulation refers to the FLSA "as interpreted and implemented by the United States Department of Labor" and thus does not implicate the "substantive expertise" of the State Department, *see id.* at 2417; and the interpretation advanced by the State Department contradicts what it told regulated parties and the public three years earlier, *see id.* at 2417-18.

amend its regulations to reflect the position it advanced in its brief below, that au pairs should receive federal but not state minimum wage.[9]

As discussed above, the claim that § 62.31(j) was "drawn" to "prohibit" application of state minimum wage has no basis in the regulatory text or history. Nevertheless, citing *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377-78 (2000), and *Arizona*, 567 U.S. at 404, the Department argued that preemption should be inferred because it regulates au pairs in a "comprehensive" and "calibrated" manner. State Dep't Br. 11; *see also* Pet. 12-13, 14-15, 26, 32. But *Crosby* and *Arizona* addressed the preemptive effect of *congressional* action, not whether an agency with no delegated authority to preempt had nonetheless impliedly done so. In *Crosby*, this Court found that Congress made "a deliberate effort 'to steer a middle

---

[9] Respondents note that the Office of Information and Regulatory Affairs has published notice that, as of May 12, 2020, it is reviewing a proposed rule titled "Exchange Visitor Program—Au Pair Federal Regulation Preemption of State and Local Law." *See* Office of Info. & Regulatory Affairs, Pending EO 12866 Regulatory Review, RIN 1400-AF12 (May 12, 2020), https://tinyurl.com/y734en2b. Although the contents of any such proposed rule have not yet been divulged, they appear likely to relate to this dispute and provide yet another reason this Court should not take up this matter at this time. If the State Department does propose to preempt state law through its rulemaking authority, it will be required to "provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings." Executive Order No. 13132, § 4(e), 64 Fed. Reg. 43,255, 43,257 (1999). Respondents further note that agencies may not preempt state law in the absence of congressional intent to preempt, *see Kansas*, 140 S. Ct. at 801; *Virginia Uranium*, 139 S. Ct. at 1907—intent that is absent from the statutes here, *see supra* at 15-17.

path'" by imposing limited intermediate sanctions on Burma while exempting "contracts to sell or purchase goods, services, or technology." 530 U.S. at 377-78 & n.13. Similarly, in *Arizona* the Court found that "Congress made a deliberate choice" to impose civil but not criminal penalties on aliens who seek or engage in unauthorized work. 567 U.S. at 404-05. Here, there is no evidence that USIA or the State Department, much less Congress, made a deliberate choice to deprive au pairs of the protections of background state worker-protection laws.

The State Department acknowledged in its brief that "the au pair regulations include an 'employment component,' and that the general 'Exchange Visitor Program' regulations' requirement that sponsors who 'work with programs with an employment component' must have 'Responsible Officers' who have 'a detailed knowledge of federal, state, and local laws pertaining to employment' applies to the Au Pair Program." Pet. App. 65. Nevertheless, it argued that those provisions should be interpreted as applying only to exchange program regulations that specifically mention state laws, and that § 62.31(j) should be presumed to be preemptive because it does not specifically mention state law. Pet. App. 66; State Dep't Br. 7, 11-13, 17-18. The First Circuit properly rejected that argument by negative inference, Pet. App. 41-43, 66, which is inappropriate in the context of agency regulations, *see Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 571 (7th Cir. 2012), and inconsistent with the rule that "the historic police powers of the States" are not superseded "unless

that was the clear and manifest purpose of Congress," *Arizona*, 567 U.S. at 400.[10]

Nor is there any basis to infer preemptive intent from the various guidance documents and fact sheets cited in the State Department's brief, none of which mention state minimum wage laws, much less their preemption. To the contrary, the documents only reinforce the conclusion, already evident from the regulatory text and history, that the Department's regulations apply only to au pair sponsors, and au pairs are entitled to minimum wage protections independent of the regulations. Pet. App. 67-68. Petitioners emphasize the documents' reference to "the stipend," Pet. 22, but ignore that the documents themselves clarify that "[t]he term stipend was changed to wage" following USIA's 1997 regulations, CA. App. 375. As the First Circuit concluded, none of these sub-regulatory materials supports "inferring an

---

[10] The fact that USIA used an unrelated term ("commensurate") in different regulations to describe compensation for teachers and camp counselors, *see* Pet. 23, sheds no light on what "conformance with the requirements of the [FLSA]" means in 22 C.F.R. § 62.31(j). And while current regulations for the summer work-travel program require participants to receive at least "[t]he applicable Federal, State, or Local Minimum Wage (including overtime)," 22 C.F.R. § 62.32(i)(1), the previous regulatory language for that program referred only generally to "Federal Minimum Wage requirements," *see* 22 C.F.R. § 514.32(e) (1999, superseded), and in 2011 the State Department revised that language in order to ensure that "host employers fairly compensate participants for their work." *See* Exchange Visitor Program—Summer Work Travel, 77 Fed. Reg. 27,593, 27,602 (May 11, 2012). The language requiring compliance with the FLSA in § 62.31(j) has required no corresponding revision, because the FLSA itself contemplates that state wage and hour laws will apply.

intent from the Au Pair Program to transform the non-preemptive FLSA floor on the wage and hour rights that au pair participants have vis-a-vis their host family employers into a preemptive federal ceiling on those rights." Pet. App. 68.

Lastly, any discussion of past agency practice cannot ignore the unequivocal position of the State Department as recently as 2015 that au pair sponsors must "comply with all other applicable federal, state, and local laws, including any state minimum wage requirements." Pet. App. 68. It may be true that the State Department has never taken on the work of a state law enforcement agency by investigating whether sponsors instructed host families to pay "whatever wages might be required by state or local law." Pet. 24. But, as the First Circuit observed, the agency's own directive to sponsors refutes any claim that applying state law to au pairs would be "unthinkable." Pet. App. 69.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
ROBERT E. TOONE*
Assistant Attorney General
One Ashburton Place
Boston, MA 02108
robert.toone@mass.gov
(617) 963-2178
**Counsel of Record*

May 18, 2020