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 Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondents' opposition does nothing to diminish the pressing need for this Court's review. After *sua sponte* inviting the United States' view on whether federal law preempts state and local attempts to regulate the federal au pair program, the First Circuit expressly rejected the federal government's considered view and held that states and municipalities are free to impose a patchwork of wage-and-hour laws and recordkeeping requirements on this federal international cultural exchange program. That decision not only is profoundly wrong, but threatens serious and immediate harm to a decades-old federal foreign relations program. Indeed, respondents do not deny that the decision has *already* caused substantial chaos and disruption both inside and outside the First Circuit.

Instead, they devote most of their brief to trying to defend the decision on the merits—albeit not on the principal ground the First Circuit embraced. Rather than endorsing the First Circuit's theory that the federal regulations governing the au pair *program* do not actually govern its *participants*, respondents make the far bolder claim that the State Department lacks the power to preempt state law at all, and then second-guess the agency's explanation of how its own program operates and belittle the obvious federal interests in uniformity. Those strained merits-based arguments only underscore that the decision below cannot stand. This Court should grant certiorari and confirm the long-settled understanding that states cannot alter the terms and conditions on which foreign visitors participate in a federal cultural exchange program.

I. The Decision Below Empowers States To Regulate A Federal International Cultural Exchange Program In Direct Conflict With The United States' Views.

A. States Have No Presumptive Power to Regulate Participation in a Federal Exchange Program.

At the outset, respondents' insistence that the First Circuit was correct to invoke the presumption against preemption that applies in "traditional state-law area[s]" only underscores how the First Circuit erred. BIO.20. The au pair program is not a traditional area of state regulation. It is "a creation of federal law," US.CA.Br.16, that "originates from, is governed by, and terminates according to federal law." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). Regulating that federal foreign exchange program "is hardly a field which the States have traditionally occupied." *Id.*

No one doubts that regulation of childcare providers is a matter of traditional state concern. But that approaches the question at the wrong level of generality. The relevant question is whether states can regulate the terms and conditions of individuals who incidentally provide childcare as part of an international cultural exchange program. Respondents do not dispute that no state—including Massachusetts—attempted to apply its labor laws to the au pair program until three decades into existence. Pet.20. The program has never operated as if state wage-and-hour law restricted it. More to the point, if the federal au pair program is just another form of childcare subject to state regulation, then the State

Department has no business operating it at all. The State Department establishes and regulates international cultural exchange programs, not childcare programs falling within traditional state and local bailiwicks.

That Massachusetts' laws do not single out the au pair program, but rather "apply broadly to all domestic workers," BIO.20, does not aid respondents' cause. Au pairs who are here only pursuant to a federal international exchange program, and on a temporary J-1 visa (not a work visa), are not like all other workers. And applying general laws to distinctly federal programs states, rather than avoids, a preemption problem. After all, the preempted law in *Buckman* was general "state tort law" impermissibly applied to regulate a federal program. 531 U.S. at 343. Tort law is the quintessential area of traditional state-law regulation, but that is the wrong level of generality, and there is nothing traditional about using it to regulate federal programs.

If anything, the preemption problem is even more apparent here given the fields in which the au pair program operates. Respondents acknowledge (as they must) that the program operates in exclusively federal fields: foreign relations and immigration. BIO.18. They nevertheless argue that states may freely regulate the program as long as their aim is "worker protection." BIO.18-19. But preemption depends primarily on "*what* the State did, not *why* it did it." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905 (2019) (plurality opinion). And states are simply not free to decide that participants in federal international exchange programs need more

"protection" than federal law provides. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 63-64 (1941).

Respondents baldly assert that Congress did not intend to preclude state regulation of the au pair program. BIO.1, 15, 17, 21. That ignores the context in which Congress was legislating. To be sure, Congress did not include an *express* preemption clause in the Fulbright-Hays Act. But that is not surprising since states cannot regulate the terms of participation in a federal exchange program in the first place. Congress similarly did not include an express preemption clause in the law imposing federal sanctions on Burma. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). There, and here, the absence of an express preemption provision "may reflect nothing more than" Congress' failure to anticipate Massachusetts' attempt to intrude on a distinctly federal field and "the settled character of" this Court's preemption doctrine. *Id.*

B. The Federal Regulations Governing the Au Pair Program Preempt Massachusetts' Laws.

The federal regulations governing the au pair program confirm that Massachusetts' laws are preempted. The federal regulations set forth detailed requirements covering all aspects of the au pair program. Pet.21-22. They include terms, like age limits and English-fluency requirements, that make sense in a cultural exchange program but would be wildly out-of-place (indeed, illegal) in an ordinary employment context. And they specifically "establish the requirements with which au pair compensation

must comply" and "ensure that participants in the au pair program receive a weekly stipend that is based on the federal minimum wage." US.CA.Br.6; *see* 22 C.F.R. §62.31(j)(1). As the State Department explained, they are "drawn not only to bar what they prohibit but to allow what they permit." US.CA.Br.10. States therefore "have no license to require the payment of a greater wage than the federal government has chosen to require." US.CA.Br.15.

Remarkably, respondents assert that the State Department has no power to preempt state law. BIO.1, 21, 28. Respondents never hinted at that argument below—likely because it is patently wrong. As even the First Circuit recognized, the State Department like any other federal agency "may preempt state law through its regulations." Pet.App.20-21 (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)); *see also* Pet.App.70. Congress need not (and does not) specifically delegate the power to preempt state law; that power is necessarily included in the power to issue binding federal regulations. U.S. Const. art. VI. That is particularly true in a context like this, where the regulations shape the contours of a congressionally authorized program in a distinctly federal field. It is undisputed that the State Department had statutory authority to issue its regulations, and that those regulations carry the full force of federal law. 22 U.S.C. §§2452, 6532(a). The State Department thus plainly has the power to preempt state law—which it just as plainly did.

Respondents alternatively insist that those regulations suggest a tacit intent to subject the au pair

program to state wage-and-hour laws. BIO.22-23, 29-30 & n.10. But that position flies in the face of the State Department's express interpretation of its own regulations, US.CA.Br.10-12, 17-19, and not coincidentally the regulatory text. When the State Department intends to incorporate state and local wage laws into an exchange program, it does so explicitly—and it did no such thing for the au pair program. *See, e.g.*, 22 C.F.R. §62.32(i)(1).

To the contrary, the regulation governing au pair compensation expressly and exclusively incorporates *federal* law. It sets a nationally uniform minimum "weekly rate," based on "45 hours of child care services per week," and incorporates the federal minimum wage along with all other "requirements of the Fair Labor Standards Act." 22 C.F.R. §62.31(j). By specifying that *federal* law should be used to calculate that stipend, the regulation preempts any state or local law that would require additional compensation. US.CA.Br.14-15; Pet.22. That is clear enough on the face of the regulation, but it is confirmed beyond cavil by comparison to regulations that expressly require participants in *other* exchange programs to be paid state minimum wage. Pet.23.

Respondents make the convoluted claim that by requiring the minimum stipend to be calculated in accordance with the "requirements of the [FLSA]," 22 C.F.R. §62.31(j), the State Department implicitly mandated that au pairs be paid in accordance with *state* law. BIO.24. But contrary to their suggestions, the FLSA does not contain any "requirement" that employees be paid state minimum wages. It contains only a saving clause stating that the FLSA does not

preempt higher state minimum-wage laws. 29 U.S.C. §218(a). A state law that is not preempted by the FLSA does not thereby become a requirement of the FLSA. Indeed, a failure to pay a higher and non-preempted state wage is not a violation of federal law at all. The only "requirements of the FLSA" are those imposed by the FLSA itself.

That likely explains why even the First Circuit did not embrace the incongruous claim that the State Department implicitly incorporated state law through the subtle stratagem of incorporating the "requirements" of a federal law that has a savings clause. That omission is particularly conspicuous given that the FLSA's savings clause was the focal point of the (unreviewed) decision in *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1083-84 (D. Colo. 2016).[1] The First Circuit instead relied predominantly on the novel theory that the federal regulations regulate only sponsors, not the host families who actually compensate au pairs, Pet.14—an argument respondents did not press below and make no effort to defend (presumably because they actively seek to enforce their laws against sponsors, BIO.14). Respondents and the First Circuit thus cannot even agree on why they think states may regulate the au pair program.

Respondents brush aside the long history of State Department guidance identifying only a single *federal* minimum stipend, noting that "none of [those guidance documents] mention[s] state minimum wage

[1] Respondents' invocation of the settlement of the *Beltran* class action is unavailing. BIO.12-13. Unsurprisingly, that settlement included no admission of liability.

laws." BIO.30. But that is exactly the point: For decades, the agency has instructed that host families may pay a uniform minimum stipend, without ever once suggesting that anyone violated the law by paying that stipend rather than some higher state minimum wage. Pet.24-25; US.CA.Br.7-8. That longstanding practice confirms that the au pair program is governed by a uniform federal scheme, not a crazy-quilt of state and local laws. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012).

Respondents claim that the State Department expressed a contrary view in 2015. BIO.2, 11, 26 & n.8, 31. But what they label "the unequivocal position of the State Department" was actually the response of an agency spokesperson to inquiries from the Washington Post. Pet.App.68. As the United States observed below (with considerable understatement), it is "not clear [that] statement reflected a considered analysis." US.CA.Br.19 n.7. The government's brief, by contrast—filed at the invitation of the First Circuit, and signed by the State and Justice Departments—unambiguously "reflect[s] the considered position of the United States." US.CA.Br.19 n.7. And that considered position is that the federal regulation governing au pair compensation establishes a nationally uniform minimum stipend and preempts any contrary state or local laws.

Respondents try to minimize the conflicts with federal law by claiming that Massachusetts' laws do not really require au pairs to be paid for time spent eating and sleeping, despite crystal-clear state regulatory language to the contrary. *See* 940 Mass.

Code Regs. 32.02 (working time includes "all time during which a domestic worker is required to be on the employer's premises … includ[ing] meal periods, rest periods, and sleep periods"). Respondents suggest that such requirements are inapplicable because au pairs can never be on duty for a 24-hour period. BIO.25. But for support, respondents cite only the very federal regulations that they argue are non-preemptive, and under state law a domestic worker required to live on-premises is working. At any rate, even assuming respondents can unilaterally negate their regulations, participants in a federal exchange program should not have to depend on assurances that state regulations that mean what they say when applied to other domestic workers do not mean what they say when applied to au pairs. In all events, merely reducing the *number* of hours au pairs must be paid state minimum wage hardly eliminates the conflict.

Respondents deny that imposing their own burdensome recordkeeping requirements on host families would conflict with federal law. BIO.24.[2] But they ignore the regulatory history confirming that a principal objective of the uniform minimum stipend is to minimize administrative burdens that would discourage host-family participation. Pet.8, 29-30. Respondents respond that "affordability of child care under the au pair program is 'not a goal of the

[2] Contrary to respondents' claims, petitioners squarely argued below that those recordkeeping requirements are preempted—not just because they are burdensome, but because they supplement the exclusive federal requirements. Pet.App.32-33 & n.11.

Fulbright-Hays Act.'" BIO.17. But that misses the point. Broad participation of a wide range of host families to ensure that cultural exchange programs are not limited to those who can shoulder extensive recordkeeping is very much a goal of the Fulbright-Hays Act, as the State Department has confirmed. Those important goals are validated by the briefs from host families, au pairs, and sponsors attesting to the existential threat to the program that the decision below poses. Br. of Amici Curiae Host Families ("Host Families Br.") 1-6; Br. of Amici Curiae Current and Former Au Pairs ("Au Pairs Br.") 12-13; Br. of Amicus Curiae All. for Int'l Exchange ("Alliance Br.") 13-15.

II. The Decision Below Threatens Severe And Immediate Injury To The Au Pair Program.

Respondents make no attempt to deny the importance of the question presented, or the dramatic effects the decision below will have—indeed, has already had. They do not dispute that allowing state and local governments to impose their own labor laws on the au pair program will fundamentally change the nature of the program and undermine its viability as a nationwide cultural exchange program. US.CA.Br.19-20. They do not dispute that applying state labor laws will discourage au pairs from traveling to low-minimum-wage jurisdictions and discourage all but the wealthiest host families from participating. Pet.34; Alliance Br.6-8. Nor do they dispute that allowing states to impose additional administrative burdens on host families, and make young foreign au pairs just as expensive as professional local child-care providers, will make the program unsustainable. Pet.34-35; Alliance Br.10-11;

Host Families Br.10. Or that allowing states to regulate the host family/au pair relationship as if it were a mere employment transaction will dramatically alter the nature of that relation and discourage meaningful cultural exchange. Host Families Br.18-21; Au Pairs Br.12-13.

Respondents *cannot* dispute those impacts because the au pair program is *already* suffering them in the aftermath of the decision below. Pet.35-36; Alliance Br.13-15; Host Families Br.1-8, 20-21. Instead, with remarkable chutzpah, respondents try to blame that disruption on au pair sponsors for failing to predict that the First Circuit would validate Massachusetts' effort to fundamentally reshape a federal cultural exchange program in the face of a State Department brief arguing that this effort is preempted. BIO.14. That blinks reality. The threat the au pair program faces is not from au pair sponsors. It is from the decision below, and from state regulators like respondents who have decided that au pairs need more worker protection than the federal regulations provide.

Respondents protest that there is no circuit split. BIO.11-12.[3] But this Court regularly grants certiorari

[3] They also note that this case is not an appropriate vehicle to decide "sponsors' potential liability as joint employers" under Massachusetts law. BIO.13. Why respondents consider that a vehicle problem is a mystery, as the petition does not ask whether sponsors are joint employers. It asks whether "federal law preempts the application of state and local labor laws to the terms and conditions of participation in the federal au pair program." Pet.i. Respondents do not even try to contend that this case is a poor vehicle for resolving *that* question, which is the

on important issues of federal law absent a circuit split—especially when, as here, the decision below rejects the considered position of the United States and threatens significant federal interests. *See, e.g.*, *U.S. Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, No. 19-177 (cert. granted Dec. 13, 2019); *United States v. Aurelius Inv., LLC*, No. 18-1514 (cert. granted June 20, 2019); *Crosby*, 530 U.S. at 371-72 (granting review of Massachusetts Burma law without a circuit split). And awaiting a circuit split has particularly little to recommend it when the question presented is whether an important federal program that demands uniformity can survive as it has operated for decades. Instead, the far better course is to grant review now, and ensure that the au pair program remains the genuine cultural exchange program that Congress intended it be.[4]

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only one petitioners raise (and would moot the joint-employer question altogether).

[4] Respondents note a pending proposed rule whose title suggests that the State Department intends to reinforce the conclusion that state regulation of the au pair program is preempted. BIO.28 n.9. But given respondents' view that the agency lacks the power to issue preemptive regulations, no matter how clearly it states its preemptive intent, *see id.*, and the serious disruption the decision below is already causing, *see* Pet.35-36, that pending rule is no reason to deny or delay review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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