No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal au pair program is a 30-year-old international cultural exchange program, authorized by Congress and administered by the State Department, that invites young foreigners to visit the United States as au pairs. Participants receive room, board, and a weekly stipend from their host families, as well as subsidized tuition to take classes at an American college or university. In exchange, they provide their host families with limited child-care services. Detailed federal regulations govern all aspects of the au pair/host family relationship, including the maximum number of hours au pairs may work and the minimum stipend host families must pay. In 2015, Massachusetts announced that it intended to begin applying its own state labor laws to the au pair program. Petitioners, two host parents and one of the private sponsoring agencies that help operate the program, brought suit challenging those laws as preempted by federal law. The First Circuit solicited the views of the United States, which filed an amicus brief expressing its considered views that state efforts to regulate participation in the au pair program are preempted and would undermine critical program goals. Despite having requested those views, the First Circuit proceeded to reject them across the board, holding that Massachusetts (and other states) are free to apply their own labor laws to the au pair program.

The question presented is:

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.

PARTIES TO THE PROCEEDING

Erin Capron, Jeffrey Penedo, and Cultural Care, Inc., d/b/a Cultural Care Au Pair, are the petitioners here and were the plaintiffs-appellants below. The Office of the Attorney General of the Commonwealth of Massachusetts and Maura T. Healey, in her capacity as Attorney General of the Commonwealth of Massachusetts, are the respondents here and were the defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioners Erin Capron and Jeffrey Penedo are individuals. Petitioner Cultural Care, Inc., d/b/a Cultural Care Au Pair, has as its parent corporation Cultural Care Management, Inc., and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Capron v. Office of the Attorney General of the Commonwealth of Massachusetts, No.17-2140 (1st Cir. opinion and judgment issued Dec. 2, 2019; mandate issued Feb. 3, 2020).

Capron v. Office of the Attorney General of the Commonwealth of Massachusetts, No. 1:16-cv-11777-IT (D. Mass. memorandum and order granting motion to dismiss issued Aug. 1, 2017; order of dismissal entered Aug. 2, 2017; order denying motion for reconsideration entered October 26, 2017).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

For the past 30 years, the federal au pair program has operated as an international cultural exchange program that has allowed young foreigners to visit the United States on temporary nonimmigrant visas and gain a first-hand experience of American culture while living with American host families, studying at American schools, and providing limited child-care services. In keeping with its foreign relations objectives as an international cultural exchange program, the au pair program is overseen by the State Department, which administers the program through partnerships with private sponsors who recruit participants and match au pairs with host families. Comprehensive federal regulations govern all aspects of the program, including the cultural exchange visas on which au pairs enter the United States, the length of the au pairs' stay, the maximum hours they may provide child-care services, the academic credits they must earn, and the minimum stipend host families must provide. Those regulations 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.

In 2014, the Massachusetts legislature enacted a new law setting additional requirements for the employment of domestic workers such as housekeepers and nannies. The state issued implementing regulations the following year. Those state laws are incompatible with the federal au pair program as it has long existed. Most obviously, state law requires compensation for all hours a domestic

worker must be on the employer's premises. It also requires that domestic workers be compensated at the state minimum wage for all hours worked, and at overtime rates for all hours over 40 hours per week; that employers may deduct only limited amounts for room and board; and that employers must keep a variety of mandatory records.

Although Massachusetts had never before claimed the power to apply its own laws to the federal au pair program, respondents asserted that the whole body of Massachusetts labor law, including the new domestic worker provisions, applies wholesale to au pair program participants. Concerned that subjecting the program to those onerous requirements would dramatically increase the cost and administrative burdens of participating for host families, and change the program's character if not destroy it, petitioners (two host parents and an au pair sponsor organization) brought this lawsuit challenging respondents' attempt to impose state law on the federal au pair program as preempted by federal law.

Recognizing the complexity and importance of the issue, the First Circuit *sua sponte* requested the views of the United States. The government responded with a brief that explained that the federal au pair program regulations are intended to preempt state law, and "do not leave room for a state or municipal government to impose terms of employment for au pairs that differ from the terms set forth in the regulations." US.CA.Br.10. Burdensome state and local regulations, the United States explained, could easily discourage host families from participating and thus undermine the program's cultural exchange goals.

Having called for the federal government's views, however, the First Circuit proceeded to reject them across the board.

That remarkable decision is plainly wrong and readily warrants this Court's review. As the United States explained, the detailed federal regulations governing the au pair program cannot be altered or superseded by state law. The Supremacy Clause simply does not permit a state to place its own conflicting restrictions on a federal cultural exchange program. Moreover, Massachusetts' onerous requirements destroy the uniformity on which the program depends and impose massive new costs and administrative burdens on host families, thereby limiting both the nature of participating host families and the number of opportunities. The program is designed to offer au pairs a diverse set of experiences; it cannot function as intended if only the wealthy can serve as host families or the financial aspects of the program differ radically in Montana and Maryland.

As the United States predicted, the First Circuit's decision has already caused substantial disruption to the au pair program, both in Massachusetts and elsewhere. There is nothing to be gained from delay, as the United States has already offered its definitive view that Massachusetts' approach is preempted. In short, this is a context in which uniformity and clarity are paramount and can only come from this Court. The Court should grant certiorari and confirm the long-settled understanding that states have no role to play in establishing the terms and conditions on which foreign visitors may participate in an international federal cultural exchange program.

OPINIONS BELOW

The First Circuit's opinion is reported at 944 F.3d 9 and reproduced at App.1-72. The district court's memorandum and order granting respondents' motion to dismiss is unreported but available at 2017 WL 3272011, and reproduced at App.73-99. The district court's order of dismissal and order denying reconsideration are unreported but reproduced at App.100-03.

JURISDICTION

The First Circuit issued its opinion on December 2, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix at App.112.

STATEMENT OF THE CASE

A. Legislative and Regulatory Background

1. Since 1961, the federal government has developed, operated, and promoted numerous international cultural exchange programs under the Fulbright-Hays Act. As Congress explained in the statutory text, the Fulbright-Hays Act seeks (among other foreign affairs objectives) "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. These educational and cultural exchange programs currently include high school student and teacher exchanges, university student and professor

exchanges, training and internship programs, summer work travel programs, and more. *See* 22 C.F.R. §§62.20-62.32. Program participants receive temporary J-1 visas (not work visas), and the cultural exchange program as a whole is often referred to as the "J-1 Program." *See* 8 U.S.C. §1101(a)(15)(J).

2. The au pair program was created in 1986 as a two-year pilot program supervised by the United States Information Agency ("USIA"). Exchange Visitor Program, 59 Fed. Reg. 64,296, 64,296 (Dec. 14, 1994). Under that pilot program, the federal government allowed young foreigners to live with American families for about a year before returning to their home countries. The host family agreed to provide the young foreigner with room, board, a weekly stipend, and a subsidy toward the cost of classes at an American school. *See* 59 Fed. Reg. at 64,298-99. In exchange, the visitor agreed to provide child-care services for the host family for a maximum of 45 hours per week. *Id.* at 64,298. Then as now, the program relied on private sponsoring agencies to match interested foreign nationals with interested American host families and ensure their compliance with program requirements. *Id.*

The au pair program faced initial questions over whether its child-care component made it more like an employment program than a cultural exchange program. *See id.* at 64,298. In response, the USIA considered reducing the child-care component to 30 hours a week, but that prompted concerns that it would be too hard to attract host families because many parents who may consider taking on the responsibilities of hosting an au pair have full-time

jobs. *Id.* After considering those competing concerns, Congress passed legislation memorializing the au pair program in its then-current form. App.8. That legislation specifically expressed Congress' sense that the terms of the program—"including, but not limited to, those relating to educational requirements and permissible hours of child care"—were "in keeping with the goals and objectives of the Fulbright-Hayes [sic] Act." S. 2757, 100th Cong., §201(a) (1988) (adopted by Pub. L. No. 100-461, §555, 102 Stat. 2268 (1988)).

At Congress' direction, the General Accounting Office ("GAO") undertook its own examination of the program. App.8. After doing so, the GAO issued a report opining that the child-care component made the program inconsistent with the educational and cultural purposes of the Fulbright-Hays Act. App.8-9. But Congress again disagreed, and passed legislation maintaining the au pair program as a cultural exchange program operating under the USIA. Pub. L. No. 101-454, §8, 104 Stat. 1063 (1990). Congress reaffirmed its approval of the program by extending its authorization twice more over the next five years. Pub. L. No. 103-415, 108 Stat. 4299, 4302 (1994); Pub. L. No. 104-72, 109 Stat. 776, 776 (1995).

3. In 1994, the USIA adopted interim regulations designed to ensure that the au pair program would continue to provide the cultural and educational benefits that Congress intended. 59 Fed. Reg. 64,296. Among other things, those interim regulations enhanced the procedures for recruiting and training program participants; added additional requirements for host families with infant children; and required

program participants to pursue at least six hours of academic credit in the United States. 59 Fed. Reg. at 64,297-98. The USIA again considered reducing the maximum number of child-care hours per week, but decided to retain the existing limit, noting that program sponsors and host families "uniformly plead that the au pair concept is not viable … unless the au pair participant may provide up to … forty-five hours of child care." *Id.* at 64,298.

The USIA also adopted a fixed formula "to ensure that all au pair participants receive uniform compensation." *Id.* Under that formula, au pairs received the federal minimum wage (then $4.25) multiplied by 45 hours (regardless of the number of hours of child-care services provided), less a fixed $36 room and board allowance. *See id.*

After requesting comments and reviewing thousands of responses, the USIA issued final rules in 1995. Exchange Visitor Program, 60 Fed. Reg. 8547 (Feb. 15, 1995). The USIA explained at the outset that the au pair program is not, and cannot be, primarily a child-care program, but rather must be "primarily a cultural and educational exchange program which incidentally provides child care." 60 Fed. Reg. at 8548. To ensure that objective, the USIA reaffirmed that program participants cannot provide more than 45 hours of child-care services per week, and must pursue at least six credits of post-secondary education. *Id.* at 8552; *see* 22 C.F.R. §514.31(c)(2)-(3) (1995).

As for the weekly stipend, after seeking the views of the Department of Labor on whether au pairs are employees under the Fair Labor Standards Act ("FLSA"), the USIA deferred to that agency's view that

the program included a work component. 60 Fed. Reg. at 8550-51. At the same time, the USIA recognized the "programmatic need for a uniform wage" for participants all across the nation. *Id.* at 8551. Accordingly, the USIA calculated a national weekly stipend regime for all au pairs by borrowing the federal minimum hourly wage and multiplying it by 45 hours per week, then allowing host families to subtract up to $76 a week (40% of the gross weekly amount) for room and board, for a stipend of "not less than $115.00" per week. *Id.* Notably, the agency instructed that au pairs should be paid based on a 45-hour work-week even if they actually worked fewer hours or not at all in a given week. *Id.*

The USIA based its room and board credit on a proposed Department of Labor regulation that was not yet final, and noted its intent to adopt whatever "fixed credit method" that agency ultimately chose. *Id.* While host families could voluntarily choose to deduct less, the USIA explained that a uniform maximum credit that every family may deduct would "eliminate the need for host families to keep individualized records," and avoid "compel[ling] the federal government to expend scarce resources to regulate or otherwise oversee this portion of the [au pair] program." *Id.*

Congress subsequently reauthorized the USIA to continue the au pair program through 1997. An Act to Extend Au Pair Programs, Pub. L. No. 104-72, 109 Stat. 776 (1995). Congress further directed the USIA to report on sponsoring agencies' compliance with the recently promulgated regulations. *Id.*

4. The federal minimum wage increased from $4.25 to $4.75 in 1996, and to $5.15 in 1997. Pub. L. No. 104-188, §2104, 110 Stat. 1755, 1928-29 (1996). In light of the existing regulation's requirement of a weekly stipend of "not less than $115.00 per week," 60 Fed. Reg. at 8553, the USIA issued a "fact sheet" in 1997 to update the stipend calculation and "dispel any confusion" about whether the increased federal minimum wage should be used. CA.App.41. The fact sheet followed the same formula set forth in the Federal Register notice accompanying the 1995 regulation, with updated stipend amounts corresponding to 45 hours multiplied by the increased federal minimum wage, less a 40% room and board credit. CA.App.41.

The USIA issued amended regulations in 1997 providing "further [specificity] regarding regulatory implementation and compliance." Exchange Visitor Program, 62 Fed. Reg. 34,632, 34,632 (June 27, 1997). Among other things, those regulations strengthened the educational component; enhanced host families' participation in selecting au pairs; and enhanced the child-care experience and orientation requirements. The amended regulations provided for a program stipend at "a weekly rate based upon 45 hours per week and paid in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor." *Id.* at 34,634; 22 C.F.R. §62.31(j)(1). Congress permanently authorized the au pair program later that year. *See* An Act to Provide Permanent Authority for the Administration of Au Pair Programs, Pub. L. No. 105-48, 111 Stat. 1165 (1997).

5. After the USIA was dissolved in 1999, Congress transferred oversight of the au pair program to the State Department. *See* App.7, 11-12. The State Department continues to regulate all aspects of the program, including the ages of au pair participants (18 to 26) and the length of their stay (one year, with a possible extension for up to one year). 22 C.F.R. §62.31(d)(1), (o). The State Department has also continued to apply essentially the same stipend calculations that the USIA developed, accounting for increases in the federal minimum wage. *See* CA.App.710, 712. Since 1999, the State Department has conducted annual audits of au pair program sponsors, and never once suggested that any sponsor should be sanctioned for failure to require host families to comply with state or local labor laws.

B. Factual and Procedural Background

Petitioner Cultural Care, Inc. is an au pair program sponsor that has sponsored au pairs for more than 30 years. During that time, Cultural Care has matched numerous au pair applicants with American host families and monitored au pair and host family compliance with program rules. *See* 22 C.F.R. §62.31(c) (describing sponsor obligations). Petitioners Erin Capron and Jeffrey Penedo are a host mother and host father who live in Massachusetts and have hosted au pairs placed by Cultural Care. App.2.

In 2014, the Massachusetts legislature enacted the Massachusetts Domestic Workers Bill of Rights ("DWBOR"), Mass. Gen. Laws ch.149, §190. The state Attorney General's Office ("AGO") issued implementing regulations the following year. 940 Mass. Code Regs. §32.00 *et seq*. Those state laws set

numerous requirements governing the employment of domestic workers in Massachusetts, including housekeepers, nannies, and others providing "household services … in private homes." Mass. Gen. Laws ch.149, §190(a). Among other things, they require that domestic workers must be compensated at overtime rates for all hours over 40 hours per week, 940 Mass. Code Regs. §32.03(3); that domestic workers must be compensated for all time that they are required to be on the employer's premises or on duty, *id.* §§32.02, 32.03; that employers may deduct only limited amounts for room and board, and only if "voluntarily and freely chosen" by the domestic worker and agreed to in writing, *id.* §32.03(5); and that employers must "keep a … record of wages and hours" for each domestic worker, and a written agreement stating "working hours, including meal periods and other time off"; "the provisions for days of rest, sick days, vacation days, [and] holidays"; "costs for meals and lodging"; "the process for raising and addressing grievances and additional compensation if new duties are added"; and various other mandatory records, *id.* §32.04(2), (3).

While Massachusetts had never before attempted to apply any of its state wage and hour laws to the au pair program, the AGO invited Cultural Care to two meetings to discuss whether the DWBOR and its implementing regulations should apply to program. CA.App.20-21. Cultural Care explained at those meetings that applying those requirements to the au pair program would intrude on the federal government's exclusive regulatory power and fundamentally undermine the program's core objectives. The AGO was unmoved, and ordered

sponsors to ensure compliance with those state requirements by September 1, 2017. CA.App.23.

Petitioners subsequently filed this action seeking declaratory and injunctive relief to confirm that federal law preempts application of the DWBOR and its implementing regulations to the au pair program. App.2-3. The district court granted respondents' motion to dismiss, App.73-99, and, after the court denied reconsideration, App.101-03, petitioners appealed.

C. The First Circuit Requests and Then Rejects the Government's Views

1. After full briefing and oral argument from the parties, the First Circuit *sua sponte* issued an order requesting the views of the U.S. State Department "[i]n light of the complexity of this case and the seriousness of the issues presented." App.104. That order was accompanied by a letter to the Solicitor General and the State Department Office of the Legal Advisor soliciting the federal government's views on whether the federal regulations governing the au pair program preempt the application of state and local labor laws to that program. App.106-07.

The United States responded with an amicus brief approved by the Departments of State and Justice, and "reflect[ing] the considered position of the United States." US.CA.Br.19 n.7. In the view of the United States, the federal regulations governing the au pair program "do not leave room for a state or municipal government to impose terms of employment for au pairs that differ from the terms set forth in the regulations." US.CA.Br.10. Those regulations, the government explained, are "drawn not only to bar

what they prohibit but to allow what they permit." US.CA.Br.10 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000)). Their "nuanced and detailed provisions"—covering the maximum hours an au pair may work, the academic credits an au pair must earn, the minimum stipend and vacation time a host family must provide, and numerous other program requirements—demonstrate a "calibrated approach to the au pair program" that displaces state attempts to impose additional conditions. US.CA.Br.11.

The United States emphasized that the broader context of the au pair program confirms that preemption is warranted. The program "operates in the fields of foreign affairs and immigration—two fields that have long been reserved exclusively to the federal government." US.CA.Br.16. As such, the traditional presumption against preemption should not apply to this "federal program to implement the foreign-policy and immigration objectives of the United States." US.CA.Br.17. Allowing states to regulate the au pair program, the government underlined, would threaten the "quintessential federal interest" in the viability of that federal program. US.CA.Br.20. In the government's view, "[s]tate and local regulations have the potential to severely undermine the au pair program, particularly if increased costs or record-keeping burdens discourage participation by host families." US.CA.Br.19-20.

2. Fourteen months later, the panel issued a lengthy decision rejecting the considered views of the United States and holding that federal law does not

preempt Massachusetts from applying its state labor laws to the federal au pair program. App.1-72. Despite the detailed and comprehensive nature of the governing regulations, and the foreign relations and immigration fields in which the program operates, the panel held that states are not barred from regulating the program. App.21-31. And despite the various conflicts between the federal regulations and the requirements Massachusetts seeks to impose—including the state's higher minimum wage and additional recordkeeping obligations, and the fact that varying state regulations would make a uniform nationwide au pair program impossible—the panel concluded that the federal regulations were not intended to supersede such state laws. App.31-62.

Nearly 70 pages into its opinion, the panel finally responded to the views it had requested from the United States. App.62. The panel recognized that the government "reads its current regulations … differently than we do," App.62, but favored its own reading. In particular, the panel dismissed the government's view that the federal regulations define the obligations of au pairs and host families, asserting that the regulations do not regulate au pairs or host families, but rather "address only the obligations that sponsors must meet," and that the government had failed to explain this purported "disjuncture between the Au Pair Program's focus on the obligations of sponsors and the state wage and hour measures' focus on the obligations of the [host families]." App.63. The panel also dismissed the government's view that the regulations were intended "not only to bar what they prohibit but to allow what they permit," App.64

(quoting *Crosby*, 530 U.S. at 380), finding that intent "not … clear" from the regulations, App.64-65.

3. As the government predicted, US.CA.Br.19-20, the panel's decision has caused immediate and substantial disruption. Sponsors and state authorities have faced numerous questions from host families understandably unsure about what regulations they must follow and whether they can continue to participate in the program. Some host families have already announced their intention to withdraw from the program, forcing their au pairs to either re-match with a new host family (itself a substantial disruption) or be sent back to their home countries. At least one sponsor organization has ceased operations in Massachusetts. *Recent Case:* Capron v. Office of the Attorney General of Massachusetts, Harv. L. Rev. Blog (Feb. 7, 2020), https://bit.ly/37lkD0a.

To mitigate that disruption, petitioners moved to stay the mandate and application of the challenged laws pending further review. The First Circuit denied that motion based on respondents' "representation regarding [their] intention not to enforce the state law provisions at issue against [host] families." App.110-11. Meanwhile, respondents publicly announced their intention to enforce the challenged state laws against sponsors, flatly contradicting the panel's assertion that the state laws do not conflict with the federal laws because the latter govern only sponsors while the former govern only host families. App.27, 29, 49-50, 62-63.

REASONS FOR GRANTING THE PETITION

The decision below reaches the remarkable conclusion that states may regulate the terms and conditions of participation in a federal cultural exchange program—*i.e.*, a program through which foreign visitors of specified ages obtain authorization to enter and temporarily live and study in this country. The decision effectively holds that states may override the terms and conditions on which a J-1 visa is issued and an international cultural exchange program is run. The court reached that startling conclusion, moreover, after soliciting—and then summarily rejecting—the considered views of the United States. The decision is wrong at every turn. It invokes a presumption against preemption that does not apply when, as here, a state seeks to regulate a federal cultural exchange program. It relies on an interpretation of the governing federal regulations that defies the view of the federal regulators and renders them nonsensical. And it ignores the federal government's clear warnings that the federal au pair program cannot thrive without a uniform minimum stipend that keeps participation affordable nationwide and obviates the need for burdensome recordkeeping requirements.

As the United States predicted, upholding the application of Massachusetts' burdensome regulatory regime to au pairs has already had a profoundly disruptive effect on the federal au pair program, and on the cultural exchange experience that program is designed to foster. Some host families have had no choice but to withdraw from the program and scramble to find a new child-care option, forcing their

au pairs to either be re-matched with another family or, if a placement cannot be found, sent back to their home countries. At least one sponsoring organization has ceased operations in Massachusetts. Meanwhile, plaintiffs' lawyers have begun filing class actions on behalf of au pairs not just in Massachusetts, but in other states with generous wage and hour laws. And the prospect that state laws will override the uniform minimum federal stipend undoubtedly will impact which families participate and where au pairs seek placement, leaving a program designed to highlight the diversity of the nation skewed toward wealthy families and high-wage locales.

This is thus not a situation that can await further percolation as lawsuits against sponsors and host families proliferate throughout the nation. The United States has already shared its definitive views that this distinctly federal and international cultural exchange program needs uniform federal regulations. Massachusetts sees an employment program, not an international cultural exchange program, and regulates it as such. The only way to restore the federal government's vision of the au pair program is for this Court to grant review and reverse now.

I. The Decision Below Empowers States To Regulate The Terms Of Participation In A Federal Cultural Exchange Program, In Direct Derogation Of Views That The Court Solicited From The United States.

Settled principles of field, conflict, and obstacle preemption all mutually reinforce the conclusion that federal law preempts state and municipal efforts to superimpose local labor laws on the federal au pair

program. The au pair program is an international cultural exchange program that operates in the exclusively federal fields of foreign affairs and immigration. It is pervasively regulated by federal regulations that leave no room for states to impose additional or conflicting requirements. And those federal regulations were crafted to accomplish specific federal objectives that Massachusetts' burdensome wage and hour laws would eviscerate. Indeed, Congress repeatedly underscored its view that the program is an international cultural exchange program and not an employment program. The First Circuit's conclusion that Massachusetts may apply its state laws to regulate it as the latter cannot be reconciled with this Court's precedents, Congress' judgments, federal regulations, and the considered views of the United States.

A. The Au Pair Program Is a Comprehensively Regulated Federal Program That Operates in the Exclusive Federal Fields of Foreign Policy and Immigration.

The federal au pair program is "a creation of federal law," US.CA.Br.16, and the relationship it forms between host families and foreign nationals visiting as au pairs is "inherently federal in character": It "originates from, is governed by, and terminates according to federal law." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001).

The au pair program operates, moreover, in two fields that are the exclusive province of the federal government: foreign relations and immigration. This Court has long recognized that the federal government

has "full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines v. Davidowitz*, 312 U.S. 52, 63-64 (1941). Likewise, the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976). The au pair program squarely implicates both of those powers. As a cultural exchange program under the Fulbright-Hays Act, it is designed to "strengthen the ties which unite us with other nations," "promote international cooperation," and "assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world." 22 U.S.C. §2451. And it does so by establishing the terms and conditions under which foreign visitors may obtain a temporary J-1 visa to enter and remain in the United States.

In keeping with the program's foreign relations and immigration nature, Congress has consistently rejected the notion that the au pair program is an employment program, rather than an international cultural exchange program. Consistent with that judgment, Congress has given responsibility for the au pair program and other cultural exchange programs to federal agencies with foreign relations expertise: first the USIA, and then the State Department. Those agencies, in turn, have set terms of participation, like age limits and renewal limits on au pairs and English-fluency requirements for au pairs and host families, that would be out-of-place (indeed, unlawful) for an employment program and thus reinforce the program's essential character as an international cultural exchange program. Those agencies have also repeatedly emphasized the foreign relations objectives

of such programs. *See, e.g.*, 22 C.F.R. §62.1 ("Educational and cultural exchanges assist the Department of State in furthering the foreign policy objectives of the United States."); 62 Fed. Reg. at 34,633 (cultural exchanges are a "foreign affairs function").

None of that makes for a very promising start for Massachusetts' late-breaking effort to subject the 34-year-old au pair program to state labor laws. Regulating the terms of a federally run international cultural exchange program "is hardly a field which the States have traditionally occupied." *Buckman*, 531 U.S. at 347; *cf. Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (states may not regulate areas involving "uniquely federal interests"). Indeed, no state appears to have made any attempt to apply its labor laws to the au pair program until its 28th year of existence. *See* US.CA.Br.15 n.5.

That is unsurprising, as allowing states to impose their own rules on the program would effectively empower states to decide "the conditions under which a legal entrant may remain" in the country—power that the Constitution vests in Congress alone. *De Canas*, 424 U.S. at 355. After all, the only reason the au pair participant can legally be in the country is to participate in the program. If Massachusetts' onerous laws force a host family to withdraw, their au pair cannot just switch professions. If another host family cannot be arranged, the au pair must leave the country. States may no more impose their own conditions on a J-1 visa program than create visa programs themselves, or refuse to accept visa-holders from specified countries based on their own foreign

policy preferences. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (states may neither "add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens").

The federal government may of course *choose* to incorporate state law into a federal program; indeed, it has done so with some cultural exchange programs. *See* US.CA.Br.7, 11-13. But it has intentionally refrained from doing so with respect to the terms of participation in the au pair program. The State Department regulations that govern all exchange visitor programs (including the au pair program) "establish a comprehensive scheme for administering an exchange program"; among other things, they

> create the program, §62.1(b); define all the relevant terms, §62.2; provide who is eligible to be a sponsor, §§62.3, 62.7-62.8; provide which foreign nationals may participate, §62.4; describe the application process for sponsors, §62.5; establish the general obligations of sponsors, §§62.9-62.15; describe the rules for foreign exchange participants, §§62.16-62.17, 62.22, 62.43, 62.45; and provide for sanctions against or termination of sponsors, §§62.50, 62.60-62.62.

ASSE Int'l, Inc. v. Kerry, 803 F.3d 1059, 1070 (9th Cir. 2015); *see generally* 22 C.F.R. §§62.1-62.32.

The regulations that govern the au pair program are especially exacting, setting forth specific age, education, physical, and personal requirements for au pairs, 22 C.F.R. §62.31(d)(1)-(6); immigration status, English fluency, financial, and personal requirements

for host families, *id.* §62.31(h)(1)-(7); more demanding criteria for au pairs placed with host families with infants, young children, or special needs children, *id.* §62.31(e)(2)-(4); exactly what au pairs and host families must receive for orientation, *id.* §62.31(f)(1)-(5), (i)(1)-(4); precisely how many hours of training an au pair must receive, *id.* §62.31(g)(1)-(2); and under what conditions an au pair may seek to extend or repeat program participation, *id.* §62.31(o)-(p). The regulations also impose extensive monitoring and reporting requirements on sponsors, which must apply for re-designation every two years and are subject to frequent State Department audits. *Id.* §62.31(b)-(c), (*l*)-(n).

Even more problematic for Massachusetts, the au pair program regulations speak quite specifically to the precise issues on which the state seeks to superimpose its own laws. Since 1994, when Congress directed the USIA to publish rules governing the program, the applicable regulations have established a uniform, national minimum stipend, and the responsible agency has issued at least three separate guidance documents since 1997 setting forth "the stipend" as a set dollar amount. *See supra* pp.6-10; US.CA.Br.7-8. That stipend is derived from a straightforward formula: the federal minimum wage, multiplied by a presumed 45-hour workweek, minus a presumed 40% deduction for room and board, for a minimum weekly stipend of $195.75. *See* 22 C.F.R. §62.31(j)(1) (providing for "a weekly rate based upon 45 hours of child care services per week"); CA.App.232-34 & nn.3-4 (explaining arithmetic behind the stipend).

Notably, the regulations specify that au pairs must be paid "at a weekly rate based upon 45 hours of child care services per week," whether or not they work that many hours in any given week, and must be "paid in conformance with the requirements of the Fair Labor Standards Act," 22 C.F.R. §62.31(j)(1)—not state and local law. That text stands in sharp contrast to the federal regulations governing other exchange programs under the Fulbright-Hays Act that *do* require compliance with state and local minimum wage standards based on actual hours worked. *See, e.g.*, 22 C.F.R. §62.32(i)(1) (summer work-travel participants must be paid "the higher of: (i) The applicable Federal, State, or Local Minimum Wage (including overtime); or (ii) Pay and benefits offered to their similarly situated U.S. counterparts"); *id.* §62.24(f)(5) (teachers must be paid "commensurate with" similarly situated U.S. counterparts); *id.* §62.30(f) (same for camp counselors); *see also* US.CA.Br.7, 11-13. As those regulations confirm, "when the State Department intends to require payment in accordance with state and local law for [exchange program] participants, the Department says so expressly." US.CA.Br.12. It did not do so for the au pair program.

That decision makes eminent sense, because the stipend was specifically designed to address a "programmatic need for a uniform wage." 60 Fed. Reg. at 8551. As the USIA explained, it was concerned not only with keeping participation affordable for host families from all walks of life, but with easing the administrative burdens on the host families on which the cultural exchange program depends. By requiring host families to compensate au pairs "based upon 45

hours of child care services a week" even if they actually work less, and allowing host families to deduct a 40% room and board credit without documenting their actual costs, the regulations "eliminate the need for host families to keep individualized records" carefully tracking all their expenses and each hour their au pair spends with their children, and strike a balance that the agency deemed "fair to host families and au pairs" alike. *Id.* That careful balancing effort would be for naught if states could impose the very requirements that the uniform stipend was designed to avoid.

For decades, host families have paid au pairs at least the uniform stipend calculated by the USIA (and later the State Department), which has always incorporated the federal minimum wage. And in the entire history of the au pair program, the State Department has never initiated an enforcement action based on the failure of a program participant to abide by state or local wage regulations. That is quite telling. The au pair program is conducted with considerable federal oversight; sponsors must inform the Department of the precise terms that govern their dealings with exchange visitors, and have undergone annual audits by the agency since 1999. *See* 22 C.F.R. §§62.9(d)(1), 62.15(a), 62.31(m). Yet since the program's inception, the State Department has never once suggested that any sponsor has violated the law by instructing host families to pay au pairs the stipend calculated by the State Department, rather than whatever wages might be required by state or local law.

Where (as here) an industry has engaged in a "decades-long practice," and the responsible agency is well aware of that practice but has never "suggested that it thought the industry was acting unlawfully," it is hardly likely that the matter has simply slipped the agency's attention. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012). The State Department's longstanding enforcement practices reinforce the conclusion that the federal au pair program regulations leave no role for state or local labor law.

B. The Federal Regulations Governing the Au Pair Program Preempt the Challenged State Laws.

Against that backdrop, there should be no serious dispute that the federal au pair program regulations "preempt state and local laws establishing terms of employment that differ from the terms established by the federal regulations." US.CA.Br.10 (capitalization altered).

At the outset, it bears repeating that the au pair program is "a creation of federal law." US.CA.Br.16. It "originates from, is governed by, and terminates according to federal law." *Buckman*, 531 U.S. at 347. Moreover, the program "operates in the fields of foreign affairs and immigration—two fields that have long been reserved exclusively to the federal government." US.CA.Br.16. Accordingly, "no presumption against pre-emption obtains." *Buckman*, 531 U.S. at 348. If anything, the presumption should be reversed, as courts should not lightly conclude that the federal government intended to empower states to impose their own terms on a "federal program to

implement the foreign-policy and immigration objectives of the United States." US.CA.Br.17.

There is certainly no basis for that conclusion here, as the comprehensive federal regulations that govern the au pair program "do not leave room for a state or municipal government to impose terms of employment for au pairs that differ from the terms set forth in the regulations." US.CA.Br.10; *see, e.g.*, *Arizona v. United States*, 567 U.S. 387, 399 (2012) (preemption is warranted where "pervasive" federal regulation leaves "no room for the States to supplement it"). Federal regulations "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. Those regulations are "drawn not only to bar what they prohibit but to allow what they permit." US.CA.Br.10 (quoting *Crosby*, 530 U.S. at 380). It necessarily follows that "states and municipalities have no license to require the payment of a greater wage than the federal government has chosen to require through the terms of employment it has set for these federal exchange-program participants." US.CA.Br.15.

That conclusion is reinforced by the fact that "[s]tate and local regulations have the potential to severely undermine the au pair program, particularly if increased costs or record-keeping burdens discourage participation by host families." US.CA.Br.19-20; *see Crosby*, 530 U.S. at 372-73 (federal law preempts state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Allowing

states to impose onerous and expensive regulations on the au pair program will make it impossible for the State Department to attract the diverse nationwide group of willing host families that is needed to make the program a success. Instead, au pairs will be drawn to a few high-wage jurisdictions, where only a few affluent families will be able to afford to host them—dramatically decreasing the "diversity of American political, social, and cultural life" that the program can offer to foreign visitors. 22 U.S.C. §2460(c).

Massachusetts' laws are a striking case in point. Under current federal law, the minimum weekly stipend for an au pair is $195.75. *See* US.CA.Br.7. Under Massachusetts law, the minimum wage for an au pair performing the same 45 hours of child care would be at least 150% higher, totaling $605.63 for wages and overtime with at most a $77 deduction for room and board. *See* Mass. Gen. Laws ch.151, §§1, 1A (minimum wage and overtime); Katie Johnston, *A Court Ruling Boosts Au Pairs' Pay, but It Puts Families in a Bind*, Bos. Globe (Dec. 12, 2019), https://bit.ly/37YNMzm. That could increase the cost of hosting an au pair by more than $17,000 per year—more than a quarter of the median American household income. Johnston, *supra*; *see* Gloria G. Guzman, U.S. Census Bureau, *Household Income: 2018* (Sept. 2019), https://bit.ly/2S6SBAd. The au pair program cannot show foreign visitors the full diversity of American culture if only Boston Brahmins can afford to be hosts.

And the increased costs for a 45-hour work-week are just the tip of the iceberg. Under Massachusetts law as written, all time during which a domestic

worker is required to be "on duty" or on the employer's premises—including time spent eating and sleeping—is compensable. 940 Mass. Code Regs. §32.02. That rule may make sense for a garden-variety employment relationship, but is completely incompatible with a cultural exchange program in which the program participant is required to live with the host family, *see* 22 C.F.R. §62.31(a), and encouraged to spend time with the family to ensure that the program creates not just an employment relationship but an enriching cultural experience. Requiring host families to compensate their au pairs for every hour sleeping under the same roof, sharing a meal, or joining the family on an outing or vacation would create an unfortunate disincentive for host families to spend time with their au pairs, fatally undermining the paramount federal goal of a cultural exchange that "increas[es] mutual understanding between Americans and others through people-to-people contact." 60 Fed. Reg. at 8547.

Indeed, even respondents appear to acknowledge that enforcing their regulations as written would be "inconsistent with the structure of the federal program," and so have promised not to require host families to pay au pairs for time spent eating or sleeping. US.CA.Br.14; *see* App.58-59. But respondents' *ad hoc* willingness to disavow the plain language of their regulations is an implicit concession of preemption, and only underscores the incoherencies that result from allowing state regulation of this federal program. Simply put, Congress did not intend the au pair program to vary wildly from one jurisdiction to another with the degree of variance dictated by the whim of state and local authorities.

Allowing the challenged Massachusetts laws (and other state and local laws like them) to govern the federal au pair program would also create precisely the kinds of onerous administrative requirements that the State Department found incompatible with the program's cultural exchange goals. Part of the reason for crafting a stipend calculation with a formulaic deduction for room and board was to "eliminate the need for host families to keep individualized records." 60 Fed. Reg. at 8551. Yet Massachusetts would require host families to perform a complicated multi-step process to determine the minimum amount owed each week—calculating all compensable "working time" hours under state law, determining whether overtime pay is required under state law, and deducting for lodging and the actual cost of each meal when state law permits, and then paying the higher of that amount or the federal minimum each week. *See* 940 Mass. Code Regs. §§32.02, 32.03.

The added administrative burdens would not end there. Massachusetts would require each host family to keep "a true and accurate record of wages and hours for three years," 940 Mass. Code Regs. §32.04(2), including "time sheet[s]" that record all "compensable time worked each day" on a biweekly basis, *id.* §32.04(4)(a). Given that the default tenure is one year, this requirement could force a host family to retain a sheaf of paperwork for four different au pairs. The host family likewise must maintain a written agreement with its au pair, including provisions governing "working hours, including meal periods and other time off"; "the provisions for days of rest, sick days, vacation days, [and] holidays"; "costs for meals and lodging"; "the process for raising and addressing

grievances and additional compensation if new duties are added"; and various other mandatory terms, *see id.* §32.04(3). Many of those terms would have to be resolved before the au pair began providing child-care services—that is, in an advance international negotiation between the host family and au pair. *See id.* §32.03(2), (5). And even if the international negotiation over terms of employment were successful, it would reinforce to all involved that the relationship is first and foremost an employment relationship for the provision of child-care services, which is precisely the view of the program that Congress repeatedly rejected.

C. The First Circuit's Decision Is Fatally Flawed at Every Turn.

Notwithstanding the wealth of evidence to the contrary, the First Circuit concluded that federal law does not preempt Massachusetts' effort to apply its own wage and labor laws to the au pair program. More remarkable still, the court did so in derogation of the views it solicited from the State Department and the United States—not only on whether state law is preempted, but even on how the State Department's own regulations work. That decision contravenes basic principles of preemption and cries out for this Court's immediate review.

The court erred at the threshold by invoking the presumption against preemption. *See* App.28-29. The principal authority the court relied on was this Court's decision in *De Canas*, which it cited for the proposition that not all state employment laws are preempted as applied to aliens. App.28-29. But even setting aside the problem that federal immigration law today "is

substantially different from the regime that prevailed when *De Canas* was decided," *Arizona*, 567 U.S. at 404, that proposition has little, if anything, to do with the question here—namely, whether the presumption applies to a state's effort to regulate the terms of participation in a federal cultural exchange program. The far more relevant authority on that question is *Buckman*, which confirms that regulation of a program that "originates from, is governed by, and terminates according to federal law" "is hardly a field" that states can claim to have "traditionally occupied." 531 U.S. at 347. That this particular federal program operates in the twin fields of foreign relations and immigration only reinforces that conclusion.

The First Circuit erred even more fundamentally in its bottom-line conclusion that Massachusetts' laws are not preempted. The court acknowledged that the federal regulations governing the au pair program are "detailed and comprehensive." App.27-28. But it nonetheless found the very federal regulations that do the preempting largely irrelevant to its preemption analysis because, in its view, those regulations "are directed at the sponsors … not the host families." App.27-28. Indeed, the court even went so far as to suggest that the federal regulations might preempt application of state law to the sponsors who assist the federal government in administering the au pair program, but not the host families who participate in it. App.19 n.5.

That reasoning not only conflicts with the government's view of its own regulations, *see, e.g.*, US.CA.Br.3 (federal regulations establish "the compensation that … families are required to pay

participants"); US.CA.Br.6, 11 ("[T]he au pair regulations require host families to pay a weekly stipend that is based on the *federal* minimum wage."), but also defies common sense. The fact that the State Department chooses to work through sponsors to supervise host families and au pairs hardly suggests that "the rights and duties of au pair participants and host families" are somehow a "merely peripheral concern" of the federal regulations. App.27. To the contrary, the whole point of obligating sponsors to ensure that host families and au pairs comply with the requirements the federal regulations create is *to ensure compliance with those requirements*.

The First Circuit also tried to make something of the notion that the regulations allow for the imposition of sanctions for noncompliance only on sponsors, "not the host families." App.27. Even assuming that is correct, the more relevant point is that the State Department cares enough about compliance with *the substance* of its regulations to impose sanctions for failure to accomplish it. If anything, the fact that the State Department has deliberately chosen to refrain from authorizing the imposition of monetary penalties on host families or au pairs simply would underscore that the program cannot exist without host families and participants, and thus that state laws imposing such penalties on host families would discourage the participation on which the program depends and upset the federal government's preferred enforcement mechanism to boot. *See Arizona*, 567 U.S. at 403-07 (Congress' decision to focus penalties on employers rather than on illegal aliens seeking employment preempts state efforts to punish the latter). Indeed, the differential

treatment of host families goes to the heart of the preemption problem. The federal government views them as necessary participants in a cultural exchange program, while the state views them as employers that must comply with state law on pain of substantial penalties.

Finally, there is no basis for the panel's insistence that the uniform stipend sets only a "regulatory floor" that states are free to supersede with their own minimum wage requirements. App.34. Far from requiring "unfounded speculation about the federal government's implicit intention," App.35, the decision to set a uniform minimum stipend that states may not increase is evident both on the face of the stipend regulation and in the USIA's explanations for adopting it. Simply put, the federal minimum stipend could not accomplish the agency's expressed objective of encouraging a nationwide and diverse pool of participants and obviating the need for burdensome recordkeeping requirements if that uniform federal minimum went out the window any time state or local law sought to impose a higher minimum compensation amount. By allowing Massachusetts to impose the very type of onerous costs and obligations that the federal stipend formula was designed to avoid, the decision below not only empowers Massachusetts to regulate a federal program that it has no business regulating, but empowers it to eviscerate a core mechanism through which that program is designed to achieve its foreign relations objectives.

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

The decision below not only is profoundly wrong, but threatens serious injury to the federal au pair program if it is permitted to stand. It has already thrown the program into chaos in Massachusetts, and it is causing ripple effects through the nation even now.

As the government explained below, allowing state and local governments to regulate the federal au pair program has the potential to substantially undermine the program's viability. US.CA.Br.19-20. The program was designed as a nationwide cultural exchange program, with the same opportunities and benefits available from Maine to Montana. That ensures not only that foreign visitors will learn about different aspects of American culture, but that Americans all over the country will have the opportunity to learn from foreign visitors. But if an au pair placed in Massachusetts will earn several multiples of an au pair placed in Kentucky, then au pairs will understandably be drawn to where the stipends are largest. And in high-wage jurisdictions like Massachusetts, only the wealthiest families could serve as hosts. Such results would be totally antithetical to a nationwide cultural exchange program intended to expose Americans and foreign visitors alike to diverse and enriching new cultural experiences.

In fact, the decision below not only threatens the character of the federal au pair program, but also its very existence. As the challenged laws here

demonstrate, state regulations may impose "increased costs or record-keeping burdens" that "discourage participation by host families." US.CA.Br.19-20. That imperils the "quintessential federal interest" in the "viability" of this federal program, since the program cannot continue without a willing supply of host families. US.CA.Br.20. Unless this Court grants review, the decision below will authorize state and local governments to make hosting a young foreign au pair (who is not a professional caregiver) just as expensive as hiring a trained local child-care provider, and thus make the program unsustainable. That is the inevitable result of a state scheme that sees only a domestic worker and not a cultural exchange participant. That is not the result Congress chose, and it is not a result this Court should permit.

The harmful effects of the First Circuit's decision are already materializing in just the few short months since it issued. From the moment the decision came down, sponsors and state authorities faced numerous questions and concerns from host families understandably unsure about which federal or state agencies have jurisdiction to regulate them, what regulations they must follow, and whether they can afford to continue participating in the program—questions that respondents here have simply passed on to sponsors. *See* Office of Att'y Gen. Maura Healey, *Domestic Workers*, https://bit.ly/36UFvv8 (last visited Feb. 14, 2020) ("If you have questions about the [First Circuit's] decision or your obligations under Massachusetts law, you should contact your au pair agency."). At least one sponsoring agency has already ceased operations in Massachusetts. *Recent Case*, *supra*. And multiple Massachusetts host families

have already decided to withdraw from the program altogether, forcing their au pairs (whose visas do not permit them to engage in unauthorized work) to either re-match with a new host family or return to their home countries. *See, e.g.*, Johnston, *supra*. Needless to say, those sudden disruptions seriously undermine the program's cultural exchange and foreign relations goals.

In short, the First Circuit "has thrown families who host au pairs into chaos as they sort through their new responsibilities … and cope with significantly increased child care costs." Kate Taylor, *A Court Said Au Pairs Deserve Minimum Wage*, N.Y. Times (Jan. 8, 2020), https://nyti.ms/31mIJ9p; *see also* Johnston, *supra*; Cristina Quinn, *Families With Au Pairs Struggle to Comply With Court Ruling*, WGBH News (Dec. 18, 2019), https://bit.ly/3ba0lKo. And the decision below "appears likely to have an impact beyond Massachusetts, in other states that … offer protections to domestic workers greater than those of the federal au pair regulations." Taylor, *supra*. Indeed, enterprising lawyers are already lining up to file class actions against sponsors and host families—not just in Massachusetts, but in any jurisdiction with labor laws that make it worth their time. There is thus ample reason for this Court to grant plenary review, and no reason to defer it. The United States has already provided the federal courts with its definitive view that Massachusetts law is preempted. The First Circuit ignored that view, with predictable practical effects in Massachusetts and nationwide. The only way to put an end to the resulting chaos is to grant review now and to preserve the federal au pair

program as an international cultural exchange program.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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