

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 OF *AMICI CURIAE* HOST FAMILIES  
IN SUPPORT OF PETITIONERS**

---

Shay Dvoretzky  
*Counsel of Record*  
Jeffrey R. Johnson  
Kristen Loveland  
*Admitted in New York*  
*Not Admitted in D.C.*  
JONES DAY  
51 Louisiana Ave., N.W.  
Washington, D.C. 20001  
(202) 879-3939  
sdvoretzky@jonesday.com

*Counsel for Amici Curiae*

---

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	7
ARGUMENT.....	10
I. MASSACHUSETTS’ LAW IMPAIRS THE AU PAIR PROGRAM’S CULTURAL EXCHANGE OBJECTIVE.....	10
A. The Au Pair Program Fosters Cultural Exchange.....	11
B. Host Families Fulfill the Program’s Objective of Cultural Exchange .....	13
C. Massachusetts’ Law Undermines the Au Pair Program.....	17
CONCLUSION .....	22

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Crosby v. Nat’l Foreign Trade Council</i> , 530 U.S. 363 (2000) .....	7, 21
<b>STATUTES</b>	
22 U.S.C. § 2451 .....	7, 11
940 Mass. Code Regs. § 32.00 <i>et seq.</i> .....	17
Mass. Gen. Laws Chapter 149, § 190 .....	17
Mass. Gen. Laws Chapter 151, § 1 .....	18
Mass. Gen. Laws Chapter 151, § 1A.....	18
Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (1961) .....	11
Pub. L. No. 101-454, § 8, 104 Stat. 1063 (1990) .....	11, 12
Pub. L. No. 103-415, 108 Stat. 4299 (1994) .....	12
Pub. L. No. 104-72, 109 Stat. 776 (1995) .....	12
<b>OTHER AUTHORITIES</b>	
22 C.F.R. § 62.1.....	11
22 C.F.R. § 62.4.....	12
22 C.F.R. § 62.31.....	12, 19

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page(s)</b>
Exchange Visitor Program, 60 Fed. Reg. 8547-02 (Feb. 15, 1995) .....	7, 12
Katie Johnston, <i>A Court Ruling Boosts Au Pairs' Pay, But It Puts Families in a Bind</i> , BOSTON GLOBE (Dec. 12, 2019) .....	18

## INTEREST OF *AMICI CURIAE* <sup>1</sup>

The amici curiae are host families who participate in the federal au pair program (the “Au Pair Program” or the “Program”) and support Petitioners Erin Capron, Jeffrey Penedo, and Cultural Care, Inc. Like countless host families, amici are interested in the outcome of this case because it could affect their ability to continue to participate in the Program. In addition, amici’s experiences as host families show that the Program works as federal law intends and that imposing state labor law on the Program thwarts those federal objectives. Host families are uniquely positioned to assess how changes to the legal regime governing the Au Pair Program have undermined the cultural exchange that the Program fosters and have made it difficult for host families to justify or afford the Program’s expense.

The amici host families are as follows:

**Diana and Ethan Bren.** Diana and Ethan welcomed their first au pair, from Brazil, in 2019. Diana is a master data manager, and Ethan is a facilities specialist at a library. They were attracted to the Au Pair Program because they wanted to introduce their children at a young age to a different culture and give a young person from a different country the chance to experience the United States. They treat their au pair like family; she joins them for meals, outings, trips,

---

<sup>1</sup> All parties have consented to the filing of this brief and received timely notice of *amici*’s intent to file as required by Rule 37. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and vacations. The Bren family is committed to facilitating cultural exchange. They have shown their au pair around New England; exchange food and recipes with her; and frequently discuss current events and Brazilian culture with her. After their au pair's parents and brother visited with the Bren family over the Christmas and Hanukkah holidays, staying on to celebrate Diana's and their daughter's birthdays, the Bren children began to talk about their "family in Brazil." The family plans to visit Brazil once the children are older, and their au pair hopes to continue her education in the United States. She is looking at colleges near the Bren family so she can remain close by.

Imposing Massachusetts labor law on the Program has changed the Bren family's experience with it, leading to frequent second guessing about what is and is not compensable. The law's increased wage requirements have led to difficult conversations with their au pair about how the family can afford to bring her on trips and to family holidays, and Ethan has modified his work hours because they now cannot afford to pay their au pair for a full week's childcare. The Bren family is unsure whether they will continue with the Program once their current au pair finishes her term.

**Keli and Kevin Callaghan.** Since 2015, Keli and Kevin have hosted five au pairs from Brazil and Germany. Keli works in marketing and Kevin in finance. Keli's mother traveled from Ohio to au pair in France when she was young, and Keli grew up with exchange students and foreign au pairs living in her home. Keli and Kevin were attracted to the Au Pair Program because it provided the opportunity to give their children a similar experience of cultural exchange. They have

particularly appreciated the opportunity to hear different perspectives on current events and to expose their children and their children's friends to foreign cultures and languages.

Their children see their au pairs as older siblings, and Keli and Kevin treat their au pairs like members of the family. The au pairs join the family for meals, vacations, and large family gatherings, and everything that Keli and Kevin provide for their children, they also provide for their au pairs. When Keli travels to Europe on business, she often visits former au pairs, and when the children are older, the family plans to visit their au pairs in Brazil and Germany. The additional costs imposed by the Massachusetts law have, however, made it difficult for the Callaghans to afford the cultural excursions that were once central to their au pairs' experiences and thus to honor the Program's cultural commitment. They are uncertain whether they will continue with the Program in the future.

**Judith Gordon and Lewis Rosenberg.** Judith and Lewis welcomed their first au pair, from Austria, into their home in 2019. Judith is a consultant for a biotechnology firm and Lewis is currently on active duty in the United States Army, deployed to the Middle East. They decided to participate in the program when Lewis was deployed, seeking both additional help while he was gone and to expose their son to German language and culture. Judith studied abroad in Germany and hoped to travel there with her son. Judith and Lewis treat their au pair like family; their au pair eats meals, goes on outings, and spends holidays with the family. At Christmas, Judith gave their au pair a personalized stocking to match the family's and baked Austrian cookies with her. Judith and Lewis are

also committed to the Program's cultural exchange mission. Their au pair toured Dallas and Savannah with Judith, who covered all costs of the trips.

However, once their current au pair completes her term, Judith and Lewis will not continue with the Au Pair Program. The family has found it difficult to walk the balance beam (to use Judith's analogy) of complying with federal and state regulations, which often seem to conflict. Even if Judith and Lewis could figure out how to comply, the Massachusetts law has made it impossibly expensive for them to participate in the Program going forward. And because of those added expenses, Judith is now uncertain that she will be able to afford the trip with her son to Germany.

**Kit Nichols and Duncan Kuhn.** Since 2018, Kit and Duncan have hosted two au pairs, both from Italy. Kit is the director of talent management at a public health organization and Duncan is an intensive care physician. When Kit's mother was young, she traveled from Sweden to au pair for a family in New Hampshire, where she met Kit's father; two of Kit's Swedish cousins have also participated in the Au Pair Program. Given that background, it is no surprise that Kit and Duncan were attracted to the Program's cultural exchange objective. It is also no surprise that they have treated each au pair like family, inviting each to join in family activities, eat meals with the family, and go on vacation together. Like a parent, Kit helps her au pair with her papers, and they discuss her coursework together. Kit and Duncan's family has benefited tremendously from the experience. Their children both now talk frequently about visiting Italy, in part because of their son's newfound interest in Pompeii and Mount Etna. Their daughter also sends their former



au pair care packages; they plan to visit her in Europe one day.

The Massachusetts law has completely changed Kit's and Duncan's experience with the Program. Constant second guessing about what is and is not compensable has undermined the cultural exchange that drew them to the Program in the first place. It has also made participation less economically feasible. As a result, Kit and Duncan are not sure that they will continue with the Program in the future.

**Catherine Toupence and Casey Stanley.** Since 2016, Catherine and Casey have hosted three au pairs, all from France. Catherine works in digital program management and Casey works in technical research sales. They were attracted to the Program by the opportunity for cultural exchange, particularly from France, Catherine's grandfather's home country. Like the couples mentioned above, Catherine and Casey treat their au pairs like family; they eat meals, spend holidays, and vacation together. Their au pairs even call Casey's parents Grammy and Grampy. Catherine and Casey have also opened their home to their au pairs' friends and family. For example, when their second au pair's mother visited for the holidays, Catherine and Casey gave her a stocking and presents to make her feel like part of the family. And when Catherine and Casey married, they covered all costs so their first au pair could attend the wedding. Through the Program, Catherine's and Casey's family has learned about French culture, exchanged recipes, and gained a desire to visit their au pairs in France.

The Massachusetts law has disrupted their experience with the Program. To save money, Catherine and

Casey had to reduce their au pair's hours; they also now have to have stilted conversations emphasizing that when their au pair is "off the clock," she need not spend time with them or their children. The awkwardness runs both ways, as they have had to ask her to pay for things for which they never contemplated asking previous au pairs to pay. Because of these changes, they are uncertain about their future with the Program.

## SUMMARY OF ARGUMENT

I. Amici join Petitioners in urging this Court to grant certiorari and confirm that Massachusetts cannot impose its labor laws on a federal cultural exchange program where doing so conflicts with federal law and destroys the objectives of that program.

Federal law preempts state laws that “stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Congress piloted the Au Pair Program in 1986 “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, and the federal government has since repeatedly confirmed that the Program is “primarily a cultural and educational exchange program.” Exchange Visitor Program, 60 Fed. Reg. 8547-02, 8548 (Feb. 15, 1995). As the experiences of amici show, cultural exchange is not just the purpose of the Program; it is also the practice of its host families, who integrate au pairs into their families, trade cultural experiences, and build lasting relationships.

Imposing labor laws like Massachusetts’ on the Au Pair Program makes that cultural exchange near impossible. It turns a familial relationship into a transactional one and renders unaffordable the cultural experiences that host families provide in order to fulfill the Program’s objectives. Indeed, it threatens to destroy the program itself. Because of these changes, amici feel that the Program can no longer serve the purpose of cultural exchange it once did. Moreover,

these changes have made the Program more costly than local childcare, so it is difficult for some to afford or justify participating. As a result, if Massachusetts' law remains in effect, some amici will not continue to participate in the Program, and others may not be able to do so. They are not alone.

A. Since its founding, the primary purpose of the federal Au Pair Program has been to facilitate cultural exchanges with people from other countries. Congress has repeatedly reaffirmed that purpose, and federal agencies have regulated the Program in accordance with that character. The Program achieves its cultural exchange objective by placing young foreigners directly in the homes of American families. The Program thus anticipates that cultural exchange will take place through an au pair's integration into an American home and participation in the host family's daily activities and special occasions. Federal regulation establishes a national, uniform stipend formula for au pairs, which facilitates the development of a familial relationship between host family and au pair by ensuring that their interactions do not devolve into transactional exchanges of work for wages.

B. The Au Pair Program has accomplished its purpose. Host families like amici have signed up for the Program because of the opportunity to share American culture with foreign au pairs and to learn about their culture in return. Hosts dedicate themselves to this task. For example, many host families plan special trips and outings so that au pairs can tour the local region and other parts of the United States. As the Program intends, however, much of the cultural exchange takes place in the home—through discussions

at the dinner table, celebrating holidays, and visits to and from the families of hosts and au pairs. Because these exchanges take place within the family environment, making au pairs feel like they are part of the host family is critical to the Program's success. Doing so creates the familiarity necessary for cultural interactions to occur organically and creates relationships that extend far beyond the au pair's stay.

C. Applied to the Au Pair Program, laws like Massachusetts'—which require the payment of an hourly wage for hourly work and vastly increase the Program's costs and record-keeping burdens—undermine the Program's cultural exchange objectives and threaten its very existence. Such laws thwart cultural exchange by turning a familial relationship into a transactional one. And the dramatically increased costs they impose make it difficult for host families to fulfill the Program's cultural exchange objective, because families can no longer afford to put their limited resources toward cultural experiences. Ultimately, these increased costs make it difficult for families—including amici's—to justify or afford continued participation in the Program. Laws like Massachusetts' thus threaten the Program's existence by decreasing the number of families willing or able to act as hosts.

The First Circuit wrongly held that federal law did not preempt Massachusetts from applying its labor law to the Au Pair Program. The only way to now prevent such state laws from undermining the purpose and existence of the Program is for this Court to grant review of the First Circuit's decision and reverse it.

## ARGUMENT

### I. MASSACHUSETTS' LAW IMPAIRS THE AU PAIR PROGRAM'S CULTURAL EXCHANGE OBJECTIVE

The primary purpose of the federal Au Pair Program is to facilitate cultural exchanges by integrating foreign au pairs into American families. In keeping with that purpose, amici have opened their homes and lives to foreign au pairs and have dedicated their time, money, and energy to exposing them to American culture. Amici have in turn learned about the cultures of other countries, broadening their and their children's horizons and developing deep and lasting relationships with individuals from around the world.

Massachusetts' law imperils the Program's central objective. By requiring host families to pay their au pairs hourly domestic worker wages rather than follow a uniform stipend formula, the law turns every encounter into a potential transaction, placing au pairs firmly in the "worker" rather than "family" category and undermining the relationships through which cultural exchange takes place. Laws like Massachusetts' also make it difficult for families to fulfill the Program's purposes by forcing them to spend limited resources on increased wages rather than cultural experiences. Many host families, including amici, now wonder why they should participate in a Program that no longer fosters cultural exchange. They also wonder how they can justify or afford the Program's increased costs, particularly because hosting an au pair now costs more than hiring local childcare. As a result, laws like Massachusetts' not only thwart the Program's objectives; they threaten its very existence.

### **A. The Au Pair Program Fosters Cultural Exchange.**

1. From its founding, the purpose of the federal Au Pair Program has been to promote cultural exchange between Americans and citizens of foreign countries. The Program was created pursuant to the Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (1961) (Fulbright-Hays Act), which seeks to “increase mutual understanding between the people of the United States and the people of other countries,” “strengthen the ties which unite us with other nations,” “promote international cooperation for educational and cultural advancement,” 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. The Program is one of the Department of State’s Exchange Visitor Programs, which “provide foreign nationals with opportunities to participate in educational and cultural programs in the United States and return home to share their experiences.” 22 C.F.R. § 62.1(b). Because the Program is intended to foster cultural exchange with foreign countries, agencies responsible for the United States’ foreign diplomacy have always been responsible for its oversight. *See* Pet. 19; 22 C.F.R. § 62.1(a) (“Educational and cultural exchanges assist the Department of State in furthering the foreign policy objectives of the United States.”).

Of course, the Au Pair Program also includes a childcare component. But Congress has repeatedly reaffirmed its character as a cultural exchange program designed to strengthen ties and increase mutual understanding between the United States and foreign countries. *See* Pet. 6; Pub. L. No. 101-454, § 8, 104

Stat. 1063 (1990); Pub. L. No. 103-415, 108 Stat. 4299, 4302 (1994); Pub. L. No. 104-72, 109 Stat. 776, 776 (1995). The agencies responsible for administering it have likewise recognized that the Program is “primarily a cultural and educational exchange program,” and they have regulated the Program accordingly. 60 Fed. Reg. at 8548. The Program was never meant as—and has not been treated as—a jobs program for foreigners.

2. The Program achieves its objective by placing young foreigners (between the ages of eighteen and twenty-six) directly in the homes of American families. There, they have “the opportunity to live with an American host family and participate directly in the home life of the host family.” 22 C.F.R. § 62.31(a); *see also id.* § 62.4(h)(5) (defining an au pair as “[a] foreign national who comes to the United States for the purpose of residing with an American host family and participating directly in their home life”). Au pairs also pursue continuing education at a nearby college or university. *See id.* § 62.31(k). Immersion in the home life of an American family, combined with their educational experience, exposes foreign au pairs to American society and values, enabling them “to return home as unofficial ‘ambassadors’ for the United States.” US.CA.Br.20.

Federal regulation establishes a uniform, national stipend formula for au pairs. 22 C.F.R. § 62.31(j). The United States Information Agency, which originally oversaw the Program, described the uniform formula as a “programmatic need,” 60 Fed. Reg. at 8551, and it is easy to see why. A uniform stipend formula keeps the Program affordable so foreign au pairs will be exposed to a diversity of American families and so that



families can afford to provide their au pairs with a variety of cultural excursions and experiences. It ensures uniformity across states so that no one region becomes more attractive than another. Most importantly, it facilitates the development of the familial relationship on which the Program's cultural exchange depends by ensuring that interactions between hosts and au pairs do not devolve into bartering negotiations about work for wages.

**B. Host Families Fulfill the Program's Objective of Cultural Exchange.**

1. Host families bring the Au Pair Program's objective of cultural exchange to life. Cultural exchange is not just the purpose of the federal Au Pair Program; it is its practice. Host families dedicate themselves to integrating au pairs into their families and exposing them to American culture. Au pairs, in turn, teach host families about their home country's society, language, and politics.

The Program's chief objective is also the primary reason many host families, including amici, sign up. For many, cultural exchange played a key role in their childhoods, and they now want to expose their children to similar world-broadening experiences. For example, Catherine Toupençe participated in a work and study abroad program in London and later worked in Switzerland, Romania, and France. Because of those experiences, and because she wanted to learn more about France, the country from which her grandfather emigrated, she has hosted three French au pairs. The parents of another host parent could no longer afford to travel the world after they had children, so they

brought the world to their home by hosting foreign exchange students. That host parent decided to host foreign au pairs so she could likewise expose her young children to different cultures. For her part, Judith Gordon was an exchange student in Germany and hoped to visit Germany with her son, so she sought a German-speaking au pair for their home.

Other amici have similar stories. Keli Callaghan's mother traveled from Ohio to au pair in France, and Keli's parents, wanting their children to be citizens of the world, frequently welcomed foreign au pairs and exchange students into their home. Keli has continued the tradition, hosting five au pairs over the past six years. Like Keli, Kit Nichols has close family members who were au pairs. Indeed, Kit's mother worked as an au pair for a family in New Hampshire—where she met Kit's father. Two of Kit's Swedish cousins went on to participate in the Au Pair Program in the 1990s, and Kit has now hosted two au pairs of her own.

2. Having joined the Program for the purpose of cultural exchange, host families dedicate themselves to introducing their au pairs to American culture and to learning about the cultures and societies of their au pairs. Families plan frequent trips with their au pairs to see local sights—walking the Freedom Trail from Boston Common to Bunker Hill, visiting the Bradley Estate, hitting up Harvard Square, catching a game at Fenway Park. They also take part in regional events, like Salem at Halloween and Cape Cod during the summer. Many host families also introduce their au pairs to the wider area, taking trips to coastal Maine, Vermont, Providence, and New York City. It is not unusual for host families to take their au pairs to even

more distant places—to visit Dallas and Savannah, ski in Utah, or celebrate a birthday in New Orleans.

These outings further the Program's purpose of cultural exchange; what better place to learn about America than Lexington and Concord? But much of the cultural exchange takes place—as the Program intends—within the daily rhythms of the host family's home. Host families and au pairs swap meals and recipes, exchanging American steak and potatoes for Brazilian rice and beans, grandma's lasagna for more modern Italian fare. Over the dinner table, host families discuss politics and world affairs, hearing different perspectives on topics such as the Amazon rainforest fires, the Olympics, and national responses to global crises. Through frequent conversations with host parents and their children, au pairs become far more fluent in English than when they arrived, enabling them to continue their education at English-language colleges and universities in the United States and abroad. The children of host families in turn learn songs, words, and numbers in foreign languages. (One of amici's children takes a day of Italian at school and then practices with her Italian au pair at home.)

Au pairs also celebrate holidays with their host families and their host families' extended families, taking part in traditional activities like pumpkin picking or attending midnight mass. To make their au pairs feel like part of the family, host families give their au pairs what they give their children: personalized Christmas stockings, Easter baskets, Hanukkah presents, and so on. The au pairs in turn introduce host families to their own holiday traditions. When Diana and Ethan

Bren's au pair told them about Brazil's Dia dos Namorados—like Valentine's Day, but on June 12—the family surprised her by celebrating with her.

Host families often welcome au pairs' families into their homes for long holiday stays, expanding and deepening the cultural exchange. Catherine Toupence and Casey Stanley hosted the parents of their current au pair for two weeks over the holidays, celebrating a joint New Year's with toasting at midnight in France and midnight in Boston. They hosted their previous au pair's mother over the Christmas holiday, providing the mother her own Christmas stocking and gifts so she would feel like part of the family. The Bren family likewise hosted their au pair's parents and brother over the holidays, integrating the two families to such a degree that the Bren children now call their au pair's parents their "family in Brazil."

3. Because these exchanges take place primarily in the family home, ensuring that au pairs feel comfortable as members of their host families is critical to the Program's success. It creates the familiarity necessary for organic cultural exchange and removes questions of work and wages that could formalize and obstruct interactions if au pairs were seen as employees rather than family members.

Host families labor diligently to create that familiarity. They introduce au pairs to their extended families, welcome au pair's families into their homes for lengthy stays, and sit down to frequent meals and discussion with their au pairs. One host parent has described her relationship with her au pairs as akin to that of aunt and niece; another describes her au pairs as older siblings to her children. As with a niece or

older child, a host parent might give advice to an au pair about schooling, careers, and relationships. And as with a niece or older child, a host family will cover the expenses associated with living together—cell phone bills, meals out, takeout in, and the costs of family trips. Host families also often provide their au pairs access to local transportation, whether through a family car (and its gas and insurance expenses) or a train pass. As with nieces and older children, hosts also often surprise au pairs with gifts.

Treating au pairs like family helps to extend the cultural exchange by creating the types of relationships that last far beyond an au pair's stay. All amici keep in touch with their former au pairs through phone calls, FaceTime, texts, and visits. One au pair who is interested in continuing her education in the United States is looking at colleges near her host family so she can remain close by. Another asked her host family's daughters to be flower girls in her wedding. All amici hope that they and their children will eventually visit their au pairs in their home countries.

### **C. Massachusetts' Law Undermines the Au Pair Program.**

In 2014, Massachusetts enacted the Massachusetts Domestic Workers Bill of Rights ("DWBOR"), Mass. Gen. Laws ch. 149, § 190. The state Attorney General's Office issued implementing regulations the following year. 940 Mass. Code Regs. § 32.00 *et seq.* On top of the uniform stipend formula for au pairs required by federal law, these provisions require host families to compensate their au pairs at a state minimum on an hourly basis, with overtime rates for all hours over 40 hours per week. They allow host families to deduct

only very limited amounts for room and board and require host families to keep extensive records. *See* Pet. 10–11.

Laws like Massachusetts’ undermine the Program’s cultural exchange objective by transforming what is meant to be a familial relationship into an economic one. The Program’s uniform stipend formula serves the “programmatically need” of facilitating cultural exchange by taking questions of hours and wages off the table. In amici’s experience, however, Massachusetts’ law now layers each interaction with financial questions—whether the au pair is “on the clock”; whether the interaction is compensable; and whether the host parent should, once again, emphasize that the au pair need not stay at the table, keep chatting with the children, or make a meal from her home country for the family. The natural flow of family life is disrupted by perpetual bartering, which hinders the cultural exchange that would otherwise take place through organic family interactions.

In addition to altering the nature of a host family’s relationship with its au pair, Massachusetts’ law dramatically increases the costs of having an au pair in the first place. The minimum weekly stipend paid to au pairs under federal law is \$195.75. *See* US.CA.Br.7. But the minimum wage for an au pair performing the same 45 hours of childcare in Massachusetts is 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). Massachusetts law can thus increase the cost of hosting an au pair by more than \$17,000 a year. Katie Johnston, *A Court Ruling Boosts Au Pairs’ Pay*,

*But It Puts Families in a Bind*, BOSTON GLOBE (Dec. 12, 2019), <https://bit.ly/37YNMzm>.

Despite these costs, the First Circuit saw no reason why a family that needed childcare would opt out of the Au Pair Program. Pet. App. 60. The court reasoned that because the wages of au pairs and local childcare providers were equivalent under Massachusetts' labor law, families would have no reason to switch from the Program to local childcare. *Id.* But the First Circuit failed to appreciate that wages are just the start of the benefits that host families have traditionally given their au pairs. Unlike local childcare providers—who have their own homes, their own cars (or T passes), and their own cell phones—host families generally provide these items to their au pairs. Host families also invest a significant amount of emotional energy integrating au pairs into their families. Unlike au pairs, local childcare providers do not expect host families to take them to see the sights or treat them like members of the family by welcoming them at the dinner table, advising them on education, careers, and relationships, or inviting them to spend the holidays together. Nor do they expect families to pay up to \$500 for their educational expenses, as host families are required to do for their au pairs. *See* 22 C.F.R. § 62.31(k)(1). Thus, if an au pair and a local childcare provider are paid the same base wage, hosting an au pair becomes far more costly in terms of money, time, and energy, and families have every reason to opt out of the Program and into the local childcare market.

That is all the more so if the increased costs make it impossible for families to fulfill the Program's cultural exchange promise. The money for the additional costs

imposed by Massachusetts law has to come from somewhere. Unfortunately, it often comes from the very kinds of activities that have so successfully integrated au pairs into their host families for so long. In this vein, a number of amici have already had to stop or cut back on outings, trips, dining out, and gifts. One family cancelled their annual trip to Vermont with their au pair. Other host families are now having difficult conversations with their au pairs about who will pay for what. A family who usually covers their au pair's trip to Connecticut to spend Passover with the family worried that they would be unable to afford it this year. The family and au pair ultimately agreed that the au pair would provide no childcare over the course of the stay so that the family could afford the cost of her trip and stay. Such conversations deter families from embarking on outings and trips in the first place and strain the familial relationship that is supposed to anchor the Program's cultural exchange.

Massachusetts' law thus puts host families in a difficult position. They participate in the Au Pair Program to share in the cultural exchange that it provides, but that exchange is now hampered by omnipresent transactional questions. And while participants in the Program have always had to pay their au pairs under a federal uniform stipend formula, they must now pay dramatically increased wages under Massachusetts' minimum wage, escalating the costs so significantly that participating in the Program costs considerably more than local childcare. As a result, for some host families, the expense of the diminished Program is not only unjustifiable—it is unaffordable. Indeed, some amici have already been forced to reduce



their au pair's childcare hours because they cannot afford to pay their au pairs for a full week of childcare at the Massachusetts rate. All amici have stated that, at the very least, they are unsure about whether they will be able to participate in the Program going forward; some are certain that they will not. One host family bought a house with a third-floor living area with the expectation that they would host au pairs for the next six years, but now they plan to discontinue the program once their current au pair finishes her term. Laws like Massachusetts' thus not only thwart the cultural exchange objectives of the Au Pair Program; they threaten its very existence. If all but the wealthiest Americans either cannot justify (or cannot afford) the Program's expense, the number of families willing or able to participate in the Program will greatly decline. Limiting the Program to the wealthiest Americans not only reduces the number of families available to host, it also undermines the Program's objective of introducing foreign au pairs to a diversity of American families. Amici, who include data and program managers, a library worker, a doctor, and an active duty service member, reflect that diversity. They will not be able to do so if Massachusetts' law remains on the books.

Laws like Massachusetts' thus conflict with federal law and "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives" that Congress had when it enacted and repeatedly reaffirmed the Au Pair Program as a vehicle for cultural exchange. *Crosby*, 530 U.S. at 373. The First Circuit wrongly held that federal law did not preempt Massachusetts from applying its labor law to the Program. The only way to now prevent such state laws from undermining the purpose and existence of the Au Pair

Program is for this Court to review the First Circuit's decision and reverse it.

**CONCLUSION**

The Court should grant certiorari and confirm that Massachusetts cannot impose its labor laws on a federal cultural exchange program where doing so conflicts with federal law and destroys the purposes and objectives of that program.

April 16, 2020

Respectfully submitted,

Shay Dvoretzky

*Counsel of Record*

Jeffrey R. Johnson

Kristen Loveland

*Admitted in New York*

*Not Admitted in D.C.*

JONES DAY

51 Louisiana Ave., N.W.

Washington, D.C. 20001

(202) 879-3939

sdvoretzky@jonesday.com

*Counsel for Amici Curiae*