

No. 17-2140

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

ERIN CAPRON, JEFFREY PENEDO, and CULTURAL CARE, INC. D/B/A
CULTURAL CARE AU PAIR,

Plaintiffs-Appellants,

vs.

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,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, No. 1-16-CV-11777-IT

**BRIEF OF *AMICI CURIAE* WORKER ORGANIZATIONS
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for the proposed *amici* Worker Organizations makes the following disclosures:

(1) *Amici* are non-profit entities that are not publicly traded and do not have parent corporations.

(2) No publicly held corporation owns 10 percent or more of any stake or stock in any of *amici*.

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STATEMENT OF INTEREST AND IDENTITY OF AMICI¹

Amici are all non-profit public interest organizations that organize or advocate for domestic workers and/or migrant workers in Massachusetts or on the national level. These organizations all have a strong interest in combatting exploitation and abuse of domestic workers and/or migrant workers, including au pairs. They strongly support the implementation of the Massachusetts Domestic Workers' Bill of Rights (“DWBOR”) as intended by the Massachusetts legislature: without any exclusion for au pairs providing childcare for American families under the J-1 Exchange Visitor Visa Program as administered by the U.S. State Department.

Amicus **Massachusetts Coalition for Domestic Workers**, with and through its member organizations, was a central player in the passage of the Massachusetts Domestic Worker Bill of Rights. The Coalition's Steering Committee organizations are Matahari Women Workers' Center, Brazilian Women's Group, and Dominican Development Center. These organizations, described individually below, organize immigrant women, including those who

¹ *Amici* certify that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certify that no person, other than *amici* or their counsel, contributed money intended to fund preparation or submission of this brief. See Fed. R. App. P. 29(a)(4)(E).

work as domestic workers, to advocate for themselves on issues facing them in the workplace.

Amicus **Matahari Women Workers' Center ("Matahari")** is a Boston-based organization in which women of color, immigrant women, and families come together to make improvements in themselves and society and work towards justice and human rights. Matahari engages in extensive organizing of in-home childcare providers, including both nannies and au pairs. The organization annually convenes an International Nanny Training Day, attended by over 200 nannies, au pairs, and childcare workers for workshops on how to best care for both themselves and the children left in their care. Throughout the year, Matahari's Au Pair Committee brings together au pairs to provide mutual support, to develop leadership of current and former au pairs who can educate others about their rights, and to advocate for domestic workers' rights at the state and national levels.

Amicus **Brazilian Women's Group ("BWG")**, based in Allston, Massachusetts, was created in 1995 by a group of women interested in discussing the issues of being an immigrant woman from Brazil in the United States. Many of BWG's members work as domestic workers, including both childcare workers and house cleaners, and the organization played an active role in the passage of the DWBOR. The organization has an active immigrant workers' rights project, led by members of the Brazilian community.

Amicus **Dominican Development Center ("DDC")**, located in Jamaica Plain, Massachusetts, is based in the Dominican community and focuses on immigrants' rights and developing community leadership. Many of DDC's members work as domestic workers, including childcare and house cleaning, and the organization also played an active role in the passage of the DWBOR.

Amicus **National Domestic Workers Alliance** (“NDWA”) is the nation's leading advocacy organization advancing the dignity, rights and recognition of domestic workers. Powered by sixty-four affiliates, NDWA advances the rights of childcare workers, housecleaners and direct care workers. NDWA fights for equal and improved treatment for domestic workers in every sector.

Amicus **Centro de los Derechos del Migrante ("CDM")** is a binational migrant workers' rights organization with offices in Baltimore, Maryland; Mexico City; and Juchitán, Oaxaca. CDM's mission is to improve the working conditions of low-wage workers throughout the United States and to remove the U.S.-Mexico border as a barrier to justice for migrant workers. The organization promotes migrant workers' rights through education and outreach, policy advocacy, and strategic litigation. CDM frequently assists J-1 workers, including au pairs, in seeking redress for workplace violations. CDM also chairs the International Labor Recruitment Working Group ("ILRWG"), a coalition of

nearly 30 organizations and academics seeking to reform international labor recruitment across visa categories and industry sectors. In February 2016, the ILRWG formalized a committee dedicated to strengthening protections for workers on J-1 visas, such as au pairs.

Amicus **The Southern Poverty Law Center ("SPLC")** is a non-profit organization founded in 1971 that throughout its history has worked to make the nation's constitutional ideals a reality for everyone. The SPLC's legal department fights all forms of discrimination and works to protect society's most vulnerable members. The SPLC's Immigrant Justice Project seeks to address the unique legal needs of migrant workers and represents thousands of low-wage workers – including J-1 visa workers – throughout the South. The Immigrant Justice Project has also published extensive reports on the abuses in the temporary foreign worker system and the historical development of foreign worker programs in the United States.

ARGUMENT

The Massachusetts Domestic Workers' Bill of Rights ("DWBOR") is an important step in Massachusetts' long history of leading the country with respect to workplace rights. In passing this legislation, the Commonwealth recognized and addressed domestic workers' vulnerability to exploitation. This vulnerability is particularly acute for au pairs, whose lawful presence in the U.S. is dependent on

their continuing employment through a sponsor agency and their placement with a host family. Although au pairs are promised a "cultural exchange" program, upon arrival in the U.S. almost all find that they are expected to provide more than full-time childcare at below-minimum-wage prices. For many, as described below, the reality is far worse. The DWBOR includes provisions to ensure that au pairs, like other domestic workers, have basic rights including reasonable rest periods, lawfully paid wages, privacy, protections upon termination, and coverage under the Commonwealth's anti-discrimination and anti-retaliation laws. In passing the DWBOR, the Massachusetts legislature made the important decision to extend these much-needed protections to au pairs along with other domestic workers, so as to help prevent and address workplace injustices.

I. ALTHOUGH BILLED AS A "CULTURAL EXCHANGE" PROGRAM, IN PRACTICE THE AU PAIR PROGRAM OPERATES AS A CHEAP CHILDCARE PROGRAM IN WHICH AU PAIRS FREQUENTLY EXPERIENCE ABUSIVE CONDITIONS WITH LITTLE OR NO PROTECTION OR RECOURSE.

The au pair industry and the U.S. Department of State extol the virtues of the au pair program as one of "cultural exchange," in which enthusiastic young people from around the world have a special opportunity to come to the United States to improve their English, take classes, and experience American family life. Yet for many au pairs, reality does not come close to this tantalizing description. Instead, au pairs find themselves functioning as employees providing childcare at

cut-rate prices. Many find themselves subjected to violations of the program's rules or otherwise mistreated, exploited, and abused, with few protections and effectively no opportunity for recourse.

A. The Au Pair Program Is An Employment Program For Low-Wage Childcare Workers, One That Is Rife With Exploitation And Abuse.

Even at its best, and under its own rules, the au pair program is one in which au pairs spend more than a typical full-time work week caring for children and doing child-related household chores for extremely low wages. In reality, many au pairs' duties and work hours go well beyond what is allowed under the program's rules. Numerous academic reports, studies, and media accounts have made clear the nature of the au pair experience as an employment program, and its ugly reality as experienced by too many au pairs. See, e.g., CDM, et al, *Shortchanged: The Big Business behind the Low Wage J-1 Au Pair Program* (2018) (publication pending) (hereinafter, "CDM Report"); Zack Kopplin, *They Think We are Slaves*, Politico Magazine (Mar. 27, 2017), <https://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956>; Noy Thrupkaew, *Are au pairs cultural ambassadors or low-wage nannies? A lawsuit enters the fray*, Washington Post Magazine (Nov. 3, 2016), https://www.washingtonpost.com/lifestyle/magazine/are-au-pairs-cultural-ambassadors-or-low-wage-nannies-a-lawsuit-enters-the-fray/2016/11/01/09e8a1ee-8f2e-11e6-9c85-ac42097b8cc0_story.html; Janie A. Chuang, *The U.S. Au Pair*

Program: Labor Exploitation and the Myth of Cultural Exchange, 36 Harvard J. of Law & Gender 269 (2013); ILRWG, Case Examples of Exploitation of Au Pairs (2013) (hereinafter, "ILRWG Report").² Reports "strongly suggest that au pair mistreatment is... quite common." Chuang, supra, at 272; see also Kopplin, supra ("[A]ccording to a dozen current and former au pairs as well as former au pair company employees," "horror stories" of egregious abuse "aren't unusual").

The reports of au pair experiences nationally as low-wage work, not cultural exchange, are reflected in the experiences of members of the Massachusetts *amici* organizations, particularly Matahari Women Workers' Center, which has an active Au Pair Committee comprised of former and current au pair members. As "Fernanda,"³ a former au pair and member of Matahari's Au Pair Committee describes, "now that I am a career nanny I understand that as an au pair I was doing exactly the same work." Another Matahari member and former au pair from Mexico, "Maria," was placed with a Boston-area family that had infant triplets plus a toddler. In addition to caring for the four children, plus the family dog, Maria washed the entire family's dishes and did laundry (in violation of the au

² Available at <https://fairlaborrecruitment.files.wordpress.com/2013/06/ilrwg-au-pair-case-studies1.pdf>.

³ For the reasons described in this brief, almost all current and former au pairs fear retaliation or other adverse personal consequences if they are identified; therefore, pseudonyms are used. See also Kopplin, supra ("Like most au pairs interviewed for this article, Juliana used a pseudonym because she fears retaliation").

pair program guidelines that restrict household cleaning activities to those related to the children). As the four children got older, Maria found herself expected to teach an academic curriculum prescribed by the mother.

One of the more common forms of mistreatment by host families is requiring or expecting more hours of work than allowed by program rules. Many au pairs report working more than 10 hours per day or 45 hours per week. See, e.g., Kopplin, supra (describing Colombian au pair's hours stretching to 12 per day and 60 per week); Host of Problems, Center for Investigative Reporting (Nov. 5, 2016), <https://www.revealnews.org/episodes/host-of-problems/> ("I have interviewed dozens of au pairs who say extra chores and extra hours are pretty much a given"). One Venezuelan au pair reported working sixty to seventy-five hours per week during the days, in addition to waking up four to six times each night to care for an infant. See Chuang, supra, at 270. "Leticia," a young au pair from Brazil, reported to both Brazilian Women's Group and Matahari that she worked more than 10 hours per day and 45 hours per week for her host family in a Boston-area suburb. Many au pairs report being denied the weekly day off to which they are entitled. Maria, for example, shared with a Matahari organizer her host family's schedule, in which she worked every day of the week, writing "the reason . . . I'm sending this is because my host mom had the idea that I could be used 24/7 and she actually told me that."

Au pairs are often assigned or simply expected to assume extensive duties beyond childcare and child-related household tasks, and at times find that household tasks are their primary function. Host families take advantage of au pairs to cook meals, go grocery shopping, and complete physically demanding house-cleaning. See generally Thrupkaew, supra. One Matahari member and Boston-area Cultural Care au pair, "Josefina," described, "As soon as I arrive[d] to the house the mother said that her kids were old enough and that they did not need a nanny, she needed most help with the cleaning and cooking. So I work[ed] mostly as a housekeeper." Maria, the Mexican au pair, found herself doing the entire family's dishes and laundry along with caring for four children under the age of three.

Another common grievance is that host families fail to respect, or even intentionally invade, au pairs' privacy and restrict their communications or ability to socialize. One au pair reported to the ILRWG that her host family "monitored her phone calls and checked her voicemails." ILRWG Report, supra, at 1. Another au pair interviewed by law students at the International Human Rights Law Clinic at American University Washington College of Law described how, after she asked for the wages that she had not been paid, her host family "took away my access to the Internet. I felt isolated and scared." CDM Report at 13-14. Matahari member Maria slept in a room in which the family stored

possessions, and the host mother went into the space regularly. Leticia reported a situation in which another au pair, who was too fearful to complain, was sleeping in an oversized closet that was also used as a passageway by members of the host family.

Some au pairs also face emotional abuse and harassment from host families. Some are subject to physical abuse and threats from children, which goes unaddressed by parents. See, e.g., ILRWG Report, *supra*, at 3. One au pair reported to Matahari that her charge was an emotionally disturbed 9-year-old who threw objects at her and threatened her with knives. The au pair felt completely isolated in the house, where she lived in darkness as she was not allowed to open any of the window curtains. Others face emotional abuse or sexual harassment from parents themselves. See Chuang, *supra*, at 306-7. Another au pair, Leticia, explained that her "so-called host mom was clearly emotional[ly] unstable. . . from harassing texting to spying things in my room. . . I decided to leave this family after getting yelled at for not washing my host mother's dishes."

Many au pairs report that their host families completely neglect their duties with respect to providing a "cultural exchange." They report never receiving invitations to family outings. One young au pair, "Ana," was placed with a host family that moved, shortly after her arrival, to a house still under construction, where she slept in a room with a mattress on the floor and no window curtains.

She reported to Matahari that she was left at the house with no food while the parents took their children out to eat. Some au pairs are not welcome at family meals at home and must spend their own money to purchase food. See, e.g., Kopplin, supra (au pair reports that her host family "[told] her she'd have to decide whether to buy food or spend her meager stipend on something else"). One au pair reported to Matahari:

[The family] promised to treat me like part of the family and take me with them on trips . . . once the time came they bought tickets for themselves and told me to stay at home. They would never ask me to come up for dinner, or invite me into their activities on the weekends. I was only invited to the kids [sic] birthday party to help out.

Another au pair reported to Matahari that, while the parents ate out, her diet was limited to the "kids' food" – cereal, crackers, and peanut butter and jelly.

An important element of the "cultural exchange" aspect of the program is the requirement that au pairs complete academic credits while in the United States. However, some host families entirely fail to facilitate their au pair's education, or even actively interfere with it. Leticia had difficulty finding an educational program because her host mother "had not agreed with the classes and times I had planned to take during my time as an au pair." Josefina described that "[w]hen I came here I lived with a family who required me to work in a schedule where I could not take classes . . . I was working 20 hours on weekends so I could

not even go out and participate [in] social activities." Another au pair, "Marisa," told the Dominican Development Center that:

[her host family had] offered . . . flexibility to attend my [English as a Second Language program]. In the beginning I was happy, but a few weeks after my reality change[d]. They start[ed] getting back home very late. I did not have any time to study . . . When I tried to ask for [the family] to comply with what they had promised, they threa[tene]d me with [a] call to my supervisor.

Yet another au pair, who worked as many as 18 hours a day, reported to Matahari that her host family told her that she had to pay herself for a babysitter to cover for her when she attended classes.

B. Sponsor Agencies Market The Au Pair Program Very Differently To Au Pairs As Compared To Host Families, Leading To Starkly Clashing Expectations And Contributing To Au Pairs' Vulnerability.

Sponsoring au pairs is big business, whether done by a for-profit business such as Cultural Care or by a non-profit organization. While financial information on for-profit au pair agencies is not available, non-profit sponsor agencies have millions of dollars in profits and assets, almost all from program fees.⁴ Au pair agencies have a strong interest in protecting their industry and maximizing their recruitment efforts and, thus, their revenues, by making the

⁴ E.g., Cultural Homestay International 2016 Form 990, ProPublica, <https://projects.propublica.org/nonprofits/organizations/942404633/201730739349301328/IRS990>; Interexchange 2016 Form 990, ProPublica, <https://projects.propublica.org/nonprofits/organizations/133449415/201712129349301171/IRS990>; Eurapair International 2016 Form 990, ProPublica, <https://projects.propublica.org/nonprofits/organizations/330316910>.

program an attractive substitute for domestic childcare workers. This interest was evident when sponsors and families lobbied against already minimal education requirements for au pairs. Exchange Visitor Program, 60 Fed. Reg. 8547, 8548 (Feb. 15, 1995); see also Chuang, supra, at 288 n. 107. Agencies' incentives to recruit both au pairs and host families, bolstering their revenues through program fees, leads to markedly different strategies for targeting each of them.

To au pairs, sponsor agencies and their overseas partners market the program as an opportunity for education and cultural exchange. Cultural Care Au Pair's website invites applicants to:

Imagine exploring the USA. Imagine befriending people from all over the world. Imagine discovering a second family — and a second home. Imagine becoming an au pair.

The Au Pair Program, Cultural Care Au Pair (last visited Mar. 26, 2018), <https://www.culturalcare.com.au/being-an-au-pair/au-pair-program>. Based on this kind of marketing, au pairs join the program with hopes of improving their English, experiencing American culture, and bonding with their host family. See Chuang, supra, at 286 (reporting that "ethnographic data suggests that au pairs typically arrive expecting plentiful opportunities to improve their English and to make friends and socialize"); Justin Wm. Moyer, 'If I go back to Colombia, I'm going to die': An au pair battling cancer fights to stay in the U.S., Washington Post (May 20, 2016), <https://www.washingtonpost.com/local/im-going-to-die-an-au->

pairs-fight-against-cancer-and-the-effort-to-send-her-home/2016/05/19/4f7ccf80-1b95-11e6-9c81-4be1c14fb8c8_story.html (au pair hoping to improve English to return to law practice in Colombia).

The stories that *amici* hear from Massachusetts au pairs confirm that the agencies' promotion of the "cultural exchange" strongly influences au pairs' decisions to join the program. Maria, for instance, signed up for the au pair program after attending a Cultural Care meeting in her hometown. In that meeting, the Cultural Care representative emphasized that au pairs' responsibilities did not include household work and that their role was "just to play with the kids." The representative also focused on the educational component of the program, saying that au pairs could just "go study whatever you want" with a \$500 stipend – without describing, as Maria later learned to her dismay, how expensive it was to take classes in the U.S.⁵ Leticia explained that she came to the U.S. as an au pair "in order to improve my English and to take classes of my interest – that is how I was sold the cultural exchange program by an agency in Brazil" but that "when I got in [sic] the United States it turned out to be more of a work program."

⁵ See also U.S. Dep't of State, 2015 Au Pair Program Annual Reports Analysis (2016), <https://www.politico.com/f/?id=0000015b-0cf2-d4b9-abff-3ffe31fd0001> (hereinafter "State Department Report") (reporting that "completing the education requirement remains the top program concern for most sponsors due to high costs of education. . . .").

childcare costs. While Cultural Care's website has since been changed, it previously included testimony from parents such as one who exclaimed, "Childcare that averages \$345 a week for 3 kids—it's a no-brainer. Daycare would cost twice as much. – Amy Hunt, host mom in OH." See Chuang, supra, at 287 (citing Flexible childcare for every budget, Cultural Care Au Pair (last visited: Mar. 10, 2013), <http://pages.culturalcare.com/affordability-submit>).

As discussed further below, when these competing expectations collide, au pairs have few avenues to ensure that the cultural exchange components of the program and the limitations on work are respected. See, Parts I.C, and II, infra, at 16-24.

C. Au Pairs Are Strongly Deterred From Reporting Abuse To Either Their Sponsors Or The State Department.

In 2015, sponsor agencies received 3,505 complaints about the au pair program. State Department Report, supra, at 6. Thirty percent were initiated by au pairs and forty percent by both au pairs and host families. Id. The complaints to the agencies as well as the reports in the media of mistreatment, reporting overwork to social isolation to physical abuse as described above, are also reflected in the anecdotal experiences reported by Massachusetts au pairs. Yet the complaints and public reports are, surely, just the tip of the iceberg because many forces strongly deter au pairs from reporting abuse.

Many au pairs spend considerable amounts of money to participate in the program – often taking out loans to do so – and feel obligated to remain with the program to recoup these costs. One major expenditure is recruitment fees; au pairs are recruited in their home countries by overseas partners of domestic sponsor agencies. Southern Poverty Law Center, Culture Shock: The Exploitation of J-1 Cultural Exchange Workers at 5 (2014)⁶ (hereinafter "SPLC Report"). Fees for these recruitment agencies are completely unregulated, SPLC at 5, and range from hundreds to thousands of dollars. Chuang, supra, at 301 n. 177; ILRWG Report, supra, at 1 (one au pair paid \$3000 to a recruiter in Colombia; another paid \$5000 to a recruiter in China). Young people in low-income countries are disproportionately affected by these exorbitant fees: "au pairs from Latin America and Africa routinely pay higher local recruitment fees than au pairs from Western Europe." Chuang, supra, at 301, n. 177. Travel costs, which au pairs must cover themselves, increase the debt looming over many au pairs from all countries.

These required fees often force young people to take out loans with interest, increasing their total debt burden. One au pair recounted having to borrow \$2,500, with interest, to pay for her plane ticket, recruiter, passport and visa expenses, and agency fees. ILRWG Report, supra, at 3. As one recent report

⁶ Available at https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/culture_shock_report_pdf.pdf.

noted in the context of students coming to the U.S. to work, like au pairs, with J-1 visas, this debt "leaves students [workers] vulnerable to exploitation. Faced with pressure to pay off loans, students and interns may opt to endure workplace abuse until they can return home." SPLC Report, supra, at 4.

Au pairs' presence in the United States is allowed solely based on their participation in the au pair program. When a host family is dissatisfied, sponsor agencies generally allow them to replace their au pair. See Chuang, supra, at 289. The sponsor agency may provide temporary shelter for an au pair who has been removed; however, if the agency does not find another placement within an extremely short period of time (typically limited to two weeks), au pairs must return to their home countries, at their own expense. Chuang, supra, at 307. Thus, many au pairs do not report even extreme violations by their host family, for fear their sponsor agency will send them home. Au pairs who are dropped by their agencies are left even more vulnerable to human rights abuses, including forced labor and sex trafficking. See, e.g., Anna Sweeney, Convicted Pimp Sentenced to Life in Prison, Chicago Tribune (Nov. 26, 2012), http://articles.chicagotribune.com/2012-11-26/news/ct-met-human-trafficking-sentence-20121127_1_message-parlors-life-sentence-illegal-immigrants (judge notes that four au pairs became victims of sex trafficking after their placements fell through and the au pair agency "basically cut them loose").

For those au pairs who do complain, the consequences can be immediate and place their entire participation in the program in jeopardy. When one Massachusetts au pair complained to Cultural Care about her concerns, the agency contacted the host family and the consequences were harsh and immediate:

[T]he family decided to kick me out of the house. They took all of my clothes, put it in a trash bag and kicked me out that night. . . I had to stay with the [local coordinator], and only had two weeks to find another family – if not, I'd be sent home.

CDM Report at 14. Even if complaining does not place au pairs at immediate risk, it seems futile: as "Natalia" reported to Matahari: "I kept all [o]f the schedules that past [sic] the 45 and showed it to the coordinator [who] did nothing about it the family has gone through 4 au pair all ready [sic]."

Even when the reason that an au pair leaves a family is that the family has violated program rules, the au pair is completely at the mercy of the sponsor agency to find the au pair a new family, or "rematch." If the sponsor agency cannot find a rematch, the au pair must still pay for her own flight home. Even beyond this unexpected expense (on top of the other initial fees), au pairs may suffer additional financial consequences as a result of complaining about host families. Some unregulated in-country recruiters, fearing loss of their own credibility and business with sponsor agencies, impose their own contracts and penalties on au pairs. Ana, who desperately wanted to rematch after leaving an abusive family, had signed a contract in her home country agreeing that she would

pay a \$10,000 penalty if she left the program prior to the completion of the year.

Au pairs wishing to extend their visas beyond their initial one or two-year term are also completely at the mercy of their sponsor agencies. See 22 C.F.R. § 62.31(o) (documentation supporting extension request must be submitted "on the sponsor's organizational letterhead").

These examples illustrate both the precarity of au pair employment and the urgent need to ensure that au pairs have access to information about and enforcement of basic workplace rights. Domestic workers generally are vulnerable to exploitation because their work occurs in private homes. This vulnerability is aggravated for au pairs given their complete reliance on the au pair program for their visas, on the goodwill and support of both their host families and sponsor agencies, and the structural barriers to complaining and receiving support.

II. LACK OF MEANINGFUL FEDERAL OVERSIGHT HAS LEFT THE AU PAIR PROGRAM RIPE FOR ABUSE.

As part of the J-1 visa program, the au pair program is administered by the U.S. State Department,⁷ which outsources the implementation of the au pair

⁷ Since the programs' inception, the State Department's lack of experience in managing work programs has prompted concerns about J-1 programs being housed in the State Department, rather than the Department of Labor. See, e.g., U.S. Gov't Accountability Office, U.S. Information Agency, Inappropriate Uses of Educations and Cultural Exchange Visas, No. GAO/NSIAD-90-61 (Feb. 16 1990); U.S. Dep't of State & Broadcasting Bd. of Governors Office of Inspector Gen., Inspection of the Bureau of Educational and Cultural Affairs at 24-25 (2012).

program to designated sponsor agencies,⁸ and permits them to operate with minimal oversight. See 22 C.F.R. § 62.31(m); SPLC Report at 7.

The State Department refuses to involve itself in individual disputes between au pairs and host families regarding its program regulations, claims it does not have authority to remove host families from the program, and does not allocate staff to enforcement of the program's requirements. Chuang, supra, at 295. Instead, sponsor agencies are responsible for implementing all steps of the program, from recruitment and placement to resolution of disputes between host families and au pairs. Upon enrollment in the au pair program, au pairs are informed that they should report any problems to their sponsor agency and contact the State Department only if the agency is unresponsive. Id. at 295-96. However, even if an au pair does contact the State Department, the State Department redirects the complaint to the sponsor agency for resolution and specifically disclaims authority to dictate how an agency resolves individual complaints. Id.

Although the program's regulations contemplate a range of sanctions for sponsor agency noncompliance, in practice there are few consequences for sponsor agencies that do not comply with the regulations: as of 2014, the State

⁸ State Department regulations allow for almost any governmental, non-profit, or for-profit entity to become a sponsor so long as it pays a non-refundable application fee of \$3,982 and its application is approved by the State Department. 22 C.F.R. §§ 62.2, 62.3 (2015); 62.17 (2013).

Department had not sanctioned an au pair agency since 2006. Justice in Motion, Visa Pages: U.S. Temporary Foreign Worker Visas, J-1 Visa at 18 (Nov. 2015), https://static1.squarespace.com/static/57d09e5c5016e1b4f21c9bd3/t/590b7f78bf629a657efa465c/1493925754158/VisaPages_J1_2015update.pdf; see also Inspection of the Bureau of Educational and Cultural Affairs at 23 (noting that State Department sanctions "rarely result[] in meaningful consequences for a delinquent sponsor"). This lack of meaningful enforcement is largely due to the State Department's almost total reliance on sponsor agencies' self-reporting. As of 2017, the State Department had only 30 staff members tasked with monitoring all thirteen of the J-1 Visa Exchange Visitor Programs, which includes more than 1,500 J-1 sponsor agencies and 300,000 participants coming to the United States annually to work. Kopplin, supra; U.S. Dep't of State, J-1 Visa Fact Sheet (2018), <https://j1visa.state.gov/wp-content/uploads/2018/03/J1Visa-fact-sheet-2018.pdf>; see also Chuang, supra, at 297 (reporting that thirteen State Department staff members were responsible for monitoring compliance as of 2012). Given their exceedingly low numbers compared to the J-1 sponsors, the Office of Private Sector Exchange must rely on sponsor agencies' self-reports for compliance determinations, resulting in scant monitoring and enforcement. See Chuang, supra, at 297. This outsourcing of enforcement by the State Department affords sponsor

agencies a large amount of discretion over the implementation of program regulations.

Although sponsor agencies themselves are tasked with monitoring host family compliance with program requirements, in practice sponsor agencies are financially incentivized to favor host families over au pairs when disputes regarding working conditions arise.⁹ 22 C.F.R. § 62.31(l)(1); Chuang, supra, at 304. Sponsors' main source of revenue derives from the fee host families pay each year of au pair placement. Chuang, supra, at 304. While host families can, and do, re-enroll multiple times, au pairs have a limited ability to re-enroll in the program and so are rarely a source of repeat business. Host Family Amicus Brief at 1 (*amicus* host family reports participating in the au pair program since 2011); 22 C.F.R. § 62.31(o), (p) (extensions beyond the first year must be approved by the State Department; absent extension, au pair must reside outside of U.S. for two years before reapplying to the program). And because the State Department does not remove noncompliant host families from the program, even if a sponsor were to terminate a host family, that host family could simply take its business to a competing agency. Chuang, supra, at 304. Meanwhile, the au pair regulations contain no provision against retaliatory dismissal of au pairs, whose termination

⁹ Consistent with their financial incentive to favor host families over au pairs, sponsor agencies have consistently lobbied against wage increases and labor protections for au pairs. See Part III, infra, at 27-28.

from the program could affect their future eligibility for U.S. visas. Chuang, supra, at 304.

Unsurprisingly, au pairs hesitate to report unfair working conditions to their sponsor agencies, and those who do often see their complaints go unaddressed. In fact, of the 3,505 complaints that were received by sponsors in 2015 (both from host families and au pairs), 47% were resolved by terminating the au pair, while only 4% were resolved by terminating the host family. State Department Report, supra, at 6.

III. THE COMMONWEALTH ENACTED THE MASSACHUSETTS DOMESTIC WORKER'S BILL OF RIGHTS TO PROTECT THE WELL-BEING OF ALL DOMESTIC WORKERS WITHIN ITS BORDERS, INCLUDING AU PAIRS.

The Commonwealth of Massachusetts has a substantial interest in the well-being and rights of all workers within its borders, as reflected in its long history of setting workplace standards that surpass those set on the federal level. These workers included, in 2016, the 1,388 au pairs who received visas to work in Massachusetts. U.S. Dep't of State, Facts and Figures (last visited Mar. 26, 2018), <https://j1visa.state.gov/basics/facts-and-figures/>. Indeed, Massachusetts has the highest number of au pairs per household of any state in the United States.¹⁰ See

¹⁰ While four states, New York, New Jersey, Virginia, and California had higher raw numbers of au pairs than Massachusetts, they also have significantly higher populations and numbers of households.

id.; U.S. Census Bureau, Quick Facts (last visited Mar. 26, 2018), <https://www.census.gov/quickfacts/geo/chart/US/HSD410216> (number of households per state). Through the initial passage of the DWBOR, and the subsequent explicit rejection through both the legislative and regulatory processes of the au pair industry's efforts to insert an exemption for au pairs, Massachusetts policymakers expressed a clear intent to include au pairs in the DWBOR's coverage and to provide them with stronger workplace protections than those provided to them by the federal government.

Massachusetts has a long history of leading the country with respect to workplace rights. This interest in being a leader in workplace rights extended to domestic workers, providing them more protections than available elsewhere and largely rejecting the commonly held notion that domestic work was not "real" work deserving of the same protections as other workers. As one example, live-in domestic workers have always been covered by the Massachusetts overtime law, M.G.L. c. 151, § 1A, which was passed in 1960, Mass. St. 1960, c. 813, 1960 Mass. Acts. 775-776, without the exemption for live-in domestic workers that still exists in the federal Fair Labor Standards Act, 29 U.S.C. § 213(b)(21). As another example, although the Massachusetts Labor Relations Act originally mimicked the National Labor Relations Act in excluding domestic workers, Mass. St. 1937 c. 436, § 2, 1937 Mass. Acts 590, this exclusion was lifted in Massachusetts (but not

at the federal level) in 1970. Mass. St. 1970 c. 760, § 12A, 1970 Mass. Acts 627 (codified as amended at M.G.L. c. 150A, § 3A). While Massachusetts took steps to move ahead of the federal government and other states in its treatment of domestic workers, significant vestiges of the attitude that domestic workers should not be treated like other workers persisted in Massachusetts law. The legislature's passage of the DWBOR, eliminating these vestiges of exclusion, is the latest incarnation of the Commonwealth's status as a leader in establishing workplace protections.

In passing the DWBOR, the Massachusetts legislature unquestionably intended to cover all childcare workers other than casual babysitters – including au pairs. The law contains two explicit carve-outs that make the legislature's intent clear. First, in 2015, the legislature made a correction to a technical error in the law as passed to clarify the exclusion for casual babysitters and ensure that childcare workers were otherwise covered. See Mass. St. 2014 c. 148, § 3, 2014 Mass. Acts 331 (codified as amended at M.G.L. c. 149, §190(a)) (inserting definition of "Domestic worker" that excludes "an individual whose vocation is not childcare and whose services for the employer primarily consist of childcare on a casual, intermittent and irregular basis for a family or household member"). Au pairs, who work up to 45 hours per week under program rules, clearly do not fall under this exclusion. Moreover, the legislature intentionally did not include au

pair agencies among the list of entities excluded from the definition of "employer," limiting the exclusion for staffing or placement agencies to those entities "licensed or registered pursuant to chapter 140." Id. (inserting definition of "employer"). Au pair agencies are not regulated under M.G.L. c. 140. If the legislature had intended to create a carve-out for au pairs and au pair agencies, it easily could have done so through these definitions of "domestic worker" and "employer."

After the DWBOR's passage, both the legislature and the Massachusetts Attorney General's Office resoundingly rejected repeated efforts by au pair agencies to obtain an after-the-fact exemption from the law. The au pair industry presented extensive comments during the regulatory process calling for au pairs and au pair agencies to be exempted through the regulations. However, those regulations were finalized on August 28, 2015 without any such exemption. See 940 C.M.R. § 32.00 et seq. The following year, the au pair industry attempted again, through the legislative process, to obtain an exemption for au pairs from both the DWBOR and the Massachusetts minimum wage and overtime laws, leading to the filing of a bill on February 1, 2016. See House Bill 4053 (2015-2016 General Court Session).¹¹ Despite heavy lobbying by the au pair industry, the legislature's Joint Committee on Labor and Workforce Development declined to give the bill a favorable report and instead sent it to study; the bill later died for

¹¹ Available at <https://malegislature.gov/Bills/189/H4053.pdf>.

good with the end of the legislative session. See Bill H.4053, General Ct. of the Commonwealth of Massachusetts (last visited Mar. 26, 2018), <https://malegislature.gov/Bills/189/H4053> ("H.B. 4053 Report"). Similarly, an effort to obtain an exemption from both the DWBOR and the Massachusetts minimum wage and overtime laws through an amendment filed to the Commonwealth's budget process came to an end when the amendment was withdrawn due to failure to garner support. See Amendment No. 1083 to House Bill 4053 (2015-2016 General Court Session);¹² H.B. 4053 Report (Amendment No. 1083 filed and withdrawn in April 2016). These events make clear that Commonwealth's extension of basic worker protection rights to au pairs is not an unintended consequence of expanding domestic worker's rights, but rather a carefully, and correctly, reached policy decision.

¹² Available at <https://malegislature.gov/Bills/GetAmendmentContent/189/H4200/1083/House/Preview>.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the district court's ruling in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

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