No. 17-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIN CAPRON, JEFFREY PENEDO, AND CULTURAL CARE, INC.,

Plaintiffs-Appellants,

v.

OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS
AND
MAURA T. HEALEY, IN HER OFFICIAL 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

AMENDED AMICUS BRIEF ON BEHALF OF CURRENT AND FORMER *AU PAIRS* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST AND IDENTITY OF AMICI

Sarah Carolina Azuela Rascon represents certified classes of *au pairs*, including a class of Massachusetts *au pairs*, in litigation against Cultural Care and certain other *au pair* agencies. *Beltran v. InterExchange*, No. 1:14-cv-03074 (D. Colo., filed Nov. 13, 2014) (the "*Beltran* litigation").[1] Ms. Azeula submits this brief on behalf of tens of thousands of *au pairs* she represents (collectively, the "*Beltran au pairs*" or "amici") because the Plaintiffs-Appellants in the action before this Court have made this case a collateral attack on the rulings in the *Beltran* litigation. The *Beltran au pairs* sought leave to file an amicus brief on August 1, after the Plaintiffs-Appellants made incomplete, misleading, and false statements at oral argument. This Court denied the motion on August 7.

However, the government's amicus brief removes any doubt about the *Beltran au pairs*' interest. It takes direct aim at the *Beltran* court's rulings—in fact, it expressly cites *Beltran* six times. This creates a highly unusual and dangerous situation:

First, the issues and statute implicated in the present appeal are ***not*** at issue in *Beltran*. Plaintiffs-Appellants in the present action sued on a statute that does

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), amici hereby state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than amici or their counsel, contributed money that was intended to fund preparing or submitting this brief. The Beltran *au pairs* are also not corporations under Fed. R. App. P. 29(a)(4)(A).

not set the minimum wage. But at oral argument Plaintiffs-Appellants ignored their own record and made this case about minimum-wage law. The government's amicus brief wrongly discusses minimum wage law in 15 of its 21 pages.

Second, after years of statements—official and unofficial—that support both the decision below and the *Beltran au pairs* in their own, separate litigation—the government, through an amicus brief, arbitrarily and capriciously attempts to re-write history, regulations, and statutes without any notice and comment or other public procedures. This kind of re-interpretation is entitled to little or no deference.

As a result, this Court is being asked to violate fundamental tenets of jurisprudence, appellate procedure, and due process. It has been asked to issue an advisory opinion that would purport to decide issues and rule on a statute not before it. It has been invited to rule on the most expansive conceivable grounds, rather than on any of the three narrow and dispositive issues before it. It has been asked to make an inappropriate collateral attack on pending trial court proceedings in another Circuit. And by expressly and repeatedly naming those pending trial court proceedings, the government is all but asking this Court to write an opinion that Appellants will claim has adjudicated the rights of non-parties in a different dispute.

For all these reasons, as well as their own stakes as *au pairs*, former *au pairs*, and potential future *au pairs*, the *Beltran* litigants respectfully submit this proposed amicus brief.

PROCEDURAL HISTORY

Appellants filed this suit shortly after the *Beltran* court, on a motion to dismiss, rejected Cultural Care's argument that the Department of State's ("DOS") *au pair* regulations preempt state and local minimum wage laws. *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1083 (D. Colo. Mar. 31, 2016). However, Appellants do not challenge the statute at issue in *Beltran*. They filed suit under the Massachusetts Domestic Workers' Bill of Rights (Mass. Gen. Laws ch. 149, §§ 190, 191, hereinafter "DWBOR"). The DWBOR is ***not*** a wage-and-hour law, nor does it govern the payment of overtime. *See Cultural Care, Inc. v. Off. of the Att'y Gen. of Mass.*, No. 16-cv-11777-IT, 2017 WL 3272011, at *7, *8 (D. Mass. Aug. 1, 2017) ("[T]he overtime requirement is not set by the domestic workers law challenged here, but instead by the Minimum Fair Wage Law, Mass. Gen. Laws ch. 151 § 1A. . . . Nor are these [minimum wage related] costs properly before the court . . . ."). Instead, it sets minimum requirements for working conditions. The statute at issue in *Beltran* is Massachusetts' Minimum Fair Wage Law, Mass. Gen. Laws ch. 151, §§ 1-1B (hereinafter "MFWL"). The DWBOR

and the MFWL are related only because both are exercises of traditional state police power over employment within the state's borders.

Beltran involves claims for unpaid wages and overtime under state wage-and-hour laws, including, for *au pairs* who worked in Massachusetts, the MFWL. As the *Beltran au pairs* have argued throughout the *Beltran* litigation, and Judge Arguello ruled on summary judgment, "[the *Beltran au pairs'*] state law wage claims are ***not*** preempted by federal statutes and regulations as a matter of law." *Beltran*, 2018 WL 3729505, at *6 (emphasis in original).

The United States filed an amicus brief in this case that disregards the statute and issues actually before this Court. It focuses almost exclusively on the MFWL at issue in *Beltran*, rather than the working conditions contained in the DWBOR that are properly before this Court, and purports to change the position of the United States respecting the preemptive effect of DOS regulations on the state wage-and-hour protections for childcare workers. *See* Brief for the United States at 1-21, *Capron v. Office of the Attorney Gen. of the Commonwealth of Mass.*, No. 17-2140 (Feb. 16, 2018) (hereinafter "USA Br.") ("We respectfully submit this brief . . . to express the views of the United States on whether the federal au pair regulations preempt ***the application of state minimum-wage and domestic-worker-compensation laws*** to the au pair program.") (emphasis added).

Prior to its amicus brief, the DOS for years communicated and acted consistent with the clear and commonsense conclusions reached by both the district court below and the *Beltran* court. It repeatedly told sponsors and *au pairs* alike that state and local laws applied to the *au pair* program.[2]

Before this Court, DOS has now stated a litigation position that is inconsistent with the plain text of its *au pair* regulations; improperly interprets the FLSA, a statute it has no authority to interpret; and arbitrarily and capriciously changes its prior interpretations.

ARGUMENT

The *Beltran au pairs* raise two points directed toward the arguments raised in the United States' amicus brief, many of which were squarely responsive to arguments in the *Beltran* litigation.

First, this brief explains that Cultural Care and DOS have positioned the present case—which involves DWBOR only, a statute that does not set the minimum wage—in a way that invites an inappropriate and broad advisory opinion that Appellants hope to use as a collateral attack against decisions another court has issued in a case involving parties not present before this Court. *Second*, it elaborates how the government's brief attempts to reverse decades of consistent

[2] *See, e.g., You're mostly isolated and alone. Why some domestic workers are vulnerable to exploitation* at 8:23-8:35, PBS News Hour (Aug. 12, 2018), *available at* https://www.pbs.org/newshour/nation/ai-jen-poo-domestic-workers-exploitation (hereinafter "PBS News Hour").

statements made under several successive administrations with a new position adopted without public notice or any of the other hallmarks of deliberative administrative decision-making.

I. THE UNITED STATES' BRIEF RESPONDS TO BELTRAN RATHER THAN THE STATE LAW ACTUALLY AT ISSUE IN THIS CASE.

A. The MFWL Is Not Properly Before This Court.

Facing the impending *Beltran* trial before Judge Arguello of the District of Colorado, Appellants seek a ruling from this Court that extends far beyond anything in its complaint in this case. Appellants ask this Court to hold that the *au pair* regulations preempt all state minimum wage laws such as the MFWL, which are not before this Court.

Unlike the MFWL, the DWBOR does not regulate minimum wages. The DWBOR regulates the working conditions of domestic workers, *see, e.g.*, Mass. Gen. Laws ch. 149, § 190(b), (i), (k) (requiring rest periods, providing for domestic workers' right to privacy, and imposing termination restrictions), imposes rules for determining hours worked, *see, e.g.*, *id.* § 190(c), and provides certain credits for room and board, *see, e.g.*, *id.* § (f), (g). This Court's decision should not extend beyond the statute pled by Appellants in the complaint. *United States v. Richardson*, 418 U.S. 166, 171 (1974) (a federal court cannot "pronounce any statute, either of the state or of the United States, void, because irreconcilable with

the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." (citation omitted)).

For these reasons, the court below correctly declined to address the minimum wage issues.

B. The Ruling Appellants Request Would Violate Principles Of Jurisprudence And Procedure, And This Court Should Abstain.

To the extent there may be any doubt about the scope of the issues in this case, the Court should abstain from ruling or opining on any issue concerning wage-and-hour-law. Fundamental principles of jurisprudence impel a narrow decision limited to the specific statute, issues, and parties before this Court. Narrow decision-making is especially appropriate in light of Appellants' forum-shopping for a collateral attack on another federal court for an advisory opinion on an issue that is not yet ripe.

First, it is foundational that Courts avoid ruling on issues not necessary to a case's disposition. *Bellville v. Town of Northboro*, 375 F.3d 25, 30 (1st Cir. 2004) (this Court normally attempts "to decide cases on the narrowest grounds possible"); *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (the "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more") (Roberts, J., concurring); *In re Chicago, Rock Island & Pac. R. Co.*, 772 F.2d 299, 303 (7th Cir. 1985) ("It is an

elementary maxim of our legal system that a court decides only the case before it . . . ."). Among other things, this principle ensures that the Court has a full record that elucidates the issues and ensures clarity about the potential effects of its decisions. Appellants did not, and do not want the Court's hearing this case to have the benefit of the point of view of the workers subject to this law. *See, e.g.*, Opp'n to Mot. "on Behalf of Current Former *Au Pairs*" for Leave to File Amicus Br. 2 (Aug. 6, 2018) (arguing that "the motion is untimely, the position of the United States regarding preemption is appropriately for the Government -- not Movants -- to provide in its impending amicus brief, and Movants are not appropriate amici"). By the same token, Appellants have created a case where the actual targets of their machinations would not be heard as parties.

The law similarly disfavors any collateral attack on another court's proceedings or decisions because such attacks duplicate work for multiple federal fora, risk conflicting decisions, and undermine the certainty and integrity of the process the Federal Rules enshrine. *See Colorado River Water Cons. Dist. v. United. States.*, 424 U.S. 800, 817 (1976) ("[T]he general principle is to avoid duplicative litigation" between federal courts); *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967), *abrogated on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977) ("[a] court may . . . in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere."). Here,

Appellants are attempting to obtain a decision that they will try to use against parties who are not before this Court, and who were not involved in the proceedings below. For example, Appellant Cultural Care joined the other *au pair* agencies in citing the DOS's brief as a ground for reconsidering the *Beltran* court's summary judgment order dismissing Cultural Care's preemption defense. *Beltran*, ECF No. 1146 (Sept. 27, 2018).

To the same end, prudence counsels in favor of a narrow decision because Appellants seek an advisory decision on a dispute that is not ripe. The "doctrine of ripeness has roots in both the Article III case or controversy requirement and in prudential considerations." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 59 (1st Cir. 2003). Ripeness inquires into both "fitness"—whether there is a sufficiently live controversy between the parties and whether judicial restraint counsels against resolving difficult issues in the present posture—and "hardship" to the parties if the Court "withhold[s] a decision at this time." *Reddy v. Foster*, 845 F.3d 493, 501 (1st Cir. 2017) (Lynch, J.); *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 807–08 (2003) ("Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.").

The dispute Appellants actually want this Court to reach is not between the parties to this case, and there is no cognizable hardship to Appellants if the Court declines to reach it because Appellants already have a competent federal forum.

In addition, the Declaratory Judgment Act gives this Court "broad discretion to decline enter a declaratory judgment," *DeNovellis v. Shalala*, 124 F.3d 298, 313 (1st Cir. 1997), and can so exercise its discretion *sua sponte*. *Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1224 n.4 (9th Cir. 1998); *Cincinnati Indem. Co. v. A & K Const. Co.*, 542 F.3d 623, 625 (8th Cir. 2008). This Court therefore has the statutory authority to decline to enter the judgment requested by Appellants for any or all the policy reasons above.

In sum, this Court should decline to decide issues not properly before it or at issue in this litigation, and should instead limit its consideration to whether the DWBOR's working conditions protections are preempted by federal law, the only issue pled in the complaint and considered by the trial court. Such an approach is consistent with the most basic principles of federal jurisprudence as well as the text of the Declaratory Judgment Act. *Cf. Korioth v. Brisco*, 523 F.2d 1271, 1274 (5th Cir. 1975) ("Federal courts are not to render advisory opinions, but rather are to decide specific issues for parties with real disputes. Cases are to be decided on the narrowest legal grounds available, and relief is to be tailored carefully to the nature of the dispute before the court.").

II. PRIOR TO THE REVERSAL IN POLICY OUTLINED FOR THE FIRST TIME IN ITS AMICUS BRIEF, DOS HAD REPEATEDLY AFFIRMED THAT AU PAIR WAGES ARE SUBJECT TO STATE AND LOCAL EMPLOYMENT LAWS.

Prior to the policy reversal contained in the United States' brief, DOS had consistently stated that state and local labor and employment laws apply to the wages *au pairs* earn while working in the United States.[3] The DOS's amicus brief, announces without any notice and comment or change in statute, a dramatic shift in U.S. policy, affecting tens of thousands of J-1 workers and states' interests in protecting the health and welfare of the people living within their borders.

First, the brief mentions *Beltran* six times, but never acknowledges DOS's previous statements specific to the *Beltran* litigation. When the *Beltran* litigation became public, an official DOS spokesperson took the extraordinary step of going on the record with the Washington Post to state that *au pair* agencies must comply with all applicable federal, state, and local laws, including any state minimum wage requirements. *See* Lydia DePilis, *Au pairs Provide Cheap Child Care. Maybe Illegally Cheap*, Washington Post (March 20, 2015), *available at* https://www.washingtonpost.com/news/wonk/wp/2015/ 03/20/au-pairs-provide-

[3] The United States does not accurately reflect the allegations in the *Beltran* case, in which it is not a party. The *Beltran au pairs* clearly allege that the $195.75 weekly stipend fails to comply with the FLSA because it does not account for overtime and improperly deducts room and board. *See Beltran*, Third Am. Compl. ¶¶ 204, 245-247, 356-364. The Department of Labor has made clear that "an employer may not credit the cost of facilities towards an employee's wages if the employer is required by law to provide the same." 29 C.F.R. § 531.30.

cheap-childcare-maybe-illegally-cheap/. In the same vein, DOS recently stated on PBS News Hours, in response to a question "Are families required to pay au pairs their state's minimum wage under FLSA rules?" that: "***In addition to*** requiring that au pairs be paid a stipend that, at a minimum meets the regulatory requirements in 62.31(j)(1) . . . sponsors must operate their au pair programs in conformance with all other applicable federal, state, and local laws." PBS News Hour at 8:31 (emphasis added).

Second, the amicus brief ignores what DOS itself has been saying to Appellant and the other companies that sell J-1 visa services. DOS has consistently communicated directly to *au pair* sponsor agencies that state labor and employment laws apply to the *au pair* program and that the *au pair* wage is a minimum. *See*, *e.g.*, Ex. 1, at ADD-2 (February 2, 2014 email from H. Stephens (DOS) to *au pair* agencies informing them that *au pairs* in Illinois are subject to Illinois Workers' compensation act and stating that "the Department of State expects sponsors, host families, and exchange visitors alike to comply with all applicable state and local laws during the exchange visitor's program."); Ex. 2, at ADD-5 (March 13, 2015 email from DOS to *au pair* sponsor agencies explaining that the 2009 notice did "not reflect the Department's view concerning any maximum compensation an au pair may receive," and reminding *au pairs* that "sponsors must operate their au pair programs in conformance with all other

applicable federal, state, and local laws"); February 19, 2016 email from DOS to *au pair* sponsor agencies; March 3, 2016 email from Kevin Saba (DOS) to Ilir Zherka (Alliance for International Exchange).[4]

And discovery in the *Beltran* litigation showed that the Department of Labor ("DOL") concurred; at a July 17, 2015 meeting between DOS and *au pair* agencies to receive guidance from the DOL on the applicability of state and local laws, certain agencies walked out to avoid hearing information that was in conflict with their ongoing practices. Ex. 3, at ADD-6–7 (DOS, Au Pair Sponsor Agency Meeting (July 17, 2015) (indicating a presentation from Patricia Davidson, Deputy Administrator for Program Operations, Wage and Hour Division); Ex. 4, at ADD-10–13 (Handout from DOL from July 17, 2015 Meeting, WHD Fact Sheet #79D) (domestic service employees "must be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one half the regular rate of pay for hours worked over 40 in a workweek.").[5] The guidance provided at

[4] The latter two documents have been produced to amici in the *Beltran* litigation and designated "CONFIDENTIAL" under the protective order governing that case. In an abundance of caution, we do not enclose them here, but the emails originated from DOS and should be available on its servers. Amici would be happy to provide them if an appropriate protective order is entered in this case.

[5] Further, in 2015, the United States Senate Committee on Appropriations (the "Committee") reported out a bill stating it was "aware of reports that participants in the Au Pair program have been compensated at the Federal minimum wage level which in some instances is below State and local minimum wage levels." S. Rep. 114-79, at 40 (2015), accompanying S. 1725 (2015). The Committee directed the Secretary of State to report to the Committee

that briefing is consistent with prior guidance from the DOL, the agency tasked with interpretation of the FLSA, that employees subject to state and federal minimum wage laws are entitled to the higher of the two minimum wages.

Third, DOS has consistently told the public, including *au pairs*, that state and local minimum wage laws apply to the *au pair* program. Under the Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, DOS is required to "develop an information pamphlet and video on legal rights and resources for aliens applying for employment or education based nonimmigrant visas." P.L. 110-457, 49 Stat. 651 (Dec. 23, 2008) (codified at 8 U.S.C. § 1375b). Pursuant to that statutory mandate, DOS—in consultation with the Department of Justice, DOL, and the Department of Homeland Security—produced an official document, the Wilberforce Pamphlet. DOS requires that *au pair* agencies provide all *au pairs* with a copy of the Wilberforce Pamphlet during orientation. *See* 22 C.F.R. § 62.10(c)(8).

The version of the Wilberforce Pamphlet in effect at the time the *Beltran* litigation was filed in 2014 notified all employment- or education-based visa

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on whether State and local minimum wage levels apply to the au pair program. *Id.* Discovery obtained in the *Beltran* case suggests that Cultural Care and *au pair* sponsor agencies launched an aggressive campaign to ensure that the report ordered by the Committee was not provided in writing. The Court may wish to request that DOS or the Committee provide it with any notes from that session (in camera or under seal if necessary).

holders, including *au pairs*, that they had the right to receive the minimum wage in the state in which they work:

> The Right to Be Paid
>
> - You have the right to get paid for all work you do, in the same manner as U.S. workers.
> - You have the right to earn at least the federal legal minimum wage $7.25 per hour, in the same manner as U.S. workers. Also check
>
> - *The minimum wage for the state in which you work. If that wage is higher, you have the right to be paid the higher amount.*

Wilberforce Pamphlet at 7 (2014) ("2014 Wilberforce Pamphlet") (emphasis added), *available at* https://internationalservices.ncsu.edu/files/2015/03/Wilberforce-Pamphlet.pdf; *see also* Wilberforce Pamphlet Publication, Fed. Reg. 34,386-87 (July 15, 2009) (describing interagency consultation process). The United States now claims that this language was inaccurate. USA Br. 19 n.6.[6]

After providing notice and an opportunity to comment on revisions to the Wilberforce Pamphlet, 80 Fed. Reg. 31,448 (June 2, 2015), in or around October 2016, DOS changed the relevant language to read as follows: "You may be entitled to earn more than the federal minimum wage if: You work in a state, city, or county that has a higher minimum wage." Wilberforce Pamphlet (October 2016)

[6] The DOS's amicus brief's footnotes demonstrates many of the flaws in DOS's position. For example, one footnote states that it was not clear that DOS's statement to the Washington Post on March 20, 2015 "reflected a considered analysis," but that "the views expressed in this brief reflect the considered position of the United States." *Id.* n.7.

("2016 Wilberforce Pamphlet"), *available at* https://travel.state.gov/content/dam/visas/LegalRightsandProtections/Wilberforce/Wilberforce-ENG-100116.pdf.

The United States argues that this language from the 2016 Wilberforce Pamphlet applies to all participants in J-1 work programs except *au pairs*,[7] but a plain reading of this language does not suggest any exception—nor would any *au pair* reading it understand an exception. The pamphlet plainly states that all nonimmigrant workers are entitled to more than the federal minimum wage if they work in a state, city, or county that has a higher minimum wage. Thus, although the DOS has now articulated a different position in its amicus brief, the Wilberforce Pamphlet itself has consistently informed *au pairs* that they are entitled to a higher wage if they live in a state with a minimum wage that exceeds the federal floor and continues to do so.[8]

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[7] DOS took the opposite position with PBS News Hour, in a statement that post-dated the 2016 revision to the Wilberforce Pamphlet, yet the United States failed to mention this statement in its brief.

[8] DOS's new reliance on their so-called authority over immigration and their traditional authority over foreign relations for the preemptive force of its regulations is misplaced. USA Br. 17, 20. State labor and employment laws have nothing to do with the federal government's immigration power to decide who enters the United States, who does not, and under what conditions. *See Beltran*, 2016 WL 695967, at *13 & n.18 (D. Colo. Feb. 22, 2016), *report and recommendation adopted in part, rejected in part*, 176 F. Supp. 3d 1066 (D. Colo. Mar. 31, 2016). And requiring that host families and au pair agencies ensure that au pairs are paid state and local minimum wage does not affect foreign relations. *See* 9 FAM 402.3-9(B)(4) (requiring foreign diplomatic missions present in the United States pay their domestic workers "the greater of the minimum wage under

In sum, until its stark reversal a few days ago, DOS consistently told *au pair* agencies and *au pairs* alike that state and local laws applied to the *au pair* wages.

CONCLUSION

For the reasons set forth above, the *au pair* regulations do not preempt the DWBOR, the only issue properly before the Court, nor do they preempt any of the state and local employment laws at issue in *Beltran*, an issue this Court need not decide. Accordingly, this Court should affirm the district court's decision below.

U.S. Federal, state, or local law," making clear that immigration and foreign relations are not threatened by adherence to state and local labor laws.).

Dated: October 19, 2018

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CERTIFICATE OF COMPLIANCE
WITH WORD-COUNT AND TYPEFACE LIMITATIONS

As required by Fed. R. App. P. 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 5155 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared using a proportionally spaced typeface using 14-point Times New Roman font.

October 19, 2018

Respectfully Submitted,

/s/ *Dawn L. Smalls*
Dawn L. Small

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the Court's CM/ECF system, and thus, copies will be served electronically on this date on the registered CM/ECF users in the case, including the parties and their counsel of record listed below. Papers copies will be sent to those indicated as non-CM/ECF registered participants.

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ADDENDUM TO AMENDED AMICUS BRIEF ON BEHALF OF CURRENT AND FORMER *AU PAIRS* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Exhibit No.	Document	Addendum Page No.
	Declaration of Dawn L. Smalls in Support of Amended Motion for Leave to File Amicus Brief on behalf of Current and Former *Au Pairs* in Support of Defendants-Appellees and Affirmance	
1	February 3, 2014 email from H. Stephens (DoS) to *au pair* sponsors	ADD-1 – ADD-3
2	March 13, 2015 email from DoS to *au pair* sponsors	ADD-4 – ADD-5
3	July 17, 2015 DoS Au Pair Sponsor Meeting Presentation excerpt	ADD-6 – ADD-8
4	Excerpt of handout from DoL from July 17, 2015 Meeting – WHD Fact Sheet #79D	ADD-9 – ADD-13

No. 17-2140

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ERIN CAPRON, JEFFREY PENEDO, AND CULTURAL CARE, INC.,

Plaintiffs-Appellants,

v.

OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS
AND
MAURA T. HEALEY, IN HER OFFICIAL 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

DECLARATION OF DAWN L. SMALLS IN SUPPORT OF AMENDED MOTION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF CURRENT AND FORMER *AU PAIRS* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Attorneys for Amici Curiae Sarah Carolina Azuela Rascon and All Other Similarly Situated Current and Former Au Pairs

I, DAWN L. SMALLS, declare as follows:

1. I am an attorney duly licensed to practice law in the State of New York and am a Partner with the law firm of Boies Schiller Flexner LLP, counsel for the amici, current and former *au pairs* who are members of classes certified pursuant to Fed. R. Civ. P. 23 and the Fair Labor Standards Act (29 U.S.C. §§ 201, *et seq.*) in *Beltran v. InterExchange*, No. 1:14-cv-03074 (D. Colo., filed Nov. 13, 2014) (the "*Beltran* litigation"). I am admitted to practice in New York, Massachusetts, the United States Supreme Court, the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Second Circuit, the United States Court of Appeals for the Tenth Circuit, the United States District Courts for the Southern and Eastern Districts of New York, the United States District Court for the District of Massachusetts, and the United States District Court for the District of Colorado.

2. The matters stated herein are based on my personal knowledge or upon information and belief, and if called upon to testify, I could and would testify competently thereto.

3. I submit this declaration in support of the Amended Motion for Leave to File Amicus Brief on behalf of Current and Former *Au Pairs* in support of Defendants-Appellees and Affirmance.

4. Attached hereto as **Exhibit 1** in the addendum is a true and correct

copy of an email produced to plaintiffs in the *Beltran* litigation, from Holly Stephens (Department of State) to *au pair* sponsor agencies, dated February 3, 2014, marked ADD-1 – ADD-3.

5. Attached hereto as **Exhibit 2** in the addendum is a true and correct copy of an email produced to plaintiffs in the *Beltran* litigation, from the "Office of Private Sector Designation", at the Department of State to *au pair* sponsor agencies, dated March 13, 2015, marked ADD-4 – ADD-5.

6. Attached hereto as **Exhibit 3** in the addendum is a true and correct copy of an excerpt of a Department of State Au Pair Sponsor Meeting presentation, dated July 17, 2015, and produced to plaintiffs in the *Beltran* litigation, marked ADD-6 – ADD-8.

7. Attached hereto as **Exhibit 4** in the addendum is a true and correct copy of an excerpt of a document produced to plaintiffs in the *Beltran* litigation, entitled "Fact Sheet #79D", authored by the Department of Labor and distributed to *au pair* sponsor agencies at the July 17, 2015 Department of State Au Pair Sponsor Meeting referenced in Exhibit 3, marked ADD-9 – ADD-13.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: October 19, 2018

Respectfully Submitted,

/s/ *Dawn L. Smalls*

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ADDENDUM

Exhibit 1

Message

From: Stephens, Holly D [StephensHD@state.gov]
Sent: 2/3/2014 1:43:56 PM
To: Agent Au Pair Operations [operations@agentaupair.com]; Bill Kapler [bkapler3@yahoo.com]; bkapler@goaupair.com; Christine La Monica-Lunn [clamonica-lunn@interexchange.org]; Deborah Herlocker [chideborah@chinet.org]; Ellen Hoggard [ellen@aupairfoundation.org]; Evelyn Blum [eblum@aifs.com]; Goran Rannefors [goran.rannefors@culturalcare.com]; Heidi Mispagel [heidi@GreatAuPair.com]; Helene Young [hly@usaupair.com]; Lisa Kempton [lkempton@aupairint.com]; Mark Gaulter [mark@expertaupair.com]; Michael McHugh [mmchugh@interexchange.org]; Natalie Jordan [Natalie.Jordan@EF.com]; Petra Crew [petra@proaupair.com]; Rikki Tracy [Rikki.Tracy@culturalcare.com]; Ruth Ferry [rferry@aifs.com]; Sarah McNamara [smcnamara@aupaircare.com]; Shannon Pitts [Shannon@GreatAuPair.com]; Stacey Frank [stacey@agentaupair.com]; Stephen Lehan [slehan@aupairint.com]; Susan Asay [susan@proaupair.com]; Susan Hayes [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f4f157b619b643dd940618ef56d24a3b-Susan Hayes]; Tanna Wilson [twilson@goaupair.com]; Theresa Nelson [theresa@aupairfoundation.org]; Thomas Areton [chitom@chinet.org]; Bill Gustafson [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f4e5773acb35427bb42bbe932ebb6a55-Bill Gustafson]
Subject: Guidance on Workers' Compensation for Au Pairs, Illinois

Good morning, everyone!

Per inquiries received in the past few weeks, I'm writing to provide direction on the issue of Workers' Compensation Insurance in the state of Illinois. Please use the following as official guidance from the Department of State for the Au Pair Program in that state.

"The Director of Intergovernmental Affairs/General Counsel in the State of Illinois has advised host families to obtain Workers' Compensation insurance for their au pair since she/he will be working 40 hours or more for 13 consecutive weeks (and is considered a domestic worker in the State of Illinois, according to the Illinois General Assembly/Workers' Compensation Act [(820 ILCS 305/3 (18))] http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2430&ChapterID=68).

Federal regulations governing the au pair category of the Exchange Visitor Program – see 22 Code of Federal Regulations (CFR) Part 62, and particularly section 62.31 – are silent as to whether au pairs are considered to be domestic workers. The regulations are also silent on the question of host family responsibility for paying workers' compensation insurance. However, the Department of State expects sponsors, host families, and exchange visitors alike to comply with all applicable state and local laws during the exchange visitor's program."

I hope this is helpful.

All best and kind regards,

Holly

Exhibit 2

---------- Forwarded message ----------
From: **DesignationAuPairProgram** <DesignationAuPairPro@state.gov>
Date: Friday, March 13, 2015
Subject: Au Pair Sponsors-Federal Minimum Wage
To: DesignationAuPairProgram <DesignationAuPairPro@state.gov>

March 13, 2015

Dear Au Pair Sponsors:

It has come to the Department's attention that sponsors having programs in the au pair category of the Exchange Visitor Program (EVP) have questions regarding the nature of the guidance contained in the June 14, 2007 Notice: Federal Minimum Wage Increase, which had been posted on the Department's website.

As sponsors are aware, the legal requirements for compensating exchange visitors in au pair programs are set forth in the Department's regulations governing the EVP at 22 CFR Part 62. The Department wishes, in particular, to remind sponsors that their obligations with respect to au pair "wages" are set forth in 22 CFR §62.31(j)(1): "Sponsors shall require that au pair participants … [a]re compensated at a weekly rate based upon 45 hours of child care services 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. EduCare participants shall be compensated at a weekly rate that is 75% of the weekly rate paid to non-EduCare participants…." This regulation sets the minimum compensation that sponsors must ensure that au pair participants are paid.

In addition, sponsors may wish to refer to the following from the Department of Labor's website: "Fact Sheet #79B: Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA)," http://www.dol.gov/whd/regs/compliance/whdfs79b.htm.

Sponsors should note that the aforementioned Notice does not reflect the Department's view concerning any maximum compensation au pairs may receive.

Finally, sponsors should remember that – in addition to requiring that au pairs be paid a stipend that, at a minimum, meets the regulatory requirements noted above – sponsors must operate their au pair programs in conformance with all other applicable federal, state, and local laws.

Sincerely,

Office of Private Sector Designation

Exhibit 3

(Excerpt)

ECA

Bureau of Educational and Cultural Affairs

Au Pair Sponsor Meeting

July 17, 2015

Patricia Davidson

Deputy Administrator for Program Operations

Wage and Hour Division

Exhibit 4
(Excerpt)

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(September 2013)

Fact Sheet # 79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA)

Background

Domestic service employment means services of a household nature performed by a worker in or about a private home (permanent or temporary). The term includes services performed by workers such as companions, babysitters, cooks, waiters, maids, housekeepers, nannies, nurses, janitors, caretakers, handymen, gardeners, home health aides, personal care aides, and family chauffeurs. This listing is illustrative and not exhaustive. Employees providing services in a private home are generally domestic service employees covered under the Fair Labor Standards Act (FLSA). These employees must be paid at least the federal minimum wage for all hours worked and overtime pay at not less than time and one half the regular rate of pay for hours worked over 40 in a workweek. Section 13(a)(15) of the FLSA provides a narrow exemption from the minimum wage and overtime requirements for casual babysitters and workers employed to perform companionship services for an elderly person or person with an illness, injury or disability. Section 13(b)(21) of the FLSA provides an exemption from the overtime, but not the minimum wage requirement for those employees who reside in the private home where they work (live-in domestic service employees).

This fact sheet is intended to provide guidance on those circumstances in which an employee who is covered by the FLSA minimum wage and overtime provisions is engaged in compensable work and therefore must be paid for those hours worked. The key issue in determining when workers are performing compensable work is whether they are working or engaged to wait for work or whether they have been completely relieved from duty and are able to use the time for their own purposes.

Generally, when an employee is "on duty" (that is they must be in the home and prepared to provide services when required), they are working. For example, a nurse who must watch over an ill patient, a chauffeur who must be at the home and ready to drive when directed, or a nanny who must watch over her charge even when sleeping are all on duty and must be paid for all of that time. Under the FLSA, an employee who reads a book, knits, or works a puzzle while awaiting assignments is working during the period of inactivity. In such cases, the employee is "engaged to wait" and must be paid for such time.

On the other hand, domestic service employees (including live-in employees) who have been completely relieved from duty and are able to use the time for their own purposes—to go to a movie, run a personal errand, attend a parent-teacher conference— need not be paid for this time. For example, a live-in care provider who assists her roommate who has a disability in the morning for three hours, then goes to class at the local university, returns home to study, watches television, and does her own laundry before assisting the roommate for two hours in the evening,

has only worked five hours; the hours spent actually engaged in assisting the roommate who has a disability is deemed to be compensable hours worked.

"Hours Worked"

An employee who works on the employer's premises is not necessarily considered working all the time he or she is on the premises.

Example: Wendy is employed as a live-in domestic service worker for Mr. White. Wendy and Mr. White have an agreement that she will provide assistance with toileting, bathing, dressing, preparing breakfast and transportation to Mr. White's workplace. This normally takes 2.5 hours depending on traffic to Mr. White's office. Mr. White is at work from 9:00 am to 4:00 pm, and Wendy is not required to remain with Mr. White. In fact, Wendy goes to another part-time job at the grocery store. At the end of Mr. White's workday, Wendy transports Mr. White to his home, prepares dinner for him and cleans up afterward before assisting Mr. White as he retires for the evening. This normally takes 4 hours. Wendy's compensable hours worked in this scenario are 6.5.

Example: George is hired as a personal attendant for Mr. Norton. He is expected to report to work at 7:00 am, when Mr. Norton's daughter departs for work, and to stay until she returns in the evening, usually at 8:00 pm. While at the Norton residence, George is expected to be available should Mr. Norton need assistance with dressing, preparing meals, taking walks in the garden, or for any other reason. Three days a week George leaves at 1:00 pm to attend to personal business and returns at 4:00 pm. There are some days when George chooses not to leave the residence during this time but rather to stay and read a book or tend to personal paperwork. George is "engaged to wait" and is considered to be working during all the time he is at the residence attending to, or is expected to be available to, Mr. Norton. George is not working when he is completely relieved from duty for a period long enough to use the time effectively for his own purposes, such as running personal errands, reading a book, or doing personal paperwork.

Example: William lives with his cousin, Ms. Jones, who has a developmental disablility. William is employed by a state agency to tend to her basic needs—preparing meals and feeding her, bathing, dressing, and administering medications. William spends 6 hours a day performing these functions and otherwise is free to leave the residence and to use the remainder of his day as he sees fit. William's hours worked are the 6 hours he spends preparing meals, feeding, bathing, and administering medications to his cousin, Ms. Jones.

Travel Time

An employee who travels from home to work and returns to his or her home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment. Normal travel from home to work and return at the end of the workday is not work time. This is true whether the employee works at a fixed location or at a different location each day. For live-in domestic service employees, home-to-work travel that is typically unpaid does not apply in this case because the employee begins and ends his or her workday at the same home in which he or she resides.

Travel that is all in a day's work, however, is compensable hours worked.

Example: Barbara drives Mr. Jones to the Post Office and grocery store during the workday. Barbara is working and the travel time must be paid.

Travel away from the home is clearly work time when it cuts across the employee's workday. The employee is merely substituting travel for other duties. Thus, if an employee hired to provide home care services to an individual (consumer) accompanies that consumer on travel away from home, the employee must be paid for all time spent traveling during the employee's regular working hours. As an enforcement policy, WHD will not consider as work time the time the employee spends as a *passenger* on an airplane, train, boat, bus or automobile when in travel away from home outside of regular working hours. However, the employee must be paid for all hours engaged in work or "engaged to wait" while on travel. For example, an employee who is required to travel as a passenger with the consumer "as an assistant or helper" and is expected to perform services as needed is working even though traveling outside of the employee's regular work hours. However, periods where the employee is completely relieved from duty, which are long enough to enable him or her to use the time effectively for his or her own purposes, are not hours worked and need not be compensated.

Example: John is a personal attendant for Mrs. Brown, who lives in Atlanta. Mrs. Brown attends a conference in New York City and John accompanies her by plane. John normally works 8:00 am to 4:00 pm. Mrs. Brown's daughter takes her to the airport where they meet John for the flight at 6:00 pm. WHD will not consider the flight time as compensable hours because it is time spent in travel away from home outside of regular working hours as a passenger on an airplane if John is completely relieved from duty. If John provides assistance to Mrs. Brown while at the airport or during the flight or must be available to assist or help as needed, he is working and must be compensated for this time.

Domestic Service Employees Who Are Employed by a Third-Party Employer: Such an employee who travels from home to work and returns to his or her home at the end of the workday is engaged in ordinary home-to-work travel that is not compensable work time. However, travel from job site to job site during the workday, such as travel between several clients during the workday, is compensable hours worked. The third-party employer is responsible for ensuring that travel time from job site to job site is paid.

Live-in Domestic Service Employees

A live-in domestic service employee is an employee who provides domestic services in a private home and resides on his or her employer's premises on a "permanent basis" or for "extended periods of time." See Fact Sheet 79B Live-In Domestic Service Workers Under the Fair Labor Standards Act (FLSA). Employees who work and sleep on the employer's premises seven days per week and therefore have no home of their own other than the one provided by the employer are considered to "permanently reside" on the employer's premises. Moreover, in accordance with longstanding agency policy, employees who work and sleep on the employer's premises for five days a week (120 hours or more) are considered to reside on the employer's premises for "extended periods of time." Only those employees who are providing domestic services in a

private home and are residing on the employer's premises "permanently" or for "extended periods of time" are considered live-in domestic service employees under the FLSA. Employees who work 24-hour shifts are not necessarily live-in domestic service workers.

"Hours Worked" When On Duty for Less Than 24-hours

If an employee is required to be on duty—that is, either performing work duties or engaged to wait—for less than 24 hours, the employee must be paid for all hours even though he or she is permitted to sleep or engage in other personal activities when not busy. However, if an employee is completely relieved from duty, is able to use time effectively for his or her own purposes, and is permitted to leave the employer's premises, the time is not compensable.

"Hours Worked" When On Duty for 24 Hours or More

If an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide sleeping period of not more than eight hours from work time, provided adequate sleeping facilities are furnished by the employer and the employee can generally enjoy an uninterrupted sleeping period.

Example: Patricia works as a domestic service worker and is scheduled to be on duty for a 36-hour shift. After 18 hours of caring for Mr. Kerschner, Patricia is completely relieved from duty to go to a dental appointment and attend a school conference. Patricia returns after six hours to continue caring for Mr. Kerschner for an additional 12 hours. Patricia must be paid for the first 18 hours and the final 12 hours of the previously scheduled shift. In this situation, Patricia is not on duty for 24 hours or more because the free time during the shift "breaks" the on-duty period for calculating compensable hours worked.

Example: Ernest works as a domestic service worker and is scheduled to be on duty for a 36-hour period to care for Mr. Honeycutt. Ernest has an agreement to exclude his meal periods (two thirty minute periods) and eight hours of sleep time from his compensable time. Ernest is released from duty at the end of the 36 hours. During the duty time, Ernest spends eight hours sleeping uninterrupted. Ernest must be paid for 27 hours.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the Department's regulations.

U.S. Department of Labor
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Contact Us