

NOTES & COMMENTS

“I’D NEVER LET MY SISTER DO IT”: EXPLOITATION WITHIN THE U.S. AU PAIR PROGRAM

by
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The U.S. Au Pair Program, administered by the U.S. Department of State, is many things all at once: a cultural exchange program, a guest worker program, and an affordable childcare program. The hybrid nature of the program makes it attractive to foreign young people and U.S. host families alike. However, the hybrid nature of the program also renders au pairs susceptible to exploitation, particularly where labor rights are concerned. This Comment argues that in order to effectively mitigate the exploitation of au pairs, the Department of State must strengthen protections for au pairs and improve its oversight of the program, as well as separate the cultural exchange and education components of the program from the work component.

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INTRODUCTION

The U.S. Au Pair Program holds itself out to be a cultural exchange program—an opportunity for foreign young people to experience American culture, take college classes, and earn money by providing child care for a host family.¹ Au pairs are at once tourists, students, employees, and family members. This duality is part of what makes the program so appealing to young people, but that same duality also leaves au pairs particularly susceptible to exploitation.

¹ The U.S. Department of State, which oversees the program, describes it as follows: “Through the Au Pair program, participants and host families take part in a mutually rewarding, intercultural opportunity. Participants can continue their education while experiencing everyday life with an American family, and hosts receive reliable and responsible childcare from individuals who become part of the family.” *Au Pair Program*, U.S. DEP’T OF STATE: BRIDGEUSA, <https://j1visa.state.gov/programs/au-pair> (last visited Mar. 13, 2022). In this Comment, the term “au pair” refers solely to official participants in the U.S. Department of State-administered U.S. Au Pair Program.

For Raquel,² a young woman from South America, the hybrid nature of the program is what piqued her interest and motivated her to save money to pay the recruitment fees associated with becoming an au pair. The host family Raquel matched with promised they would provide her with a car and a cell phone, and spoke glowingly of the nearby university. They told her about their children—one child had special needs, but the parents promised Raquel she would “hardly notice.”³ However, once Raquel arrived in the United States, she discovered that her host family was motivated to participate in the U.S. Au Pair Program less by a desire to host a foreign young person, and more by a desire to secure inexpensive child care. Au pairs are expected to work 45 hours a week,⁴ yet Raquel often found herself working well beyond the 45 hours and being asked to undertake housecleaning and other duties outside of an au pair’s typical scope of work. Raquel described feeling constantly torn between acquiescing to her host parents’ demands in an effort to keep the peace, and pushing back to set boundaries for herself.

Once the Covid-19 pandemic took hold and Raquel’s part of the country entered lockdown, tensions between Raquel and her host parents intensified. Her host parents took her cell phone away, reasoning she no longer needed it since the family was all under one roof—disregarding the fact that Raquel used her phone to communicate with others, including her family back home, and that, without a phone, Raquel was essentially cut off from the outside world. When Raquel tried to advocate for herself, her host family told her she was being dramatic and should be more grateful because they “brought” her to the United States.⁵

² Raquel’s name and other identifying details have been changed to honor her request for confidentiality. Citations to interviews of au pairs are omitted to protect confidentiality. Interview notes are on file with the author.

³ Au pair agencies are not permitted to “[p]lace an au pair with a host family having a special needs child . . . unless the au pair has specifically identified his or her prior experience, skills, or training in the care of special needs children.” 22 C.F.R. § 62.31(e)(4) (2020). However, in determining whether a child has special needs, au pair agencies rely on the representations made by the host family. *Id.* § 62.31(e)(4) This means families and agencies can effectively skirt this requirement, resulting in au pairs taking on work they are inadequately trained for, and children receiving substandard care. Raquel had no prior training or experience in working with special needs children.

⁴ See *id.* § 62.31(j)(1) (explaining that au pairs “[a]re compensated at a weekly rate based upon 45 hours of child care services per week”).

⁵ For an excellent discussion of the unique challenges Latina au pairs face in the United States, see Sondra Cuban, “*Any Sacrifice Is Worthwhile Doing*”: *Latina Au Pairs Migrating to the United States for Opportunities*, 16 J. IMMIGR. & REFUGEE STUD. 235 (2018). The dynamic Raquel experienced with her host family was likely exacerbated given her country of origin. Another au pair I spoke with told me how her agency representative would casually threaten to have her “deported” if she failed to comply with basic programmatic requirements, such as arriving at a check-in meeting on time. The language used to police Latina au pairs’ behavior resembles the language and threats deployed in the victimization of undocumented immigrants. *Cf.* Elizabeth

As issues with Raquel's host family intensified, she sought assistance from her au pair agency, which downplayed her concerns and declined to intervene. The only support Raquel found was from her fellow au pairs, one of whom told me, reflecting on her own experience compared to that of Raquel's: "I've had a good experience here, but I'd never let my sister do it."

While Raquel's story may not be representative of the typical au pair experience, it is illustrative of the relative ease with which a host family and au pair agency can exploit an au pair's labor, as well as the lack of consequences for bad actors.

Academic research,⁶ news stories,⁷ internal government reports,⁸ and first-hand accounts⁹ alike reveal a troubling pattern of exploitation of au pairs. Recent

Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOCIO. Q. 593, 607–09 (2011) (analyzing the deportation threat dynamic through the lens of day laborers).

⁶ See, e.g., AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS? (Rosie Cox ed., 2015) (containing a compilation of academic papers on au pairs); Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269 (2013) (arguing that the program's cultural exchange narrative both obscures and enables the exploitation of au pairs); Sabine Hess & Annette Puckhaber, *'Big Sisters' Are Better Domestic Servants?! Comments on the Booming Au Pair Business*, 77 FEMINIST REV. 65 (2004) (demonstrating how the cultural exchange aspect of au pairing can make au pairs more vulnerable to exploitation); Cuban, *supra* note 5 (comparing the marginalization of highly educated Latina au pairs to that of undocumented migrant workers); Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. & FEMINISM 1 (2020) (discussing the exclusion of au pairs from labor protections); CAMERON LYNNE MACDONALD, *SHADOW MOTHERS: NANNIES, AU PAIRS, AND THE MICROPOLITICS OF MOTHERING* (2010) (elucidating factors that lead to the exploitation of childcare providers and, specifically, au pairs).

⁷ See, e.g., Zack Kopplin, *Au Pairs Come to the U.S. Seeking Cultural Exchange, but the State Department Often Fails to Protect Them*, HUFFINGTON POST (July 31, 2020, 5:45 AM) [hereinafter Kopplin, *Seeking Cultural Exchange*], https://www.huffpost.com/entry/au-pair-america-cultural-care_n_5f204d6ac5b69fd473126c61; Zack Kopplin, *'They Think We Are Slaves'*, POLITICO MAG. (Mar. 27, 2017) [hereinafter Kopplin, *They Think We Are Slaves*], <https://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956>; Jordan Salama, *The Great Au Pair Rush*, N.Y. TIMES (Jul. 25, 2020), <https://www.nytimes.com/2020/07/25/business/the-great-au-pair-rush.html>; Shae Healey, *In Unsafe Hands*, WILLAMETTE WEEK (Oct. 25, 2011, 5:01 PM), <https://www.wweek.com/portland/article-18136-in-unsafe-hands.html>; Ellen Wulforst, *Foreign Students Recruited as Au Pairs Face Abuse in U.S.: Report*, REUTERS (Aug. 20, 2018, 9:39 PM), <https://www.reuters.com/article/us-usa-trafficking-aupairs/foreign-students-recruited-as-au-pairs-face-abuse-in-u-s-report-idUSKCN1L60B8>.

⁸ See, e.g., U.S. DEP'T. OF STATE, BUREAU OF EDUC. & CULTURAL AFFS., 2014 AU PAIR PROGRAM ANNUAL REPORTS ANALYSIS (2014) [hereinafter 2014 STATE REPORT], <https://www.politico.com/f/?id=0000015b-0cf1-d373-a17b-4ff399fb0001>; U.S. DEP'T. OF STATE, BUREAU OF EDUC. & CULTURAL AFFS., 2015 AU PAIR PROGRAM ANNUAL REPORTS ANALYSIS (2015) [hereinafter 2015 STATE REPORT], <https://www.politico.com/f/?id=0000015b-0cf2-d4b9-abff-3ffe31fd0001>.

⁹ Firsthand accounts from au pairs can be found on internet forums, such as Reddit. See,

litigation centering on au pair compensation, together with shifting geopolitical and familial dynamics driven in large part by the Covid-19 pandemic, further expose the flaws in the design and oversight of the U.S. Au Pair Program.¹⁰

This Comment argues that au pairs are at inherent risk of exploitation, and that such risk can only be meaningfully mitigated by radically restructuring the program and separating the cultural exchange and educational components of the program from the work component. Au pairs' youth, temporary immigration status, and lack of familiarity with American laws and culture, together with the design of the program and the lack of oversight by the Department of State and au pair agencies, set the stage for the exploitation of au pairs by au pair agencies and host families, rendering illusory the program's purported goal of being a "mutually rewarding, intercultural opportunity."¹¹

To remove the risk for exploitation inherent in the U.S. Au Pair Program and realize the cultural exchange and educational opportunities promised to au pairs, the Department of State must reform the program in three major ways. First, the Department of State must bring the work component of the U.S. Au Pair Program into compliance with the rules promulgated by Fair Labor Standards Act (FLSA), which would chiefly consist of modifying the wage-and-hour scheme so au pairs are paid what their U.S. counterparts are paid. Second, the Department of State must strengthen its oversight of the U.S. Au Pair Program by conducting more independent investigations, exercising authority to sanction non-compliant au pair agencies, making more data publicly available, and requiring au pair agencies to produce more detailed reporting. Third, to realize the cultural exchange and educational value of the program, the Department of State should give program participants, upon their completion of the program, the opportunity to receive a student visa to continue their post-secondary studies at an accredited college or university in the United States—effectively separating the educational component of the program so it is not overshadowed by the work component.

This Comment is divided into four parts. Part I describes the evolution of the U.S. Au Pair Program, from its origin as an experimental pilot program in 1986 to the present, where recent judicial and executive actions have significantly altered the program. Part II demonstrates why au pairs as a group are at high risk for exploitation. Part III argues that the design and administration of the U.S. Au Pair Program contributes to the exploitation of au pairs, with a particular focus on the actions (and inaction) of the Department of State and au pair agencies that contribute to and enable the exploitation of au pairs by au pair agencies and host families. Finally,

e.g., *Au Pairs, Nannies, and Babysitters*, REDDIT, <https://www.reddit.com/r/Aupairs/> (last visited Mar. 13, 2022). As part of the research for this Comment, I interviewed four current and former participants in the U.S. Au Pair Program.

¹⁰ See *infra* Section I.C.

¹¹ See *infra* Part II. The quoted text is taken from *Au Pair Program*, *supra* note 1.

Part IV proposes major reforms to the U.S. Au Pair Program, advocating for both stronger work protections for au pairs and the addition of a new programmatic component, the opportunity for program participants to receive a student visa upon their completion of the program.

I. BACKGROUND ON THE U.S. AU PAIR PROGRAM

A. *From Pilot to Permanent*

In 1986, the United States made its first foray into the au pair scheme by authorizing a pilot program through which families could host foreign young people from Western Europe as au pairs.¹² The program was modeled on European au pair programs, which rose in popularity following World War II, spurred on by the need for more domestic workers.¹³

The 1986 two-year pilot program was administered by the U.S. Information Agency (USIA)¹⁴ in partnership with two private au pair agencies, Experiment in International Living and the Institute for Foreign Study.¹⁵ The pilot program enabled au pairs, ages 18 to 25, to come to the United States on a cultural exchange visa for 13 months, where “in exchange for room, board, and a small stipend” of \$100 per week and a \$300 tuition credit, au pairs would provide their host families with 45 hours a week of child care.¹⁶

Indications of au pair exploitation were evident during the early years of the U.S. Au Pair Program. Almost immediately following the launch of the pilot

¹² SUSAN B. EPSTEIN, CONG. RSCH. SERV., RL 95-256, THE AU PAIR PROGRAM 2 (1998).

¹³ Rosie Cox, *Introduction to AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS?*, 1, 3 (Rosie Cox ed., 2015). In response to the growing “number of young persons going abroad” and the “uncontrolled development of temporary migration,” the Council of Europe drafted the European Agreement on Au Pair Placement in 1969. Helle Stenum & Hanne Marlene Dahl, *Abused Domestic Workers in Europe: The Case of Au Pairs*, at 23, Eur. Parliament Comm. on Women’s Rts. & Gender Equal. Pol’y PE 453.209 (Oct. 2011), https://ec.europa.eu/anti-trafficking/document/download/6b698489-bab7-4f1e-add1-511930b2c718_en. The European Agreement formally established the concept of “au pairing as a form of international movement” and provided the basis for au pair programs in Europe and beyond. Cox, *supra* note 13, at 3.

¹⁴ A now defunct agency, the USIA was established in 1953 to promote the United States abroad through public diplomacy. Reorganization Plan No. 8 of 1953, § 1, 67 Stat. 642, 642 (repealed 1998); see also Joon Soo Lim, *United States Information Agency*, in 2 ENCYCLOPEDIA OF POLITICAL COMMUNICATION 799 (Lynda Lee Kaid & Christina Holtz-Bacha, eds., 2008).

¹⁵ EPSTEIN, *supra* note 12, at 2–3. The Institute for Foreign Study is still a designated U.S. au pair agency, over 30 years later, though it currently does business as Au Pair in America. *About Us*, AU PAIR IN AMERICA, <https://www.aupairinamerica.com/about-au-pair-in-america/> (last visited Mar. 13, 2022); *Designated Sponsor Organizations*, U.S. DEP’T OF STATE: BRIDGEUSA, <https://j1.visa.state.gov/participants/how-to-apply/sponsor-search/?program=Au%20Pair> (last visited Mar. 13, 2022).

¹⁶ EPSTEIN, *supra* note 12, at 3.

program, government officials began to question its “validity.”¹⁷ In 1986, an immigration commissioner “reportedly sent a letter stating that the au pair program resembled an employment program, not a cultural exchange activity.”¹⁸ In 1987, an interagency review panel, consisting of representatives from the USIA, the Department of State, the Department of Labor, and the Immigration and Nationality Service (INS), determined that the au pair program “did not meet the educational and cultural requirements of the [Mutual Educational and Cultural Exchange Act of 1961] and should not be continued on that basis.”¹⁹ The USIA, seeking to provide au pairs with “greater cultural experience,” proposed programmatic reforms—chief among them, reducing au pairs’ maximum weekly work hours from 45 to 30 hours.²⁰ Au pair agencies pushed back against these reforms, contending that the 45-hour work week was “critical to the program’s continuation, because in the United States most participating host parents worked full-time.”²¹

With the future of the program hanging in the balance, au pair agencies went directly to Congress to secure an extension of the program as originally designed.²² Not only did Congress authorize an extension of the program as “previously authorized,” but it also expressly prohibited the USIA from terminating or substantially altering the program.²³ It would not be until 1994 that Congress would grant the USIA authority to “to regulate (not just oversee) the au pair program.”²⁴ Additionally, it would not be until 1997 that the U.S. Au Pair Program would be made permanent, no longer subject to regular renewal by Congress.²⁵

¹⁷ *See id.* at 3–4.

¹⁸ *Id.* at 3.

¹⁹ U.S. GOV’T ACCOUNTABILITY OFF., GAO/NSIAD-90-61, U.S. INFORMATION AGENCY: INAPPROPRIATE USES OF EDUCATIONAL AND CULTURAL EXCHANGE VISAS 19 (1990). The Mutual Educational and Cultural Exchange Act of 1961 established a robust cultural and educational exchange scheme. *See* Mutual Educational and Cultural Exchange (Fulbright-Hays) Act of 1961, Pub. L. No. 87-256, § 101, 75 Stat. 527 (codified at 22 U.S.C. ch. 33).

²⁰ EPSTEIN, *supra* note 12, at 3. For context, many other au pair programs only permit au pairs to work 30 hours a week. *See, e.g., Employing Someone to Work in Your Home, Au Pairs*, GOV.UK, <https://www.gov.uk/au-pairs-employment-law/au-pairs> (last visited Mar. 13, 2022) (United Kingdom); BUNDESAGENTUR FÜR ARBEIT, “AU PAIRS” IN GERMAN FAMILIES: INFORMATION FOR AU PAIRS AND HOST FAMILIES 7 (Oct. 2020), https://www.arbeitsagentur.de/datei/au-pair-in-germany-en_ba012998.pdf (Germany); *Residence Permit on Grounds of Au-Pair Placement*, ÚTLENDINGASTOFNUN: DIRECTORATE OF IMMIGR., <https://utl.is/index.php/en/au-pair> (last visited Mar. 13, 2022) (Iceland).

²¹ EPSTEIN, *supra* note 12, at 3.

²² *Id.*

²³ S. REP. NO. 100-500, at 9 (1988).

²⁴ EPSTEIN, *supra* note 12, at 4.

²⁵ An Act to Provide Permanent Authority for the Administration of Au Pair Programs, Pub. L. No. 105-48, § 1, 111 Stat. 1165 (1997).

Criticism of the program persisted, with a 1990 GAO report concluding, once again, that the au pair program was “essentially child care work,” not compatible with the Mutual Educational and Cultural Exchange Act of 1961 which “was intended to increase mutual understanding through educational and cultural exchanges.”²⁶ The report suggested transferring the U.S. Au Pair Program and other non-compatible programs to other agencies so as not to “dilute[] the integrity of the J visa” and “obscure[] the distinction between the J visa and other [work] visas.”²⁷ The USIA sought unsuccessfully to shift the program to another, better suited government agency. Congress, instead, authorized the U.S. Au Pair Program’s continued growth as a cultural exchange program, “result[ing] in USIA adding six more organizations to carry out au pair programs.”²⁸

In the mid-1990s, incremental changes were made to the U.S. Au Pair Program following the deaths of two infants while in the care of au pairs and other “tragic incidents.”²⁹ In 1994, the USIA proposed raising the weekly stipend for au pairs to \$155 a week, increasing families’ tuition contribution to \$500, and reducing au pair work hours to 30 hours a week.³⁰ However, after a “sharp public response,”³¹ the regulations were modified to require au pairs be paid a weekly stipend of \$115, pass a thorough background check, receive up to \$500 in tuition costs, and receive a day and a half off each week and two weeks of paid vacation.³² The au pair work week remained at 45 hours.³³ Additionally, the USIA decided to “permit a credit for room and board . . . not to exceed \$76 per week,” effectively lowering compensation.³⁴

From 1997 to 1998, as the highly-publicized Louise Woodward case brought the U.S. Au Pair Program into the public eye, the federal government considered

²⁶ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 19, at 20, 22.

²⁷ *Id.* at 22. Cultural and educational exchange participants enter the United States on a J-1 visa. *Programs*, U.S. DEP’T OF STATE: BRIDGEUSA, <https://j1visa.state.gov/programs> (last visited Mar. 13, 2022).

²⁸ EPSTEIN, *supra* note 12, at 3. Two pending bills would have transferred the U.S. Au Pair Program to the U.S. Department of Justice. Statement of Policy Regarding Exchange Visitor Au Pair Programs, 57 Fed. Reg. 46,676, 46,676 (Oct. 9, 1992).

²⁹ Exchange Visitor Program, 60 Fed. Reg. 8547, 8547–48, 8552–53 (Feb. 15, 1995) (codified at 22 C.F.R. pt. 514).

³⁰ EPSTEIN, *supra* note 12, at 4. The USIA characterized as “extremely vexing” the issue of au pair wages and hours, noting with skepticism that agencies and host families “uniformly plead that the au pair concept is not viable in the United States unless the au pair participant may provide up to forty-five hours of child care.” Exchange Visitor Program, 59 Fed. Reg. 64,296, 64,298 (Dec. 14, 1994).

³¹ EPSTEIN, *supra* note 12, at 4. The USIA received “over 3,000 responses from American families during the thirty day public comment period.” 60 Fed. Reg. at 8548.

³² 60 Fed. Reg. at 8552–53.

³³ *Id.* at 8552.

³⁴ *Id.* at 8551.

anew whether the program should be further modified.³⁵ Woodward, a 19-year-old British au pair, was convicted of involuntary manslaughter after an infant sustained fatal injuries while in her care.³⁶ In response to this incident, some members of Congress proposed eliminating the au pair program, others suggested reforming the program by increasing oversight, assuring host families understood “their educational and cultural responsibilities to the au pair,” strengthening recruiting standards, and improving au pair training.³⁷

Ultimately, the USIA made programmatic changes that put much of the onus for preventing future injuries and deaths of children on au pairs, rather than host families or agencies. For example, a final rule adopted in 1999 to “reduce the potential risk of injury to program participants” required au pairs who cared for infants to have “at least 200 hours of documented infant child care experience” and required au pairs who cared for children with special needs to have “prior experience, skills, or training.”³⁸

B. *The Program Today*

Decades later, the U.S. Au Pair Program remains strikingly similar to the fledgling program of the 1980s and 1990s, as demonstrated in the chart below.

	1986 Pilot Program	1995 Program	2021 Program
Government Agency	U.S. Information Agency	U.S. Information Agency	U.S. Department of State
Work Hours Maximum	45 hours per week	45 hours per week	45 hours per week
Room & Board Deduction	No deduction	\$76 per week maximum	40% deduction from payment
Weekly Payment	\$100 per week	\$115 per week	\$195.75 per week minimum
Tuition Payment	\$300 for six credits	\$500 for six credits	\$500 for six credits

³⁵ EPSTEIN, *supra* note 12, at 1, 5–6 (noting that one congressperson described the program as “nothing more than indentured servitude”).

³⁶ *How Louise Woodward Escaped a Life-Sentence*, BBC NEWS (Mar. 4, 1998, 5:14 PM), http://news.bbc.co.uk/2/hi/special_report/1998/woodward/61289.stm. This case is still of interest today, and a three-part documentary on Woodward is currently in the works. See Susan Knox, *Infamous Case of ‘Killer Nanny’ Louise Woodward Probed in Chilling New Documentary*, MIRROR, <https://www.mirror.co.uk/tv/tv-news/chilling-new-channel-4-documentary-24690282> (Aug. 4, 2021, 7:58 PM).

³⁷ EPSTEIN, *supra* note 12, at 5.

³⁸ Exchange Visitor Program, 64 Fed. Reg. 53,929, 53,929–30 (Oct. 5, 1999) (codified at 22 C.F.R. pt. 514).

In the U.S. Au Pair Program's 35-year history, au pair weekly payment and tuition payment have remained stagnant. Adjusting for inflation and accounting for taxes, the buying power of an au pair's wages is lower today than it was at the program's inception. Since 1997, an au pair's weekly payment has been tied to the federal minimum wage.³⁹ The weekly payment of \$195.75 per week represents 45 hours of work at \$7.25 an hour, with a 40% deduction for room and board.⁴⁰ While tying au pairs' wages to the federal minimum wage makes it possible for wages to increase over time, that protection falls short, as the federal minimum wage has remained at \$7.25 an hour for over a decade and past changes have not increased the minimum wage enough to account for inflation and the rising cost of living in many parts of the country.⁴¹ Adjusting for inflation, an au pair's \$100 weekly payment from 1986 would be worth roughly \$257 today, indicating that au pair compensation has dipped over time.⁴² Moreover, following a determination by the Department of Labor that au pairs are employees as defined by the FLSA,⁴³ au pairs are now required to pay taxes on their earnings, further reducing their total compensation.⁴⁴ Au pairs' low wages were at the center of two recent federal cases, which will be discussed in the following Section.

Though the Code of Federal Regulations purports that au pair compensation is in line with the requirements of the FLSA, there are three notable exceptions to

³⁹ EPSTEIN, *supra* note 12, at 5; *see also* 22 C.F.R. § 62.31(j)(1) (2020). The federal minimum wage for nonexempt employees is currently \$7.25 per hour. *Minimum Wage*, U.S. DEPT OF LAB., <https://www.dol.gov/general/topic/wages/minimumwage> (last visited Mar. 13, 2022).

⁴⁰ Curiously, the 40% room and board deduction is not codified in the Code of Federal Regulations, nor discussed on the U.S. Department of State website. Nonetheless, it has been treated by au pair agencies as an integral step in calculating the "one nationwide stipend." *See* Vanessa Romo, *Au Pair Sponsor Agencies Settle Wage Lawsuit, Offer \$65.5 Million in Back Pay*, NPR (Jan. 9, 2019, 11:01 PM), <https://www.npr.org/2019/01/09/683831264/au-pair-sponsor-agencies-settle-wage-lawsuit-offer-65-5-million-in-back-pay> (quoting Michael McCarry, former Executive Director of the Alliance for International Educational and Cultural Exchange).

⁴¹ *See* Caralynn Lippo & Debanjali Bose, *How Much the US Minimum Wage — And What It Can Get You — Has Changed Since the Year You Were Born*, BUSINESS INSIDER, <https://www.businessinsider.com/how-much-us-minimum-wage-and-its-value-has-changed-over-time> (July 30, 2020, 6:20 AM).

⁴² Inflation calculated using *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 13, 2022) (comparing January 1986 with January 2022).

⁴³ Exchange Visitor Program, 60 Fed. Reg. 8547, 8550 (Feb. 15, 1995) (codified at 22 C.F.R. pt. 514).

⁴⁴ However, since au pairs are "nonimmigrants," they are not subject to Social Security and Medicare taxes. *Au Pairs*, IRS, <https://www.irs.gov/individuals/international-taxpayers/au-pairs> (Sept. 30, 2021).

the au pair payment scheme that do not apply to other similarly situated workers. First, au pairs' weekly payment, though premised on a 45-hour work week, cannot be varied depending on how many or how few hours an au pair works.⁴⁵ Second, au pairs' wages are calculated on a 45-hour week, not a 40-hour week, meaning the additional five hours in an au pair's work week are not treated as overtime.⁴⁶ Third, au pairs are prohibited from working more than 45 hours a week,⁴⁷ meaning those who invariably do are not eligible for overtime payment, unlike other hourly employees who are eligible for overtime pay when they work in excess of 40 hours a week.⁴⁸ In sum, while the Code of Federal Regulations may give the impression that au pair wages are calculated in compliance with FLSA requirements, in reality, they are not.

Wage and hour violations constitute common forms of au pair exploitation. In 2017 and 2018, the Government Accountability Project surveyed 125 au pairs, 83 (or 66%) of whom indicated they "regularly worked overtime."⁴⁹ Additionally, in 2015, the Department of State tabulated 58 complaints from au pair agencies of host families requiring au pairs to work overtime.⁵⁰ An au pair consulted for this Comment explained that overtime work is pervasive, as au pairs live with their host families who know au pairs do not have anywhere to go when the work day is over (this became even more true during the early days of the Covid-19 pandemic, when local governments imposed lockdowns throughout the country). When there is no separation between an employee's home and workplace, it becomes easier for working time to bleed into free time.⁵¹ For example, a host parent who asks an au pair who is relaxing at home while off the clock to keep an eye on a sleeping child while the host parent runs a quick errand may not perceive such a request as cutting into the au pair's leisure time and impermissibly extending the au pair's workday.

⁴⁵ 22 C.F.R. § 62.31(j)(1) (2020) (au pairs are "compensated at a weekly rate *based* upon 45 hours of child care" (emphasis added)).

⁴⁶ *See id.*

⁴⁷ *Id.* § 62.31(j)(2) (au pairs may "not provide more than 10 hours of child care per day, or more than 45 hours of child care in any one week").

⁴⁸ The FLSA requires employers to compensate nonexempt employees who work over 40 hours in a week at a rate of "not less than one and one-half times the regular rate at which [they are] employed." 29 U.S.C. § 207(a)(1); *accord Overtime Pay*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/overtime> (last visited Mar. 13, 2022).

⁴⁹ Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

⁵⁰ 2015 STATE REPORT, *supra* note 8, at 6.

⁵¹ For a discussion on the blurring of working time and leisure time, situated in the context of platform-based work, see Tammy Katsabian, *The Rule of Technology: How Technology Is Used to Disturb Basic Labor Law Protections*, 25 LEWIS & CLARK L. REV. 895, 915–16 (2021) ("[I]n today's world, the distinction between working time and leisure time is considered to be a significant element of labor law that aims to protect employee rights. This is because the distinction between working time and leisure time has far-reaching implications for employees' personal lives.").

The U.S. Au Pair Program's tuition payment component has remained at \$500 for 25 years, despite the fact that the cost to attend a private or public four-year university has more than doubled since 1995.⁵² Additionally, \$500 is the maximum amount a host family may pay towards an au pair's tuition, suggesting host families may pay less.⁵³ Au pairs, who are required to complete "not less than six semester hours of academic credit"⁵⁴ a year while also balancing a 45-hour work week, may have to settle for something less than the traditional college experience to satisfy this regulatory requirement. An entire industry of "weekend classes" has sprung up to provide au pairs with courses that cost exactly \$500, can be completed in a weekend, and satisfy the Department of State education requirement.⁵⁵ Though these weekend programs likely save au pairs from going into debt to complete the education requirement, they also indicate that the education requirement has become near meaningless. An au pair who checks off the education requirement by taking a class over a weekend, surrounded by classmates who are also au pairs, cannot be said to have gained the exposure to American culture and education the U.S. Au Pair Program promises to provide its participants. On the other hand, an au pair who strives to take a traditional college course may find that her busy work schedule prevents her from fully realizing the value of the educational opportunity.

C. *Recent Litigation*

In 2019, the outcomes in two federal court cases raised the possibility of higher wages for au pairs.

1. *Beltran v. InterExchange, Inc.*

In August 2019, a district court judge approved a \$65.5 million class-action settlement in *Beltran v. InterExchange, Inc.*, a case that challenged the legality of the \$195.75 weekly payment.⁵⁶ Plaintiffs, a group of 11 au pairs, sued 15 Department

⁵² Jessica Dickler, *Why College Tuition Keeps Rising*, CNBC, <https://www.cnbc.com/2019/10/24/why-college-tuition-keeps-rising.html> (Oct. 24, 2019, 7:31 AM); NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., TUITION COSTS OF COLLEGES AND UNIVERSITIES (2021), <https://nces.ed.gov/fastfacts/display.asp?id=76>. The Department of State has acknowledged that "high costs of education" are a barrier to au pairs' completion of the education requirement. 2015 STATE REPORT, *supra* note 8, at 7.

⁵³ 22 C.F.R. § 62.31(k)(1) (2020) (host families "must agree to facilitate the enrollment and attendance of au pairs in accredited U.S. post-secondary institutions" and pay "an amount not to exceed \$500" for academic course work). Presumably, however, this cap would not prevent a host family from providing additional education-related funding outside the scope of the program. See I.R.C. § 2503(e) (providing an unlimited exclusion for "tuition [paid] to an educational organization" on behalf of another person).

⁵⁴ *Id.* § 62.31(c)(3).

⁵⁵ See, e.g., AU PAIR WEEKEND, <https://www.aupairclasses.org/> (last visited Mar. 13, 2022); LEARNING ACROSS AMERICA, <https://www.learningacrossamerica.net/> (last visited Mar. 13, 2022).

⁵⁶ No. 14-cv-03074-CMA-KMT, 2019 WL 3496692 (D. Colo. Aug. 1, 2019).

of State-designated au pair agencies, alleging that defendants “colluded” with one another to “keep standard *au pair* wages at exactly \$195.75 per week,” in order to increase their own profits.⁵⁷ The plaintiffs’ claims of violations of the Sherman Act, the FLSA, Colorado Minimum Wage Law, as well as fraud and breach of fiduciary duty, all survived the defendants’ motion to dismiss.⁵⁸

To avoid going to trial, defendants reached a settlement that, according to Professor Shayak Sarkar, “reaffirmed domestic workers’ self-sovereignty” and recognized au pairs as “local workers—not family members—who can avail themselves of legal protections.”⁵⁹ As a result of the settlement, about 10,000 au pairs who worked in the United States from 2009 to 2018 were eligible to receive payments averaging \$3,500 each.⁶⁰ Moreover, as a result of *Beltran*, the \$195.75 weekly payment must no longer be considered a federally-mandated maximum, but rather a starting point from which au pairs and host families may negotiate.⁶¹

While *Beltran* is a landmark case for au pair and domestic worker rights, it is as of yet unclear whether it will significantly increase au pair wages. Au pairs’ lack of familiarity with U.S. laws and worker protections will likely continue to stand as an obstacle to meaningful salary negotiations.⁶² Moreover, au pair agencies may have au pairs enter into contracts that limit au pairs’ ability to seek redress. Just two years following *Beltran*, an attempt by an au pair to levy a class action lawsuit, then a class arbitration, centered on wage violations, failed in court.⁶³

⁵⁷ Third Amended Complaint at 21–22, 33, *Beltran v. InterExchange, Inc.*, No. 14-cv-03074-CMA-KMT, 2018 WL 1906012 (D. Colo. Apr. 11, 2018); *see also* *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1071 (D. Colo. 2016).

⁵⁸ *Beltran*, 176 F. Supp. 3d at 1071–88.

⁵⁹ Sarkar, *supra* note 6, at 34, 37–38.

⁶⁰ Colleen Slevin, *About 10,000 Au Pairs to Get Paid in Class-Action Settlement*, AP NEWS (July 18, 2019), <https://apnews.com/34b821b730624fb4b42a7783f4ef61cc>.

⁶¹ *See Beltran*, 176 F. Supp. 3d at 1086 (“[T]he Court notes that it is undisputed that the \$195.75 represented, at best, a ‘wage floor,’ such that families could pay au pairs more if they wished—but Plaintiffs’ allegations indicate that the Sponsors led both au pairs and host families to believe otherwise.” (footnote omitted)).

⁶² *See infra* Section II.B. An au pair interviewed following the *Beltran* settlement said she would feel uncomfortable starting her time in the program by pushing for a higher salary. Tala Hadavi, *Why Au Pairs Make \$4.35 per Hour*, CNBC, <https://www.cnbc.com/2019/10/03/why-au-pairs-make-4point35hour.html> (Oct. 7, 2019, 9:44 AM). All the au pairs interviewed for this Comment noted that they did not realize how inadequate their wages would be until they arrived in the United States. They initially thought the wages offered were fair given that the same amount of money would have greater purchasing power in their home countries. *Cf.* Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMPAR. L. 953, 969 (2010).

⁶³ *See* Am. Inst. for Foreign Study v. Fernandez-Jimenez, 468 F. Supp. 3d 414, 425 (D. Mass. 2020), *aff’d*, 6 F.4th 120 (1st Cir. 2021) (“[T]he Arbitration Provision fails to provide the requisite consent to defendant to proceed with class or collective arbitration . . .”).

2. *Capron v. Office of Attorney General of Massachusetts*

The outcome in another recent case further raised the possibility of higher wages for au pairs. In December 2019, in *Capron v. Office of Attorney General of Massachusetts*, the U.S. Court of Appeals for the First Circuit affirmed a Massachusetts district court's finding that state minimum wage laws apply to au pairs.⁶⁴ The legal dispute in *Capron* began in 2014, when the Massachusetts state legislature adopted the Domestic Worker Bill of Rights and "deemed that the labor protections . . . including the higher Massachusetts minimum wage, did apply to au pairs."⁶⁵ In response to that finding, one of the country's largest au pair agencies, Cultural Care Au Pair, sued the state in federal court to prevent the application of Massachusetts's labor protections to au pairs.⁶⁶

The Department of State submitted an amicus brief, in support of Cultural Care Au Pair, arguing that federal au pair regulations contradicted and preempted state law.⁶⁷ The First Circuit disagreed, remarking:

It is hardly evident that a federal foreign affairs interest in creating a "friendly" and "cooperative" spirit with other nations is advanced by a program of cultural exchange that, by design, would authorize foreign nationals to be paid less than Americans performing similar work. We thus conclude . . . that the plaintiffs have failed to meet their burden to show that the federal government intended to preempt a field that would encompass the state law measures that they challenge.⁶⁸

In rejecting the arguments of Cultural Care Au Pair and the Department of State, the First Circuit articulated a major criticism of the U.S. Au Pair Program: How is it that paying a foreign national less than an American for comparable work facilitates cultural exchange? The connection is not apparent.

As a result of *Capron*, au pairs in Massachusetts could see their wages increase dramatically, without needing to negotiate for higher wages.⁶⁹ Should other jurisdictions follow *Capron*, au pairs in 29 other states with minimum wages greater than

⁶⁴ 944 F.3d 9, 13 (1st Cir. 2019), *cert. denied* 141 S. Ct. 150 (2020).

⁶⁵ INT'L HUM. RTS. LAW CLINIC, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., INT'L LAB. RECRUITMENT WORKING GRP. & NAT'L DOMESTIC WORKERS ALL., *SHORTCHANGED: THE BIG BUSINESS BEHIND THE LOW WAGE J-1 AU PAIR PROGRAM* 16 (2018) [hereinafter *SHORTCHANGED*], <https://cdmigrante.org/wp-content/uploads/2018/08/Shortchanged.pdf>.

⁶⁶ *Capron*, 944 F.3d 9.

⁶⁷ *Id.* at 19–21, 40; *see also* Brief for the United States as Amicus Curiae Supporting Petitioners at 10, *Capron v. Off. of the Att'y Gen. of Mass.*, 994 F.3d 9 (1st Cir. 2019) (No. 17-2140).

⁶⁸ *Capron*, 944 F.3d at 26.

⁶⁹ As of February 2022, the Massachusetts minimum wage is \$14.25 an hour. It is on track to rise to \$15.00 an hour by January 2023. *Massachusetts Law About Minimum Wage*, MASS.GOV, <https://www.mass.gov/info-details/massachusetts-law-about-minimum-wage> (last visited Mar.

the federal minimum wage could see their wages increase.⁷⁰

However, the victory in *Capron* may be short-lived. In rejecting Cultural Care Au Pair’s preemption claim, the First Circuit acknowledged that the Department of State “would be free to preempt such state laws now by revising the regulations.”⁷¹ The Department of State, at the behest of au pair agencies and host families, indicated it would consider new regulations. In late 2020, the Department of State issued a moratorium on the growth of the U.S. Au Pair Program, explaining, the “Department is currently monitoring the development of litigation . . . particularly recent challenges to the federal preemption of local law.”⁷² The Department of State noted that the moratorium would remain in effect until “next steps, including potential modifications” were determined.⁷³ While, as of the time of this writing, no new regulations have been issued,⁷⁴ the Biden Administration appears poised to adopt a rule that would “preempt state and local statutes.”⁷⁵ Such a rule would effectively rollback the victory for au pairs in *Capron*.

D. J-1 Visa Suspension

In June 2020, citing concerns about the effect of the Covid-19 pandemic on U.S. unemployment rates, former President Donald Trump suspended the J-1 visitor exchange program, which encompasses the U.S. Au Pair Program.⁷⁶ The proclamation stated:

[T]he May unemployment rate for young Americans, who compete with certain J nonimmigrant visa applicants, has been particularly high. . . . The entry of additional workers . . . therefore, presents a significant threat to employment opportunities for Americans affected by the extraordinary economic disruptions caused by the COVID-19 outbreak.⁷⁷

The J-1 visa suspension did not affect au pairs who were already in the country—

13, 2022).

⁷⁰ *Minimum Wage Tracker*, ECON. POL’Y INST., <https://www.epi.org/minimum-wage-tracker/> (Jan. 1, 2022) (30 states and Washington, D.C. have minimum wages higher than the federal minimum wage).

⁷¹ *Capron*, 944 F.3d at 44.

⁷² Exchange Visitor Program—Moratorium on Growth in the Au Pair Program, 85 Fed. Reg. 64,213, 64,213–14 (Oct. 9, 2020).

⁷³ *Id.*

⁷⁴ As of February 2022, new regulations had not been issued, and the last mention of the U.S. Au Pair Program in the Federal Register was in 85 Fed. Reg. 64,213.

⁷⁵ Lydia O’Neal, *State Department’s Federal Au Pair Oversight Plan Draws Critics*, BLOOMBERG L. (July 16, 2021, 2:41 AM), <https://news.bloomberglaw.com/daily-labor-report/state-departments-federal-au-pair-oversight-plan-draws-critics>.

⁷⁶ Proclamation No. 10052, 85 Fed. Reg. 38,263, 38,263–64 (June 22, 2020).

⁷⁷ *Id.* at 38,264.

they were permitted to continue the program.⁷⁸ The J-1 visa suspension was initially set to expire on December 31, 2020,⁷⁹ but was later extended by President Trump to expire on March 31, 2021.⁸⁰

President Trump's suspension of the U.S. Au Pair Program had profound effects on au pair agencies and host families, as well as current and prospective au pairs. Scrambling to meet the needs of host families, one au pair agency came up with a novel solution to fill the au pair gap. Agent Au Pair created an "American Au Pair Program," a domestic worker program modeled on the U.S. Au Pair Program that places young American workers with families.⁸¹ Notably, the program differed from the U.S. Au Pair Program when it came to compensation and work hours: American au pairs must be paid at least \$10 per hour (or more if required by state or local minimum wage laws) and are expected to only work 40 hours per week, though if they work beyond those hours, they must be paid pursuant to local overtime regulations.⁸² Also, unlike the U.S. Au Pair Program, host families are also required to pay payroll taxes and cannot deduct room and board from American au pairs' wages.⁸³ The differences between Agent Au Pair's American Au Pair Program and the U.S. Au Pair Program underscore the disparity between what a comparable American worker is legally entitled to earn and what an au pair earns. A participant in Agent Au Pair's American Au Pair Program who works 45 hours a week will earn at least \$475 a week, or 2.4 times what her foreign au pair counterpart will earn for the same work.

⁷⁸ Terri Peters, *With Au Pair Visas Frozen, Working Parents Are Scrambling for Child Care*, USA TODAY (June 25, 2020, 9:18 AM), <https://www.today.com/parents/parents-face-childcare-concerns-due-au-pair-program-halt-t185054>.

⁷⁹ Proclamation No. 10052, 85 Fed. Reg. at 38,264.

⁸⁰ Proclamation No. 10131, 86 Fed. Reg. 417, 418 (Jan. 6, 2021). Once the J-1 visa suspension expired in March 2021, it was not renewed. See *Update on Presidential Proclamation 10052*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/News/visas-news/update-on-presidential-proclamation-10052.html> (Apr. 1, 2021) [<https://web.archive.org/web/20210511172322/https://travel.state.gov/content/travel/en/News/visas-news/update-on-presidential-proclamation-10052.html>].

⁸¹ Agent Au Pair, Inc., *New American Au Pair Program Offers Families an Affordable Live-in Childcare Solution*, PR NEWSWIRE (July 9, 2020, 8:32 AM), <https://www.prnewswire.com/news-releases/new-american-au-pair-program-offers-families-an-affordable-live-in-childcare-solution-301090392.html>. Agent Au Pair described their new program as a "reliable domestic sourced live-in childcare solution." *Id.*

⁸² *American Au Pair Compensation*, AGENT AU PAIR: AMERICAN AU PAIR, <https://web.archive.org/web/20201031152205/https://americanaupair.com/program-fees/>. As of February 2022, the American Au Pair website has been taken down; visitors are redirected to the Agent Au Pair website.

⁸³ *Id.* Host families participating in the U.S. Au Pair Program are not required to pay employment taxes, though they can claim a childcare tax credit. Chuang, *supra* note 6, at 289.

As a result of President Trump's executive order in 2020, some au pairs already in the United States and seeking to "rematch" (secure a new host family placement) suddenly had more employment options and more leverage to negotiate favorable contracts.⁸⁴ For au pairs, whose immigration status is contingent on their participation in the program, seeking a rematch means risking expulsion from the program if a new host family cannot be secured in time.⁸⁵ However, with the sudden shortage of au pairs, au pairs were suddenly in a position where they could more meaningfully exercise their ability to *leave* an employer. Immigration scholars, including Professors Howard Chang and Hiroshi Motomura have argued for "the ability to move freely" in guest worker programs.⁸⁶ The ability to leave an employer is not only a powerful protection against exploitation, but can also be used as a means to "obtain the highest and best wages."⁸⁷

While the secondary effects of President Trump's executive order are unlikely to persist beyond the period of J-1 visa suspension, as the order does not fundamentally alter the U.S. Au Pair Program, the secondary effects provide a valuable insight into how the program might be reformed to benefit au pairs.

II. AU PAIRS ARE VULNERABLE TO ABUSE

Au pairs as a group are especially vulnerable to exploitation given their age, their general lack of familiarity with U.S. laws and worker protections, and their immigration status. These factors, which will be discussed in this Part of this Comment, together with the program's structural issues,⁸⁸ increase the likelihood that au pairs will experience some form of exploitation during their time in the program.

A. *Youth and Inexperience*

Au pairs are particularly vulnerable to abuse because they are young and often lack work experience.⁸⁹ By regulation, au pairs must be "between the ages of 18 and

⁸⁴ See Salama, *supra* note 7.

⁸⁵ Chuang, *supra* note 6, at 302; SHORTCHANGED, *supra* note 65, at 14; see also *infra* Section II.C.

⁸⁶ Howard F. Chang, *Guest Workers and Justice in a Second-Best World*, 34 U. DAYTON L. REV. 3, 7–8 (2008); accord Hiroshi Motomura, *Designing Temporary Worker Programs*, 80 U. CHI. L. REV. 263, 271–72 (2013).

⁸⁷ Chang, *supra* note 86, at 8; accord Motomura, *supra* note 86, at 272. Data bears out the claim that employees who switch jobs make more than those who stay. Jack Kelly, *A New Study Concludes that It Literally Pays to Switch Jobs Right Now*, FORBES (July 26, 2019, 11:31 AM), <https://www.forbes.com/sites/jackkelly/2019/07/26/a-new-study-concludes-that-it-literally-pays-to-switch-jobs-right-now/?sh=f2f27d459598>.

⁸⁸ For a discussion on the structural issues of the U.S. Au Pair Program, see *infra* Part III.

⁸⁹ Laurie Berg, *Hiding in Plain Sight – Au Pairs in Australia*, in AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS?, 187, 196 (Rosie Cox ed., 2015) ("It is well recognized in the

26” to participate in the program.⁹⁰ For au pairs, particularly those on the younger end of that range, au pairing may be their first full-time job and first time living away from home. Edwina Koch, founder of a blog that provides helpful information and support to au pairs, indicated that, from her experience, many young au pairs struggle to balance the host parent and employer dynamic and to raise issues.⁹¹

Moreover, au pairs may not immediately recognize when they are being exploited by their employers.⁹² Professor Sabine Hess and researcher Annette Puckhaber tracked the experiences of au pairs in Germany and the United States and found that “it took most of the au pairs several months to recognize the dynamics of their relationships with their host families, to find their treatment ‘unjust,’ and to demand clear boundaries between working hours and free time.”⁹³ Other factors contributed to au pairs’ delayed realization that their employers were taking advantage of their labor, including au pairs’ lack of access to information about “their rights and obligations as au pairs,” as well as programmatic messaging that positions an au pair as a “big sister” and part of the family—not as an employee.⁹⁴ Hess and Puckhaber explain, “[T]he ‘big sister’ image promises a more malleable domestic servant because being seen as a member of the family allows employers to use the logic of the moral economy to expect more than they could from a paid employee.”⁹⁵

international scholarship that au pairs can be susceptible to mistreatment by their host families due to their youth, lack of fluency in the local language and unfamiliarity with local laws and customs.”); *see also* Chuang, *supra* note 6, at 315.

⁹⁰ 22 C.F.R. § 62.31(d)(1) (2020). Generally, au pairs are not required to have prior childcare or employment experience. However, au pairs who will care for children under the age of two must have “at least 200 hours of documented infant child care experience.” *Id.* § 62.31(e)(3). The regulations do not clarify whether such documented experience must be undertaken in a work or educational setting. *See id.*

⁹¹ Hadavi, *supra* note 62. Koch’s blog contains many posts aimed at helping au pairs navigate conflicts with their host parents. *See, e.g., 5 Tips for Awkward Host Parent Conversations!*, AU PAIR, OH PARIS (Feb. 11, 2020), <https://www.aupairohparis.com/> (advising au pairs to “have evidence” and “a clear action plan” before approaching host parents).

⁹² *See* Hess & Puckhaber, *supra* note 6, at 69, 73.

⁹³ *Id.* at 73. In Norway, efforts by a legal services organization lacked knowledge to contact and provide services to au pairs revealed that au pairs knew very little about the country’s laws and worker protections. A frequent question asked by au pairs was, “[W]hen am I working, and when am I off duty?” Lene Løvdaal, *Au Pairs in Norway: Experiences from an Outreach Project*, in AU PAIRS’ LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS?, 136, 137–40 (Rosie Cox ed., 2015). Norway now appears poised to “scrap” their au pair program, after program complaints continued to rise despite programmatic reforms. *See* Nina Berglund, *Norway Bids ‘Adieu’ to ‘Au Pair’ System*, NEWS IN ENG.: VIEWS & NEWS FROM NOR. (Nov. 2, 2021), <https://www.newsinenglish.no/2021/11/02/norway-bids-adiou-to-au-pair-system/>. Norwegian labor unions have long criticized the country’s program, describing it as “a form of modern slavery.” *Id.*

⁹⁴ Hess & Puckhaber, *supra* note 6, at 73–74.

⁹⁵ *Id.* at 74.

B. *Blurred Boundaries*

Au pairs' lack of knowledge, together with the rhetoric of "cultural exchange" and "family" used in both government and au pair agency materials, obscure the boundary between work and free time, enabling host families to take advantage of an au pair's labor, rationalizing that she is "part of the family" and must therefore pitch in even if doing so would mean violating program requirements, such as working more than ten hours in one day or performing tasks outside an au pair's scope of work.⁹⁶ An au pair interviewed for this Comment said that even though she regularly worked longer than the ten hours per day permitted, she did not report the issue to her agency or bring it up with her host parents because she considered her host mom a friend and did not want to jeopardize their relationship.

C. *Immigration Status*

Moreover, au pairs, whose presence in the United States is contingent on their participation in the U.S. Au Pair Program, are especially vulnerable to exploitation as reporting abuse or seeking a rematch may result in the loss of legal immigration status.⁹⁷ For au pairs from the Global South, who may see participation in the U.S. Au Pair Program as an opportunity to realize "long-term migration goals" or "strive for better economic status"⁹⁸ and who may not otherwise be able to secure a U.S. visa, the threat of visa revocation may compel them to tolerate abuse rather than return home early.⁹⁹ If an au pair leaves a placement and cannot find another one within a short period of time, she must either return to her home country or stay in the United States as an undocumented immigrant.

Research conducted by Professor Janie Chuang revealed that au pair agencies wield significant control over their au pairs' legal immigration status that can extend far *beyond* au pairs' participation in the program.¹⁰⁰ By designating an au pair's sta-

⁹⁶ See Berg, *supra* note 89, at 196; Mirza Aguilar Pérez, *The Cosmopolitan Dilemma: Fantasy, Work and the Experiences of Mexican Au Pairs in the USA*, in AU PAIRS' LIVES IN GLOBAL CONTEXT: SISTERS OR SERVANTS?, 203, 212–13 (Rosie Cox ed., 2015).

⁹⁷ See Chuang, *supra* note 6, at 302, 330–31.

⁹⁸ Christine Geserick, "America is the Dream of So Many Things": Images and Experiences of German Speaking Au Pairs in the United States, 6 NORDIC J. MIGRATION RES. 243, 244 (2016). Geserick notes that au pairs' motivations for participating in the program may vary depending on their country of origin. *Id.* For example, au pairs from Western countries generally see the au pair program as a "rite of passage" and opportunity for personal growth. *Id.*

⁹⁹ See Chuang, *supra* note 6, at 330–31. Only citizens from one country in the Global South, Chile, may travel to the United States without first obtaining a visa. *Visa Waiver Program*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html> (last visited Mar. 13, 2022).

¹⁰⁰ See Chuang, *supra* note 6, at 302.

tus at program completion as “inactive,” an au pair agency conveys to the Department of State that the participant has successfully completed the program.¹⁰¹ However, by designating an au pair’s status as “terminated,” an au pair agency “signals an au pair’s failure to comply with the federal regulations, which . . . ‘may prevent a participant from receiving a future U.S. visa.’”¹⁰² Moreover, the Department of State “does not monitor the accuracy of these designations” and review of designations is rare.¹⁰³ On the one hand, giving deference to au pair agencies’ determinations might make sense, given that au pair agencies oversee the work of au pairs. However, by giving such deference to au pair agencies’ determinations, the Department of State has effectively given those agencies powerful leverage over au pairs.

Au pair agencies and host families, aware of au pairs’ precarious immigration status, may weaponize that knowledge to suppress complaints and coerce au pairs to remain in exploitative placements.¹⁰⁴ In this way, au pairs may be compared to undocumented immigrants, who are more susceptible to labor exploitation as “some employers tend to view them as powerless targets” given their immigration status.¹⁰⁵

As the paragraphs above illustrate, in many ways, immigration controls, not labor laws, regulate the work of au pairs.¹⁰⁶ Unlike a similarly situated U.S. citizen or resident, who would be free to seek a new job or empowered to file a complaint against an exploitative employer, au pairs are constrained in their ability to find a new job or file a complaint, as doing so carries the risk of being sent home and denied the ability to return.

¹⁰¹ *Id.*

¹⁰² *Id.* (quoting an email from the Department of State).

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 302, 330–32 (noting that the “threat of illegality is a powerful tool of control for employers and agencies” and proposing a “delinking” of “immigration status from one’s employer or agency” by providing au pairs the “option of switching au pair agencies . . . if the agency is unwilling or unable to find a suitable rematch”). The excerpt below illustrates how agencies and host families can wield the “threat of illegality” to the detriment of au pairs:

A Brazilian au pair in New Jersey who said she was verbally abused daily by her host’s children and was “basically a maid,” was afraid to ask for a switch. “There’s a lot of stories about girls getting kicked out of the house when they ask for a rematch,” she said. When she reported the situation to her local agency counselor, she was told in an email to work things out or she would likely be sent home. Only after the host mom approved the rematch a month later, the au pair said, did the agency agree to facilitate a change.

Salama, *supra* note 7.

¹⁰⁵ *See* Pauline Portillo, Comment, *Undocumented Crime Victims: Unheard, Unnumbered, and Unprotected*, 20 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 345, 356 (2018); *accord* Fussell, *supra* note 5.

¹⁰⁶ *See* Berg, *supra* note 89, at 194–96; Chuang, *supra* note 6, at 330–32.

III. EXPLOITATION BY DESIGN

This Part expounds on the argument that the design and administration of the U.S. Au Pair Program contributes to the exploitation of au pairs, by focusing on the actors that either enable or effectuate the exploitation of au pairs, namely, the Department of State, au pair agencies, and host families.

A. *Department of State*

The Department of State, tasked with overseeing the U.S. Au Pair Program,¹⁰⁷ fails to effectively oversee the program and protect au pairs from exploitation. The Department of State's failures can be attributed to insufficient staff, a lack of resources for au pairs, practices that obscure from the public important program information (including program complaints registered by au pairs and host families), and a regulatory scheme which delegates program responsibility almost entirely to au pair agencies.

1. *Insufficient Staff*

The Department of State lacks sufficient staff to effectively oversee the U.S. Au Pair Program. A staff of 100 manages the administration of Department of State-run visitor exchange programs, with about a dozen staff members dedicated to compliance and only *one* analyst designated specifically to the au pair program.¹⁰⁸ For context, the au pair program is one of 15 Department of State-run visitor exchange programs through which foreign participants come to the United States on temporary J-1 visas.¹⁰⁹ In 2019, over 330,000 individuals, about 6% of whom were au pairs, participated in a Department of State-run visitor exchange program.¹¹⁰ With a ratio of one Department of State staff member to every 33,000 participants, the Department of State simply cannot provide effective oversight of the program.

Employees themselves have raised concerns about the lack of sufficient staff.¹¹¹ In a 2020 news article, a former Department of State employee shared that the visitor exchange program “ha[s] become too large with not enough oversight to keep up with the 300K+ participants coming to the U.S. every year.”¹¹² Without sufficient staff, the Department of State cannot provide meaningful oversight of the au

¹⁰⁷ 22 C.F.R. § 62.31(a) (2020).

¹⁰⁸ Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹⁰⁹ *Programs*, *supra* note 27.

¹¹⁰ *Participant and Sponsor Totals 2019*, U.S. DEP'T OF STATE: BRIDGEUSA, <https://j1visa.state.gov/basics/facts-and-figures/participant-and-sponsor-totals-2019/> (last visited Mar. 13, 2022).

¹¹¹ See, e.g., Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹¹² *Id.* The Department of State's lack of oversight has also contributed to the exploitation of other J-1 visitor exchange program participants. Michelle Chen, 'We Were Treated Like Dirt': A Visa Program Exploits Student Workers, NATION (Aug. 14, 2019), <https://www.thenation.com/article/archive/j1-visa-summer-work-travel-abuse/>. In 2011, a group of workers at a

pair program—it cannot conduct thorough investigations of the complaints it receives, nor can it proactively create resources for program participants.

2. *Inadequate Resources*

Additionally, the Department of State lacks adequate resources to aid au pairs in need of guidance. A visit to the Department of State’s “Au Pair Program” webpage reveals a lack of materials or resources for au pairs seeking help.¹¹³ Similarly, the linked “Common Questions for Participants” webpage, which is intended to serve as a source of information for participants from all J-1 visitor exchange programs, also lacks helpful information.¹¹⁴ For example, these pages do not provide information to help au pairs calculate their work hours, determine what constitutes harassment or an unsafe workplace, learn whether there are consequences for leaving the program early, or find access to legal help. The only potentially helpful resource provided by the Department of State to au pairs seeking help is phone and email information for a hotline that participants may access if their concerns are “not being addressed” by their program sponsors (which, in the case of au pairs, is their respective au pair agencies).¹¹⁵ However, as the following Section will demonstrate, even this resource falls short in helping au pairs who seek help.

The little information provided by the Department of State suffers from another deficiency—it is entirely in English.¹¹⁶ Though au pairs are required to be “proficient in spoken English,”¹¹⁷ au pairs may still prefer to read or may better comprehend materials—particularly those written in a formal style—in their native language. For some au pairs, a lack of translated materials is a barrier to remedying issues.

3. *Poor Complaint Process*

The complaint process falls short in two respects. First, the Department of State does not sufficiently protect reporting au pairs’ confidentiality, exposing them to retaliation by their respective au pair agencies. Second, the Department of State fails to meaningfully follow up with au pairs who file complaints.

Hershey’s factory “organized a high-profile strike and protest campaign against their harsh working conditions.” *Id.* That same year, other J-1 visa workers arrived in the United States only to find they had been recruited into a sex-trafficking scheme. *Id.*

¹¹³ *Au Pair Program*, *supra* note 1.

¹¹⁴ *Common Questions for Participants*, U.S. DEP’T OF STATE: BRIDGEUSA, <https://j1visa.state.gov/participants/common-questions/> (last visited Mar. 13, 2022).

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *Au Pair Program*, *supra* note 1; *Common Questions for Participants*, *supra* note 114.

¹¹⁷ 22 C.F.R. § 62.31(d)(3) (2020). Anecdotal evidence suggests that not all au pairs meet the English proficiency requirement. See *SHORTCHANGED*, *supra* note 65, at 8; cf. 2015 STATE REPORT, *supra* note 8, at 5–6 (indicating that one of the “most common reasons for complaints of au pairs and from host families” was au pairs’ “insufficient English language speaking ability”).

First, the manner in which the Department of State addresses complaints may contribute to retaliation against au pairs by their au pair agencies and host families. In response to an inquiry from a journalist as to how the Department of State handles complaints, a spokesperson indicated the Department of State “resolve[s] problems identified through monitoring activities by working directly with sponsor agencies.”¹¹⁸ The Department of State’s reliance on au pair agencies to resolve programmatic issues that arise “expos[es] au pairs’ complaints to their employers, which risks causing retaliation.”¹¹⁹

Second, data collected on reported complaints indicates that the Department of State fails to effectively investigate and resolve complaints lodged by au pairs.¹²⁰ The Government Accountability Project, a nonprofit whistleblower organization, filed a Freedom of Information Act lawsuit to obtain data on complaints reported to the Department of State, and received in response a partial dataset, which, notably, did not disclose whether or how the Department of State responded to the complaints logged.¹²¹ In 2017, Politico obtained internal reports on the U.S. Au Pair Program for the years of 2014 and 2015.¹²² The 2015 report indicated there were 3,505 complaints, whereas, a Department of State spokesperson initially told Politico it had received only 62 complaints from au pairs and families that year.¹²³ This discrepancy suggests a failure to document complaints and follow up with au pairs who register complaints.

Were the Department of State to make information like this public, prospective au pairs would be able to make more informed decisions about whether to participate in the program. Additionally, the release of more information might also shift the public perception of the au pair program, spurring advocacy and increasing the possibility of programmatic reform.

4. *Abdication of Responsibility*

Finally, the Department of State, by outsourcing nearly all responsibility for administration and oversight of the U.S. Au Pair Program to U.S. au pair agencies,¹²⁴ enables the exploitation without recourse of au pairs by agencies and host families. Though in the past the government has held out regulations enabling “ag-

¹¹⁸ Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.* Curiously, the Department of State cited “trade secret” concerns as its reason for withholding the majority of data from years other than 2016. *Id.*

¹²² Kopplin, *They Think We Are Slaves*, *supra* note 7.

¹²³ *Compare* 2015 STATE REPORT, *supra* note 8, at 6, *with* Kopplin, *They Think We Are Slaves*, *supra* note 7.

¹²⁴ Agencies, referred to in regulation as “sponsors,” are responsible for au pair selection, placement, training, and monitoring. 22 C.F.R. § 62.31 (2020).

gressive” enforcement and “oversight” as mechanisms to counterbalance programmatic components that leave au pairs vulnerable to abuse,¹²⁵ in reality, those mechanisms are little more than a mirage, giving only the appearance of oversight. While the Department of State has the authority to levy sanctions or revoke authorization from non-compliant agencies,¹²⁶ between 2006 and 2020, the Department only officially sanctioned one au pair company.¹²⁷

B. *Au Pair Agencies*

Au pair agencies, charged with administering the U.S. Au Pair Program and serving as intermediaries between au pairs and host families, are the lead architects in the exploitation of au pairs. U.S. au pair agencies contribute to the exploitation of au pairs by employing recruitment tactics that mislead au pairs, failing to meaningfully support au pairs who report issues, and campaigning against program changes intended to bolster protections for au pairs. Within the regulatory framework, U.S. au pair agencies are positioned as intermediaries who balance the interests of host families and au pairs, but the reality is that au pair agencies are motivated by profit, leading them to place the interests of their host family-clients above those of au pairs.¹²⁸

As of February 2022, there are currently 14 designated au pair agencies in the country.¹²⁹ Au pair agencies run the gamut from non-profit to for-profit organizations.¹³⁰ Agencies generally resist programmatic changes that would threaten to undermine their business model.¹³¹

¹²⁵ The USIA, in explaining its 1995 decision to not impose a cap on au pairs’ daily work hours, wrote that “the Agency has concluded that the 45 hour week limit, if aggressively enforced, in conjunction with other oversight changes, makes the nine hours per day cap unnecessary” and “[g]iven the monthly contact by organizational representatives, the Agency is of the belief that the documented abuses that prompted the limitation of hours will be prevented.” Exchange Visitor Program, 60 Fed. Reg. 8547, 8550 (Feb. 15, 1995) (codified at 22 C.F.R. pt. 514).

¹²⁶ 22 C.F.R. § 62.31(n).

¹²⁷ According to a Department of State spokesperson, an “unspecified lesser sanction” was issued to one au pair agency in 2019. Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹²⁸ See SHORTCHANGED, *supra* note 65, at 7, 13–15; see also POLARIS & NAT’L DOMESTIC WORKERS ALL., HUMAN TRAFFICKING AT HOME: LABOR TRAFFICKING OF DOMESTIC WORKERS 45–46 (Caren Benjamin, ed., 2019), https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf.

¹²⁹ *Designated Sponsor Organizations*, *supra* note 15.

¹³⁰ SHORTCHANGED, *supra* note 65, at 14–15.

¹³¹ See SHORTCHANGED, *supra* note 65; cf. 2015 STATE REPORT, *supra* note 8, at 7 (noting that, for agencies, a class action lawsuit regarding au pair wages “continues to be a challenge and a potential threat to their business model”).

1. Recruitment Fees

Exploitation of au pairs begins at recruitment, where au pairs are often charged hefty fees in order to participate in the program.¹³² Foreign recruiters often charge au pairs recruitment fees upwards of \$1,500.¹³³ The Department of State does not require agencies to publish the full set of fees and costs they or their affiliates charge au pairs,¹³⁴ eliminating the possibility for au pairs to “shop around.” Agencies’ lack of transparency about costs was at the heart of a recent lawsuit, *Mack v. Cultural Care Inc.*, in which a host parent sued Cultural Care, an au pair agency, for double charging both the host parent and her au pair for “travel costs” and “training.”¹³⁵

Furthermore, the Department of State is silent on requirements for foreign recruiters—leaving au pair agencies to ensure foreign recruiters’ compliance with au pair program guidelines.¹³⁶ There is no financial incentive for au pair agencies to hold recruiters accountable and there is no mechanism whereby the Department of State or other federal agencies may hold these recruiters accountable either.¹³⁷ The Department of State has indicated that “fraud” and “scams” are “persistent in the program,”¹³⁸ yet, no regulations have been adopted to combat fraud that may originate overseas.

2. Misinformation

Part of why au pair agencies and recruiters succeed in extracting such large fees from prospective participants is that agencies and recruiters misrepresent the program to au pairs, emphasizing the cultural exchange and educational aspects of the program while minimizing the reality of providing 45 hours a week of child care.¹³⁹ Agencies paint a rosy picture of the au pair experience, promising the opportunity to travel, make friends, learn English, and experience American culture.¹⁴⁰ Researcher Christine Geserick’s interviews of au pairs indicate that the opportunity of providing child care was *not* a decision-making factor cited by prospective au pairs.¹⁴¹

¹³² SHORTCHANGED, *supra* note 65, at 8.

¹³³ *Id.*

¹³⁴ *Id.* at 7.

¹³⁵ No. 1:19-CV-11530-ADB, 2020 WL 4673522 (D. Mass. Aug. 12, 2020). While the plaintiff’s contractual claims were dismissed, her Massachusetts state law claim for unfair conduct was allowed to move forward. *Id.* at *8–10.

¹³⁶ SHORTCHANGED, *supra* note 65, at 7–8.

¹³⁷ *Id.*

¹³⁸ 2015 STATE REPORT, *supra* note 8, at 7; *see also* 2014 STATE REPORT, *supra* note 8, at 3.

¹³⁹ *See* Cuban, *supra* note 5, at 236.

¹⁴⁰ Christine Geserick, *I Always Wanted to Go Abroad. And I Like Children’: Motivations of Young People to Become Au Pairs in the USA*, 20 YOUNG 49, 51 (2012) (“Commercials of au pair agencies often portray a ‘happy,’ ‘fancy’ and ‘easy-going’ au pair life.”).

¹⁴¹ Geserick, *supra* note 98, at 244.

Au pair agencies recruit au pairs by portraying to them a different version of the program than what is portrayed to families. As one report succinctly summarized: “[A]u pairs are sold an experience, and families are sold cheap labor.”¹⁴² This sentiment was echoed in an internal Department of State report, which indicated that a common reason for program termination was “unrealistic expectations” on the part of au pairs and host families.¹⁴³

Professor Sondra Cuban summarizes: “[P]rospective recruits are told that their acculturation into an American family will turn them into social cosmopolitans, back home and elsewhere, and add cache to their portfolios in the global marketplace,” an outcome that has ultimately been “critiqued as unrealistic.”¹⁴⁴ Yet, by the time au pairs arrive in the United States and learn that promises made by agencies are unrealistic, agencies have already been enriched by au pairs’ fees. Some au pairs go into debt in order to participate in the program and are left with no option but to continue the program in the hopes of earning enough to pay their creditors back.¹⁴⁵

3. *Failure to Support*

Au pair agencies’ willingness to turn a blind eye to exploitation stems from the reality that a host family’s business is more valuable to them than the safety and wellbeing of au pairs. While au pair agencies pocket recruitment fees paid by au pairs, those fees pale in comparison to the “around \$10,000 a year” paid by host families.¹⁴⁶ Moreover, while au pairs are limited to two years of program participation, families may participate for as long as they have children and meet program criteria.¹⁴⁷ Given that agencies stand to gain more from host families’ involvement in the program than au pairs’, agencies are disincentivized from intervening in exploitative situations or removing problematic host families from the program.

In reviewing data on au pair rematches and early departures, journalist Zack Kopplin noticed that agencies would “code the reasons for departure using vague terms like ‘personality conflicts’” even in extreme situations in which abuse was alleged. In one case, an agency coded an au pair’s departure as a “personality conflict,” when, in fact, the au pair’s host father had “sent suggestive texts” to the au pair.¹⁴⁸

¹⁴² SHORTCHANGED, *supra* note 65, at 15.

¹⁴³ 2015 STATE REPORT, *supra* note 8, at 6.

¹⁴⁴ Cuban, *supra* note 5, at 236–37.

¹⁴⁵ See Zack Kopplin, *Actually, Owning an Immigrant Is Bad*, SLATE (Feb. 15, 2018, 4:37 PM), <https://slate.com/news-and-politics/2018/02/the-au-pair-system-is-broken-we-dont-need-to-expand-it.html> (explaining that “*technically* having the right to walk away doesn’t mean someone is *actually* able to do so” and comparing the au pair system to “indentured servitude”).

¹⁴⁶ Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹⁴⁷ See 22 C.F.R. § 62.31 (2020); POLARIS & NAT’L DOMESTIC WORKERS ALL., *supra* note 128, at 45–46.

¹⁴⁸ Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

For Kopplin, the sheer number of rematches and departures, combined with the explanatory “innocuous-sounding labels” raised the possibility that rematches and early departures may be correlated with exploitative situations that agencies sought to cover up rather than remedy.¹⁴⁹ In 2011, a former German au pair sued her au pair agency for negligence and fraud after she was sexually abused by her host father.¹⁵⁰ An investigation by a local newspaper revealed that previous au pairs had reported incidents of sexual abuse in this home to the au pair agency, yet the agency continued placing au pairs with the family.¹⁵¹

4. *Lobbying Against Reform*

Since the early days of the program, au pair agencies have lobbied the congressional and administrative branches of government to keep au pair pay low and work hours high.¹⁵² In the decades since, au pair agencies have many times organized against other proposed changes that threatened their revenue stream, even when those reforms would have protected au pairs. For example, in 2012, agencies organized host parents in what was ultimately a successful “nationwide letter-writing campaign to defeat a legislative proposal to impose employment taxes on host families and au pairs.”¹⁵³ In 2013, au pair agencies organized against anti-trafficking legislation that “would have prohibited companies from charging au pairs recruitment fees, which can . . . leave au pairs in debt.”¹⁵⁴ In 2017, when President Trump contemplated eliminating the J-1 visa program,¹⁵⁵ under which the au pair program is housed, au pair agencies mobilized host parents to show their support for the au pair program. Au Pair in America, an au pair agency, launched a petition entitled “Save the J-1 Au Pair Program” on Change.org that collected a total of 3,209 signatures and 179 comments.¹⁵⁶

¹⁴⁹ *Id.*

¹⁵⁰ *Conrad v. U.S. Au Pair Inc.*, No. 111012975 (Or. Cir. Ct. Oct. 5, 2011); Healey, *supra* note 7; Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹⁵¹ Healey, *supra* note 7.

¹⁵² *See* Part I.

¹⁵³ Chuang, *supra* note 6, at 327 n.310.

¹⁵⁴ Kopplin, *They Think We Are Slaves*, *supra* note 7; *see also* SHORTCHANGED, *supra* note 65, at 15. Insiders on Capitol Hill point to the lobbying strength of au pair agencies and wealthy host families as obstacles for reform. A Senate aide said, “We see these stories of abuse and exploitation and everyone knows we need to reform the program, but the political influence of wealthy donors with au pairs is very difficult to take on.” Kopplin, *Seeking Cultural Exchange*, *supra* note 7.

¹⁵⁵ Laura Meckler, *Trump Administration Considering Cuts to Cultural Exchange Visas*, WALL ST. J. (Aug. 27, 2017, 2:17 PM), <https://www.wsj.com/articles/trump-administration-considering-cuts-to-summer-work-visas-1503857856>.

¹⁵⁶ Au Pair in America, *Save the J-1 Au Pair Program*, CHANGE.ORG, <https://www.change.org/p/president-of-the-united-states-save-the-j-1-au-pair-program> (last visited Mar. 13, 2022).

In addition to lobbying government bodies, au pair agencies have fought against au pair reforms in court. When, in 2014, the Massachusetts state legislature adopted a Domestic Worker Bill of Rights and determined the state minimum wage applied to au pairs, Cultural Care Au Pair, one of the largest agencies, brought a suit in federal court to block application of Massachusetts's labor protections to au pairs.¹⁵⁷ After losing the fight in federal court to limit au pair wages, agencies turned to the Department of State to promulgate new regulations that would be “consistent with the department’s longstanding position that the existing au pair regulations preempt state and local law.”¹⁵⁸

C. *Host Families*

Host parents are promised an affordable, flexible childcare program and, in seeking to take advantage of these benefits, they may (possibly inadvertently) contribute to the exploitation of their au pairs. When host parents exploit au pairs, they often face little to no consequences.

The U.S. Au Pair Program, with its prescribed 45-hour work week, limited time off scheme, live-in requirement, and relatively low cost, provides busy parents with affordable, flexible, dedicated child care.¹⁵⁹ Au pair agencies underscore the benefits of affordability and flexibility in marketing materials aimed at prospective host parents, obscuring the cultural exchange aspect of the program. Au Pair in America advertises “flexible and dependable care,” writing that “[b]y having your child care assistant living in your home, dealing with sick days, snow days and life’s little surprises has never been easier.”¹⁶⁰ Au Pair USA describes hosting an au pair as a “budget-friendly childcare option” and highlights the benefits to parents of “[f]lexible scheduling and consistency.”¹⁶¹ Cultural Care Au Pair promises parents the ability to “schedule hours according to your needs” and emphasizes that au pairs

¹⁵⁷ *Capron v. Off. of Att’y Gen. of Mass.*, 944 F.3d 9 (1st Cir. 2019), *cert. denied* 141 S. Ct. 150 (2020); *see supra* Section I.C.2.

¹⁵⁸ Suzanne Monyak, *State Dept. Plans Changes to Au Pair Rules After Wage Ruling*, LAW360 (May 22, 2020, 6:25 PM), <https://www.law360.com/articles/1276305/state-dept-plans-changes-to-au-pair-rules-after-wage-ruling>.

¹⁵⁹ *See* MACDONALD, *supra* note 6, at 61. A host parent interviewed by Professor Macdonald explained that by hiring an au pair, she not only saved money on childcare costs, but “could schedule her au pair’s workweek to match her own needs.” *Id.* Another host parent explained her preference for au pairs over nannies—the former lived with the family and had “our family as their priority and not their family as their priority.” *Id.* Middle class parents in the United States may also be interested in the au pair program because of the lack of state-supported child care. *See* Cuban, *supra* note 5, at 237.

¹⁶⁰ *Why Choose Us?*, AU PAIR IN AMERICA, <https://www.aupairinamerica.com/what-sets-us-apart/> (last visited Mar. 13, 2022).

¹⁶¹ AU PAIR USA, <https://www.aupairusa.org> (last visited Mar. 13, 2022).

can provide 45 hours of child care each week.¹⁶² Curiously, an au pair's pay is not conditioned on the number of children she cares for, whether the children have special needs, or where her host family resides.¹⁶³ This makes the program particularly attractive for host parents who might, if forced to find comparable child care at market rate, be paying double, triple, or more.¹⁶⁴

The promise of affordable child care from au pair agencies, together with the program's authorization from the Department of State, create the impression that the program operates within the law and is fair for all involved, perhaps justifying for host parents the fact that an au pair costs a fraction of what a nanny would. This impression may obscure exploitation or lead host parents to rationalize exploitation, particularly when it comes to au pairs' work hours and scope of work. This phenomenon is not new, nor is it unique to au pairs. In 2010, Professor Hila Shamir observed:

The United States deals with the cost of care for middle and high income families mostly by labor market regulation and immigration policies. It relies on a "softly" regulated care work sector with a high tolerance for employment law violation, facilitating substandard employment in the care sector. And it counts on a flow of a cheap labor force (consisting mostly of migrant women) to sustain the supply side of the care market. Many care workers are often relatively new immigrants and undocumented migrant workers, who, due to their market vulnerability, are willing to work for less pay than "legal" care workers (citizens or documented migrants) would.¹⁶⁵

Host parents' perceptions of the program may be further skewed in the case of au pairs from non-European countries.¹⁶⁶ For example, au pair agencies market Latin American au pairs to host families as "warm, affectionate and careful with children," positioning "domestic work as natural to their identities."¹⁶⁷ The invocation of stereotypes by agencies shapes how host families perceive au pairs (as servants, not equals) and inhibits au pairs' ability to further themselves professionally and educationally while in the United States.¹⁶⁸

¹⁶² *Benefits of Hosting an Au Pair*, CULTURAL CARE AU PAIR, <https://culturalcare.com/becoming-a-host-family/> (last visited Mar. 13, 2022).

¹⁶³ See 22 C.F.R. § 62.31 (2020); see also Salama, *supra* note 7.

¹⁶⁴ See Hadavi, *supra* note 62. Host parents, who benefit from the services provided by au pairs, may rationalize the fact the pay au pairs so little with the program's supposed non-tangible benefits. For example, a host parent interviewed for a news story on au pair wages, explained that an au pair's low pay is justified because of the many other benefits she receives—including room and board, use of the family car, a home to which she could invite her friends, and "somebody listening to you talk about your breakup with your partner." *Id.*

¹⁶⁵ Cf. Shamir, *supra* note 62, at 969.

¹⁶⁶ See Cuban, *supra* note 5, at 250–51.

¹⁶⁷ Aguilar Pérez, *supra* note 96, at 209–10; Cuban, *supra* note 5, at 238.

¹⁶⁸ Aguilar Pérez, *supra* note 96, at 209 ("Distinctions based on stereotypes among au pairs

Finally, as discussed earlier, host parents who exploit or abuse their au pairs face few to no consequences, both because au pair agencies have no financial incentive to act and because au pairs are disempowered to report abuses.¹⁶⁹ As one report summarized: “Families, unlike au pairs, are repeat customers of sponsor agencies.”¹⁷⁰ Without facing consequences, host parents, whether knowingly or unknowingly, are free to continue to exploit other au pairs.

IV. PROPOSED REFORMS

In its current form, the U.S. Au Pair Program is both a poor work program and a poor cultural exchange and educational program. This Comment proposes reforms to both the work and cultural exchange and educational components of the program. To bolster the work component of the program, the Department of State should promulgate regulations that bring the program into compliance with the FLSA and strengthen oversight. To improve the cultural exchange and educational component of program, the Department of State should provide au pairs with a student visa upon their successful completion of the program.

A. *FLSA Compliance*

The Department of State should promulgate regulations that bring the U.S. Au Pair Program into compliance with the FLSA. Specifically, the Department of State should adopt the 40-hour work week, enact a fair wage scheme that complies with federal and state law, and make information about wage and hour requirements available to au pairs in their native languages.

First, the Department of State should set the au pair work week at 40 hours, requiring host parents to compensate au pairs for overtime at the rate of time and one-half of their regular pay. This modification would bring the U.S. Au Pair Program into compliance with the federal work week and overtime provisions of the FLSA.¹⁷¹ Host parents who ask their au pairs to work overtime will shoulder that cost, which will serve as a better check than that of the current system, which outright bans au pairs from working beyond 45 hours a week and, therefore, lacks a mechanism for compensating au pairs who work beyond 45 hours a week.

Second, the Department of State should enact a fair wage scheme by eliminating the room and board deduction and calculating au pairs' wages based on state minimum wage requirements and anticipated workload. Discontinuing the room

produce hierarchies When cultural differences are portrayed as static, these representations never leave the scope of otherness”); Cuban, *supra* note 5, at 238 (discussing how this “servant identity creates contradictions for the au pairs’ professional aspirations and trajectories”).

¹⁶⁹ For a discussion of these issues, see *supra* Part II; Section III.B.3.

¹⁷⁰ See SHORTCHANGED, *supra* note 65, at 15.

¹⁷¹ See 29 U.S.C. § 207(a)(1); *Overtime Pay*, *supra* note 48.

and board deduction would bring the U.S. Au Pair Program in compliance with FLSA requirement that room and board not be deducted if it is not for the “primary benefit” of the employee.¹⁷² Given that an au pair’s live-in status makes possible the flexible childcare aspect of the program which benefits host families, it should not be counted towards an au pair’s compensation.

Additionally, the Department of State should follow the holding of *Capron*, which recognized the authority under the FLSA that states have to enact their own minimum wage requirements,¹⁷³ and tie au pairs’ wages to state minimum wage requirements. By doing so, the Department of State would also bring the U.S. Au Pair Program wage scheme in line with other J-1 visitor exchange programs that provide explicitly for the application of state wage and hour laws to their participants.¹⁷⁴

Moreover, the Department of State should adopt a workload adjustment formula, wherein certain host family or work conditions would automatically increase an au pair’s base salary. Potential conditions that may trigger an increase in base pay may include number of children, ages of children, and special needs of the children. The Department of State should conduct market research to determine which factors to include and how to weigh them.

Finally, the Department of State should provide the above information, as well as answers to commonly asked questions, to au pairs in their native languages. This information should be made public and easily accessible on the Department of State website, so host families, prospective au pairs, and members of the public may access it, too. Commonly asked questions may include which activities count as work, how to calculate work hours, and what resources and remedies exist for employees who have been exploited by their employers.¹⁷⁵

¹⁷² *Credit Towards Wages Under Section 3(m) Questions and Answers*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq> (last visited Mar. 13, 2022).

¹⁷³ *Capron v. Off. of Att’y Gen. of Mass.*, 944 F.3d 9, 18, 42 (1st Cir. 2019), *cert. denied* 141 S. Ct. 150 (2020); *see also* 29 U.S.C. § 218(a) (“No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter . . .”).

¹⁷⁴ *See, e.g., Summer Work Travel Program: Employers*, U.S. DEP’T OF STATE: BRIDGEUSA, <https://j1visa.state.gov/programs/summer-work-travel/#employers> (last visited Mar. 13, 2022).

¹⁷⁵ The Department of Labor provides several helpful fact sheets that may serve as a starting point. *See, e.g., Overtime Pay: Fact Sheets*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/overtime/fact-sheets> (last visited Mar. 13, 2022). The Department of State has indicated that “[i]mplementing weekly time-keeping processes that require signatures of au pair and host family and frequent review by the local/regional coordinator” is a best practice, yet this is not currently required of agencies, au pairs, or families. *Compare* 2014 STATE REPORT, *supra* note 8, at 5, *with* 22 C.F.R. § 62.31 (2020).

B. *Improved Oversight*

The Department of State must assume an independent oversight role in order to better protect au pairs from exploitation and counterbalance au pair agencies' control. Specifically, the Department of State, in partnership with Congress and other relevant departments, such as the Department of Labor,¹⁷⁶ should improve its process for collecting, investigating, and resolving complaints and issues that arise.

The Department of State must make au pairs and host families aware of its independent oversight role and encourage them to submit comments and complaints directly to the Department of State. In doing so, the Department of State must also make clear that lodging a complaint will *not* negatively impact an au pair's ability to continue in the program, and that complaints will be kept confidential unless permission is given by the individual filing the complaint for identifying information to be shared with others (such as the au pair agency).

In addition to accepting and reviewing complaints, the Department of State should conduct independent investigations to proactively identify issues. The Department of State should require agencies to produce more detailed reporting, including a detailed reporting of any complaints regarding host families or au pairs, the specific actions agencies took to remedy these complaints, and the status of au pairs and host families following agency action.¹⁷⁷ Analysts should review this data to determine whether patterns emerge that may improve the Department of State's ability to spot exploitative situations more rapidly.

The Department of State should exercise its authority to sanction au pair agencies that fail to comply with regulations or fail to remedy complaints raised by au pairs and host families. Sanctions need not be reserved for extreme violations, such as failing to investigate complaints of sexual abuse, but should also be imposed for violations such as wage and hour violations, which while perhaps not as extreme are currently prevalent. Imposing penalties on agencies would provide an incentive for agencies to better screen prospective host families and to intervene when they receive complaints from au pairs.

Finally, the Department of State should make public aggregated data about the complaints and issues that arise. Additionally, the Department of State should publish information on the demographic data of program participants and wages and fees across agencies—this is information the Department of State currently collects, but keeps private.¹⁷⁸ Doing so will enable prospective au pairs to make more informed decisions about whether to participate in the program and which agency to

¹⁷⁶ Others have argued oversight for the U.S. Au Pair Program should be transferred to the Department of Labor, as it is better positioned to protect workers' rights. See SHORTCHANGED, *supra* note 65, at 21; O'Neal, *supra* note 75.

¹⁷⁷ Currently, agencies are only required to provide a "summation" of this information and to indicate whether "any unresolved complaints are outstanding." 22 C.F.R. § 62.31(m)(2).

¹⁷⁸ After years of declining to provide demographic data on program participants, Chuang,

select, as well as provide legislators and the public with a more accurate picture of the program.

C. *Student Visa*

The Department of State should divide the U.S. Au Pair Program into two distinct sub-programs that occur consecutively: first, au pairs would work for one to two years as childcare providers for host families,¹⁷⁹ and, second, au pairs would receive a student visa and education stipend to pursue a degree of higher education at a U.S. college or university, if they so choose.

The student visa would be contingent on two requirements being met by au pairs. First, the au pair must have successfully completed at least one year in the program.¹⁸⁰ Second, the au pair must have secured admission to and enrolled in an accredited U.S. college or university.¹⁸¹ Once the student visa is received, the au pair will no longer fall under the purview of the U.S. Au Pair Program, but instead be subject to the same requirements other foreign students face.

Similar to the current program, host families would continue to provide a \$500 tuition payment, per year of au pair service, to offset the cost of education.¹⁸² Since host families will be paying au pairs more for the work component of the program, it is not necessary to increase their tuition payment. Should an au pair choose not to apply for a student visa at the close of her program, she may request early disbursement of the tuition payment so she may take classes during her time in the United States.

This change both recognizes au pairs' desire to improve themselves professionally and educationally through participation in the program and the current model's

supra note 6, at 314 n.239; MACDONALD, *supra* note 6, at 50, the Department of State released limited demographic data in the form of a list of the top 20 sending countries in 2020. *Au Pair Category*, BUREAU EDUC. & CULTURAL AFFS.: U.S. DEP'T OF STATE (2020), <https://j1visa.state.gov/wp-content/uploads/2021/02/Au-Pair-Flyer-2020.pdf>. The top five sending countries in 2020 were Brazil (1,454 au pairs), Colombia (1,046 au pairs), South Africa (797 au pairs), Mexico (691 au pairs), and Germany (667 au pairs). *Id.*

¹⁷⁹ This is similar to the current au pair model, wherein au pairs receive a one-year visa, with the possibility to extend their participation by "six, nine, or 12 months," for a maximum of two years. 22 C.F.R. § 62.31(o) (2020).

¹⁸⁰ Just as in the current system, successful completion does not entail staying with the same family for one year.

¹⁸¹ This is in line with the requirement that individuals seeking a U.S. student visa must first apply and enroll in an approved university. *Student Visa*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html> (last visited Mar. 13, 2022).

¹⁸² See 22 C.F.R. § 62.31(k)(1).

failure to provide au pairs with a satisfactory cultural exchange and education experience.¹⁸³ Moreover, by including an additional component that is singularly focused on cultural exchange and education, the work component of the program will now be able to be perceived more clearly as *work* and regulated accordingly. The reality of the U.S. Au Pair Program is that it provides families with affordable, flexible child care, thereby filling the U.S. child care gap.¹⁸⁴ Providing au pairs with a student visa at program termination is a form of compensation that recognizes the important role they play in providing child care for families in the United States.

Critics of this change may argue that the perk of a student visa would entice prospective au pairs who are not interested in or qualified to perform the childcare component, diluting the childcare value of the program. However, this argument fails for four reasons. First, the Department of State mandates a background check and screening process which agencies appear to take seriously, likely because failure to do so could result in lawsuits, bad press, and a loss of revenue.¹⁸⁵ Second, the requirement of completing a minimum of one year of childcare would still act as a deterrent for some candidates to whom childcare truly is of no interest. Third, this criticism could just as easily be levied at the current model, as research shows that current au pairs are not particularly interested in the childcare component, nor uniquely qualified to provide child care, but instead hope to experience American culture.¹⁸⁶ Finally, providing this benefit might entice more applicants, allowing au pair agencies to be more selective about who they admit into the program.

Some critics may also say that providing a student visa to participants in the au pair program is simply too large of a perk. However, it is important to remember that participating in the program is *supposed* to be primarily for the benefit of au pairs—providing participants with student visas would enable the Department of State to make good on its promise to provide au pairs with cultural exchange and educational opportunities.

CONCLUSION

The continued existence of the U.S. Au Pair Program relies in part on the excusing of exploitation—as minor, as temporary, as inadvertent, as the result of a few “bad apples”—by legislators, government officials, agencies, host families, the public, and, sometimes, au pairs themselves. Once exploitation is seen as a feature of the program, not an accident, work can begin to reimagine the future of this program.

¹⁸³ See *supra* Section I.B.

¹⁸⁴ Cf. *supra* Section III.C.

¹⁸⁵ 22 C.F.R. § 62.31(d)(5)–(6). Recall that regulations regarding au pair training and screening were heightened following the deaths of infants while in the care of au pairs. See *supra* Section I.A.

¹⁸⁶ Geserick, *supra* note 98, at 244; Geserick, *supra* note 140, at 59, 62; see also MACDONALD, *supra* note 6, at 138.