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CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2018, the United States extended two international agreements and entered into one new agreement pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("Convention"), to which the United States became a State Party in 1983, in accordance with the Convention on Cultural Property Implementation Act ("CPIA"), which implements parts of the Convention. Pub. L. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq*.

If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological and/or ethnological material of a nation, the government of which has requested such protections and has ratified, accepted, or acceded to the Convention. Accordingly, the United States took steps in 2018 to protect the cultural property of Libya, Belize, and Algeria by extending an existing memorandum of understanding ("MOU") or entering into a new one, or considering requests for measures, and imposing corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material. Current import restrictions and MOUs pertaining to those restrictions are available at https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions.

1. Libya

The United States and Libya signed an MOU on cultural property protection on February 23, 2018. See February 20, 2018 press notice, available at https://www.state.gov/united-states-and-libya-sign-cultural-property-protection-

agreement/. The MOU was signed as part of ongoing efforts to cooperate with the Libyan Government of National Accord (see Chapter 9). The MOU provides for U.S. import restrictions on categories of archaeological material representing Libya's cultural heritage dating from 12,000 B.C. through 1750 A.D. and Ottoman ethnological material from Libya dating from 1551 to 1911 A.D. The full text of the agreement is available at https://www.state.gov/18-223/. The MOU continues emergency import restrictions imposed by the U.S. government on December 5, 2017. See *Digest 2017* at 570.

2. Belize

Effective February 27, 2018, the United States and Belize extended for five years their 2013 MOU concerning the imposition of import restrictions on certain categories of archaeological material originating in Belize. 83 Fed. Reg. 8354 (Feb. 27, 2018); and see *Digest 2013* at 422-23. The 2018 extension was concluded via exchange of diplomatic notes after the Cultural Property Advisory Committee and the Acting Assistant Secretary for Educational and Cultural Affairs concluded that the cultural heritage of Belize continues to be in jeopardy from pillage of certain archaeological material. The agreement is available at https://www.state.gov/18-223-1/.

3. Algeria

On February 27, 2018, the United States received a request from the Government of Algeria under Article 9 of the UNESCO Convention for U.S. import restrictions on archaeological and ethnological material representing Algeria's cultural patrimony. 83 Fed. Reg. 27,649 (June 13, 2018).

4. Cambodia

On September 12, 2018, the United States and Cambodia signed an MOU, which entered into force September 19, 2018, extending import restrictions previously agreed in a 2003 MOU, as extended in 2008, and as amended and extended in 2013. The amended and extended MOU is available at https://www.state.gov/18-919/.

B. CULTURAL PROPERTY: LITIGATION

Three Knife-Shaped Coins (*Ancient Coin Collectors Guild*)

In *United States v. Three Knife Shaped Coins*, 246 F. Supp. 3d 1102 (D. Md. 2017), the district court granted summary judgment for the United States as to 15 coins in dispute and granted summary judgment for the Ancient Coin Collectors Guild (the "Guild") as to seven coins the United States had agreed to return. The Guild appealed. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision. *United States v.*

Ancient Coin Collectors Guild v. 3 Knife-Shaped Coins, 899 F.3d 295 (4th Cir. 2018). Excerpts follow from the opinion of the Court. In October, the Fourth Circuit denied the Guild's motion for rehearing. The Guild then filed a petition for certiorari.*

* * * *

…The Guild … decided to manufacture litigation by deliberately importing restricted ancient Cypriot and Chinese coins into the United States. … Using the Cypriot and Chinese Designated Lists for guidance, [the Guild's agent] located twenty-three Cypriot and Chinese coins that they considered likely to be detained by Customs.

* * * *

The Guild challenges the district court's judgment on multiple grounds. First, the Guild contends that the court erred in the Forfeiture Opinion by failing to require the government to prove all the elements of its forfeiture case. Second, the Guild argues that the court abused its discretion in the Forfeiture Opinion when it rejected the Guild's expert evidence. Third, the Guild maintains that the court erred in ruling that the Guild had not been deprived of its right to fair notice of the ancient coins that were subject to import restrictions imposed by the government. Fourth, the Guild maintains that, in the Discovery Order, the court abused its discretion by declining to authorize several discovery requests. Fifth, the Guild argues that the court abused its discretion in the Strike Opinion and Order by striking certain affirmative defenses and other aspects of the Guild's Amended Answer. Notably, the Guild supports its third and fifth contentions with constitutional arguments.

* * * *

In its initial appellate contention, the Guild maintains that the district court erred in failing to require the government to prove two essential elements of its prima facie forfeiture case. According to the Guild, the government was obliged to prove that the ancient Cypriot and Chinese coins were (1) first discovered within and hence subject to the export control of the State Party for which restrictions were granted ("first discovery"); and (2) illegally removed from the State Party's control after those restrictions were granted ("illegal removal"). …

The government counters that it had to prove—pursuant to § 2610—only that a particular seized item was "listed in accordance with section 2604." …

As explained below, we reject the Guild's contentions with respect to the first discovery and illegal removal elements. We agree that the district court properly determined that the government had satisfied its burden with respect to the fifteen ancient Cypriot and Chinese coins at issue in these forfeiture proceedings.

… Contrary to the Guild's erroneous reading of the CPIA, the first discovery requirement only delimits what material the executive branch can place on a restricted list. Once the material is properly included on a list, or, in other words, "designated," the government no longer must establish the first discovery element with regard to particular imported material.

* Editor's note: The Supreme Court denied the petition for certiorari on February 19, 2019.

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… Thus, in *Ancient Coin I*, we decided that the government had properly listed the Cypriot and Chinese coins, having satisfied the first discovery element.

* * * *

As noted, the CPIA uses the defined term "designated archaeological material"—which does not contain the first discovery element—in describing the responsibilities of federal officials *after* import restrictions have gone into effect, i.e., after ancient coins have been placed on a "designated list." *See* 19 U.S.C. § 2601(7). Thus, Customs is tasked with preventing the "designated archaeological ... material" from entering the United States without adequate documentation. *Id.* § 2606(a). Furthermore, when a determination has been made by Customs that "designated archaeological ... material" was sought to be imported in violation of § 2606, the government is obliged to initiate an appropriate forfeiture action. *Id.* § 2606(b); *see also id.* § 2609. Finally, during the forfeiture proceedings, the government's initial burden of proof is simply to demonstrate that "material subject to the provisions of section 2606"—that is, designated archaeological material—is listed "in accordance with section 2604." *Id.* § 2610.

The crux of the Guild's incorrect interpretation of the CPIA appears to emanate from the "in accordance with section 2604" language. *See* 19 U.S.C. § 2610(1). In addition to directing the executive branch to promulgate lists of restricted material, § 2604 also imposes minimum drafting standards for those lists. It provides that each listing "shall be sufficiently specific and precise to ensure [both] that [the restrictions] are applied only to the archeological and ethnological material covered by the agreement" and that importers have fair notice regarding what material is subject to those restrictions. *Id.* § 2604. However, our *Ancient Coin I* decision foreclosed a subsequent challenge to whether Cypriot and Chinese coins were "listed in accordance with section 2604." *See* 698 F.3d at 183 ("Here, CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604 ...."). Instead, in the forfeiture proceedings, the government had to demonstrate that the particular coins in question fall under the type described in the listing.

* * * *

Here, Congress's use of the term "designated archaeological material" absolves the government from the need to again prove the first discovery element after properly promulgated import restrictions have gone into effect. If that were not the case, the importers—such as the Guild—could always relitigate the State Department's conclusions that certain materials belong to a particular country's cultural patrimony. And that is precisely what the Guild seeks to do in this forfeiture action. As we recognized in *Ancient Coin I*, however, the determination of where certain types of archaeological materials are typically discovered is beyond the competence of the federal courts. *See* 698 F.3d at 179 ("The federal judiciary has not been generally empowered to second-guess the Executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage.").

Consistent with the foregoing, the issue pursued by the Guild regarding first discovery is resolved by the designated lists in the regulations—and need not be relitigated in a forfeiture action. We therefore reject the Guild's contention that the district court erroneously excused the government from proving first discovery as an essential element of its prima facie forfeiture case.

…[T]he Guild also maintains that the government failed to establish that the fifteen ancient coins were illegally removed from Cyprus or China. This argument is predicated on the fact that the CPIA does not bar importation of all "designated archaeological or ethnological material," but rather only designated material that has been "exported ... from the State Party after the designation of such material under section 2604," without "documentation which certifies that such exportation was not in violation of the laws of the State Party." *See* 19 U.S.C. § 2606(a). … [T]he Guild contends that the government had to prove the illegal removal element as part of its prima facie forfeiture case.

Simply put, we reject the Guild's interpretation of the CPIA on this point. As we explained in *Ancient Coin I*, Congress anticipated efforts to import archaeological material "without precisely documented provenance and export records." *See* 698 F.3d at 182. In those circumstances, the CPIA does not require the *government* to produce evidence establishing the provenance or export status of the archaeological material. Rather, as *Ancient Coin I* recognized, when Customs has determined that the archaeological material "has been designated by 'type' and included in the list of restricted articles," § 2606 "expressly places the burden on importers to prove [the designated material is] importable." *Id.* at 182. The importer can satisfy that burden by presenting to Customs one of the three types of documentation specified in § 2606(b). *Id.* Unless the importer does so, however, Customs must "refuse to release the material from customs custody." *See* 19 U.S.C. § 2606(b).

* * * *

Distilling the statutory requirements, the government must establish the following in order to meet its initial burden in a forfeiture action for material subject to § 2606 of the CPIA: (1) that the material is covered by an MOU, *see* 19 U.S.C. § 2601(7)(A)(i); (2) that the material is "listed by regulation under section 2604," *id.* § 2601(7) (B); and (3) that the listing is "sufficiently specific and precise" to ensure both that "the import restrictions ... are only applied to the archeological or ethnological material covered by the [MOU]," and that "fair notice is given to importers and other persons as to what material is subject to such restrictions" *id.* § 2604.

The Forfeiture Opinion properly determined that the government had met its initial burden. …

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In its third contention of error, the Guild argues that the Customs regulation promulgated and codified at 19 C.F.R. § 12.104—which governs the enforcement of CPIA import restrictions—irreconcilably conflicts with its statutory parent's requirements, which are found in 19 U.S.C. § 2601(2). And the Guild further argues that this purported conflict deprives an importer of fair notice of those specific items that are subject to the import restrictions.

* * * *

In contrast to the § 2601(2) statutory definition enacted by Congress, the "Definitions" provision in the related regulation, that is, 19 C.F.R. § 12.104(a), does not segregate the words "first discovered within, and is subject to export control by the State Party" from the preceding subparagraphs. …

The Guild argues that the "first discovered within" clause of the regulatory definition therefore applies only to subparagraph (3) of 19 C.F.R. § 12.104(a). According to the Guild, the regulatory provision in § 12.104(a) suggests that fully intact archaeological or ethnological objects— as opposed to fragmented objects—are not subject to the "first discovered within" proviso. On the other hand, the statutory definition in § 2601(2) clearly provides that the "first discovered within" proviso applies to each category of object, regardless of whether an archaeological or ethnological object is fully intact or in fragments.

The Guild presses two arguments in connection with what it perceives as a fatal drafting error. First, it contends that the error in the regulation—§ 12.104(a)—deprived the Guild of "fair notice" of those objects that are subject to import restrictions under § 2604. … [T]hat contention misses the mark and must be rejected. Section 2604's fair notice provision applies only to those regulations that "list [archaeological or ethnological] material by type or other appropriate classification," i.e., the designated lists. *See* 19 U.S.C. § 2604. The definitional regulation in § 12.104(a), which the Guild says deprived it of fair notice, is not a designated list. To present a viable fair notice challenge under § 2604, the Guild would need to allege that either the Cypriot Designated List or the Chinese Designated List was insufficiently "specific and precise" to notify the Guild of what materials, such as ancient coins, were subject to the import restrictions. *See id.* Because no such allegation has been made, the Guild's statutory fair notice claim is fatally defective.

* * * *

In the second part of its fair notice contention, the Guild argues that it was unconstitutionally deprived of adequate notice that the Cypriot and Chinese coins were subject to import restrictions. The Fifth Amendment's Due Process Clause, under which this contention is presented, requires that "a party must receive fair notice before being deprived of property." *See United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997). To provide notice that satisfies constitutional due process, a regulation "must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" …

* * * *

…The Guild cannot credibly claim that it has been unconstitutionally deprived of its property. The Guild simply implemented a scheme designed to knowingly contravene, and subsequently challenge, a federal law that it opposed.

* * * *

By its final contention, the Guild maintains that the district court acted improperly by striking the Amended Answer. …

* * * *

… [T]he district court did not abuse its discretion by granting the government's motion. In so ruling, the court was simply adhering to our *Ancient Coin I* decision. We therein acknowledged that, during an ensuing forfeiture proceeding, the Guild could "press a *particularized* challenge to the government's assertion that the twenty-three coins are covered by import restrictions." *See* 698 F.3d at 185 (emphasis added). The portions of the Amended Answer that were stricken by the district court, however, were not particularized to this forfeiture action. Rather, the stricken allegations sought to resurrect claims that the Guild had already lost in *Ancient Coin I*. …

The *Ancient Coin I* decision had resolved those issues by ruling that the State Department and Customs had properly imposed import restrictions on ancient Cypriot and Chinese coins, in compliance with the CPIA. In this forfeiture case, the district court thus lacked the authority to question the validity of our earlier rulings. Similarly, we are bound by the rulings of our earlier panel decision. *See McMellon*, 387 F.3d at 332. Thus, the stricken defenses were not pertinent to this forfeiture action, and the court did not err in striking them.

… The Guild also presents its motion to strike contention with a constitutional hue as a violation of its due process rights. Relying on the Supreme Court's decision in *Degen v. United States*, the Guild contends that the ruling on the motion to strike deprived the Guild of the "right of a citizen to defend his property against attack." *See* 517 U.S. 820, 828, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996). A review of the *Degen* case, however, reveals that the constitutional argument is also without merit.

* * * *

In stark contrast to the claimant in *Degen*, the Guild has not been disentitled from defending its property in a forfeiture action. In fact, the Guild was not even disentitled from pursuing the affirmative defenses stricken by the district court. In the *Ancient Coin I* litigation, the district court and this Court each considered and rejected the Guild's claims regarding the propriety of the import restrictions imposed on ancient Cypriot and Chinese coins. Having already received two hearty bites at the proverbial apple, the Due Process Clause does not entitle the Guild to a third. The district court's conclusion in the Strike Opinion and Order thus did not violate the Guild's due process rights.

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C. CULTURAL PROPERTY ADVISORY COMMITTEE

On April 2, 2018, the State Department announced that it was renewing the Charter of the Cultural Property Advisory Committee for a two-year period, effective April 8, 2018. Background on the Committee follows, excerpted from the April 2, 2018 State Department media note, available at https://www.state.gov/u-s-department-of-state-renews-charter-of-cultural-property-advisory-committee/.

First established in 1983 by the Convention on Cultural Property Implementation Act (Public Law 97-446), the Cultural Property Advisory Committee advises the President of the United States on appropriate U.S. action in response to requests from foreign governments for cultural property agreements. Cultural property agreements with other countries are collaborative tools to prevent illicit excavation and trade in cultural objects. Once an agreement is in place, importation into the United States of designated material is prohibited except under certain exceptional circumstances. U.S. efforts to protect and preserve cultural heritage through these agreements promote stability, economic development, and good governance within the concerned countries, while denying critical financing to terrorist organizations and other criminal networks that engage in such illicit trade.

The Presidentially appointed members of the Committee include private-sector experts in archaeology, anthropology, ethnology, and related fields; experts in the international sale of cultural property; representatives of museums; and the general public. The President has delegated decision-making responsibility for cultural property agreements to the Secretary of State, and the Committee submits its findings and recommendations directly to the Department of State.

D. EXCHANGE PROGRAMS

1. Uzbekistan

On May 16, 2018, the United States and Uzbekistan signed two agreements in the field of education. See U.S. Mission Uzbekistan press release, available at https://uz.usembassy.gov/landmark-u-s-uzbekistan-agreements-signed-on-education-and-culture/. First, they signed an MOU supporting partnerships between U.S. universities and higher education institutions across Central Asia for three years. Second, they signed an MOU increasing funding for English language programs in Uzbekistan to include university students, journalists, and professionals; capacity building programs for Uzbek English teaching professionals; and online learning opportunities for both teachers and students.

2. ASSE Litigation

As discussed in *Digest 2017* at 580-81; Digest *2016* at 582-83; *Digest 2015* at 611; and *Digest 2014* at 576-79, ASSE International, a program sponsor in the State Department's J-1 Exchange Visitor Program ("EVP") challenged in federal court the imposition of sanctions by the Department of State for ASSE's violations of EVP regulations. After the Ninth Circuit reversed the district court's dismissal and remanded the case, *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015), the State Department conducted further administrative proceedings and imposed a lesser sanction. ASSE renewed its challenge

in district court to the lesser sanction and sought discovery. The district court's January 3, 2018 order denied ASSE's motion to require further production by the Department. On June 19, 2018, the district court granted the government's motion for summary judgment. ASSE appealed in the U.S. Court of Appeals for the Ninth Circuit.

3. *Capron v. Massachusetts*—case relating to the au pair program

On September 25, 2018, the United States filed a brief in response to the request of the U.S. Court of Appeals for the First Circuit in a case involving the U.S. au pair program. *Capron v. Massachusetts*, No. 17-2140. Excerpts follow from the U.S. brief, which is available in full at https://www.state.gov/digest-of-united-states-practice-in-international-law/.

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STATEMENT[1]

1. The Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (Fulbright-Hays Act), authorized the Director of the United States Information Agency (USIA), "when he considers that it would strengthen international cooperative relations," to provide for "educational exchanges…between the United States and other countries of students, trainees, teachers, instructors, and professors." *See* 22 U.S.C. § 2452(a)(1)(B)(ii). The resulting Exchange Visitor Program (EVP) furthers the Act's purposes of "increas[ing] mutual understanding between the people of the United States and the people of other countries," "strengthen[ing] the ties which unite us with other nations," "promot[ing] international cooperation for educational and cultural advancement," and "assist[ing] in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world." *Id.* § 2451. Participants in the EVP enter and remain in the United States on a J visa, a type of nonimmigrant visa that was created for, and is specific to, the EVP. *See* 8 U.S.C. § 1101(a)(15)(J).

The State Department has administered the EVP since 1999, when the USIA and the State Department merged. The State Department's regulations establish different categories of exchange programs within the EVP—each of which uses the[1] J visa—that delineate the different roles that exchange visitors may fill. Reflecting the purposes of the Fulbright-Hays Act, these regulations explain that the exchanges "assist the Department of State in furthering the foreign policy objectives of the United States." 22 C.F.R. § 62.1.

2. One such program category allows foreign nationals to enter the United States as au pairs. 22 C.F.R. § 62.31. The au pair program is a cultural- and educational-exchange program available only to foreigners between the ages of 18 and 26. Young people who qualify for this opportunity spend a year in the United States living with an American host family, providing childcare services within that family, and attending classes at an accredited college or university. By "participat[ing] directly in the home life" of an American family, *id.* § 62.31(a), au pairs gain valuable exposure to our country's society and values. In the State Department's judgment, our country's continued engagement with these young people advances the status of the United States as a global leader and furthers the government's foreign-policy goals.

* * * *

3. Although the State Department oversees the EVP, the exchange programs are conducted by organizations known as "sponsors" that the State Department designates for that purpose. *See* 22 C.F.R. §§ 62.1(b), 62.3. …

* * * *

ARGUMENT

A. The Au Pair Regulations Require Host Families To Pay A Weekly Stipend That Is Based On The Federal Minimum Wage.

The compensation provision that applies to the au pair program requires sponsors to ensure that participants in the au pair program receive a weekly stipend that is based on the federal minimum wage. …

Ultimately, au pair wages are determined by sponsors and host families, not by the State Department. Host families are free to pay au pairs—and sponsors are free to direct host families to pay au pairs—more than the minimum that would be required to comply with the State Department's regulations, and some do. But the State Department's regulations establish the requirements with which au pair compensation must comply.

The compensation provision of the au pair regulations differs in key respects from the compensation provisions in regulations that govern other categories of the EVP. …

Consistent with the au pair regulations' reference to the FLSA, both the USIA and the State Department have informed sponsors about changes in the federal minimum wage. …

The EVP regulations require sponsors to provide accurate information to prospective exchange visitors and host families about work hours, wages and compensation, and credits for room and board. 22 C.F.R. § 62.9(d)(3). Sponsors have long informed prospective host families and au pairs that the required weekly stipend is based on the federal minimum wage, less a credit for room and board. …

The district court in this case nevertheless ruled that, by requiring compensation in accordance with the requirements of the FLSA, the State Department's au pair regulations require host families to comply with applicable state and local minimum-wage laws. That ruling was incorrect. …

B. The Au Pair Regulations Preempt State And Local Laws Establishing Terms Of Employment That Differ From The Terms Established By The Federal Regulations.

The federal au pair regulations do not leave room for a state or municipal government to impose terms of employment for au pairs that differ from the terms set forth in the regulations. (Court's question 1). Like the federal statute at issue in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the au pair regulations are "drawn not only to bar what they prohibit but to allow what they permit." *Id*. at 380. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)…

As discussed, the au pair regulations require host families to pay a weekly stipend that is based on the *federal* minimum wage. They contain no such requirement concerning state or local minimum wages. The au pair regulations also determine the maximum number of hours an au pair can work per day (10) and per week (45); require that au pairs receive a certain number of days off per week (1.5) and per month (one full weekend); require that au pairs receive two

weeks per year of paid vacation; and require that host families facilitate the au pair's enrollment and attendance in an accredited U.S. post-secondary institution and pay the cost of such academic course work in an amount not to exceed $500. *See* 22 C.F.R. § 62.31(j)(2)- (4), (k).

These nuanced and "detailed provisions" show that the federal government's "calibrated" approach to the au pair program is deliberate. *Crosby*, 530 U.S. at 377-78…

This conclusion is textually reinforced by the contrast between the au pair regulations and the regulations governing other EVP categories. As noted, the regulations for three such categories—summer work-travel, teachers, and camp counselors—specifically entitle participants to any higher state or local minimum wage that may apply, either explicitly or by entitling participants to compensation that is commensurate with U.S. counterparts. Thus, when the State Department intends to require payment in accordance with state and local law for EVP participants, the Department says so expressly. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted); *accord In re PHC, Inc. Shareholder Litig.*, 894 F.3d 419, 432 (1st Cir. 2018).

* * * *

The compensation scheme required under the au pair regulations differs from state labor laws in other ways as well. For example, the compensation required under the au pair regulations is structured as a weekly stipend, rather than as a fixed hourly rate. Under the federal regulations, an au pair's weekly compensation is "based upon 45 hours of child care services per week" that must be paid even if the au pair has worked fewer than 45 hours. *See* 22 C.F.R. § 62.31(j)(1). State labor law, by contrast, typically requires pay only for hours worked, and requires a different overtime rate for work beyond 40 hours. *See, e.g.*, 940 Mass. Code Regs. § 32.02 (Massachusetts definition of "working time"); *id.* § 32.03(3) (Massachusetts overtime provision for domestic workers).

The Commonwealth appears to acknowledge that the au pair regulations preempt state or local laws governing compensation that are inconsistent with the structure of the federal program—even if it is technically possible for a host family to comply with both the federal and state requirements. Notably, the Commonwealth disavows a reading of its regulations that would require host families to pay au pairs for time spent sleeping and eating. Resp. Br. 46. The Commonwealth thus implicitly concedes that such a requirement is not compatible with the State Department's regulations, which provide that au pairs shall be compensated at a weekly rate "based upon 45 hours of child care services." 22 C.F.R. § 62.31(j). And if a state claimed that its statute or regulation required au pairs to be paid for sleeping or eating, that state law would be preempted because it is inconsistent with the State Department's regulations for the au pair program.

* * * *

In concluding that Massachusetts' domestic-worker-compensation law is not preempted by the State Department's au pair regulations, the district court here relied on a presumption against preemption. *See* JA602. That reliance was misplaced. The presumption applies when a federal statute or regulation would supersede the historical police powers of the States. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But the presumption "disappears…in fields of regulation that have been substantially occupied by federal authority for an extended

period of time." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (holding that, despite the states' "legitimate role in regulating certain banking activity," the presumption against preemption does not apply in the context of federally chartered banks).

States have no historical power to regulate the Exchange Visitor Program, of which the au pair program is a part. The EVP is a creation of federal law, and it operates in the fields of foreign affairs and immigration—two fields that have long been reserved exclusively to the federal government. Au pairs enter and remain in the United States on a J visa, a type of nonimmigrant visa that was created for, and is specific to, the EVP. *See* 22 C.F.R. § 62.2 (definition of "J visa"). The au pair program is a foreign-relations function of the federal government, regulated and overseen by the State Department, which advises the President in the conduct of U.S. foreign policy. Congress enacted the Fulbright-Hays Act, pursuant to which educational and cultural exchange programs are administered, in order to "increase mutual understanding between the people of the United States and the people of other countries," "strengthen the ties which unite us with other nations," "promote international cooperation for educational and cultural advancement," and "assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world." 22 U.S.C. § 2451. Consistent with these purposes, the State Department's regulations note that the EVP "assist[s] the Department of State in furthering the foreign policy objectives of the United States." 22 C.F.R. § 62.1. There is no presumption against preemption in the context of a federal program to implement the foreign-policy and immigration objectives of the United States. In any event, the presumption against preemption is just a presumption, which "can be overcome" by an adequate showing of preemptive intent. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001). As explained, the comprehensive features of the "calibrated" au pair regulations make clear that their terms are intended to be exclusive with respect to the matters that they address, including the terms on which au pairs are compensated. *See Crosby*, 530 U.S. at 377-78.

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C. Policy Arguments For Changing The Terms Of Au Pair Employment Should Be Directed To The State Department.

State and local regulations have the potential to severely undermine the au pair program, particularly if increased costs or record-keeping burdens discourage participation by host families. The district court correctly noted that the affordability of child care under the au pair program is not a goal of the Fulbright-Hays Act. *See* JA612. However, the viability of the au pair program is a quintessential federal interest. The program is a valuable tool of U.S. foreign policy. For over 30 years, the program has brought young people from other countries to the United States; immersed them in the home life of an American family; enabled them to continue their education at a local college or university; provided them with unique opportunities to develop leadership skills; and allowed them to return home as unofficial "ambassadors" for the United States.

Contrary to the district court's suggestion, *see* JA607, the USIA did not abandon an interest in a uniform basis of compensation for au pairs when it linked the au pair stipend to the requirements of the FLSA. (Court's question 5). Per the FLSA, the federal minimum wage is, of course, uniform nationwide. If changes are to be made to the terms and conditions of the au pair program, those changes should be made not through litigation but through rulemaking by the State Department—as clearly intended by Congress, which vested regulatory oversight of the

EVP not in individual states or municipalities but in that agency. The State Department, which has both the relevant foreign policy expertise and the ability to consult with affected constituencies, is best suited to balance the many policy considerations that any proposed change would present. …

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E. INTERNATIONAL EXPOSITIONS

Expo Dubai 2020

On February 16, 2018, the Department of State issued a request for proposals for the U.S. Pavilion at Expo Dubai 2020. 83 Fed. Reg. 7098 (Feb. 16, 2018). The Department made a selection in May.[**]

[**] Editor's note: In early 2019, the United States terminated the relationship with the selected entity.

Cross References

Visa Regulations and Restrictions, **Ch. 1.B.2**