No. 20-15591

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD JARVIS TAXPAYERS ASSOCIATION, et al.,
Plaintiffs-Appellants,
v.

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:18-cv-01584-MCE-KJN
Hon. Morrison C. England, Jr.

BRIEF OF AMICI CURIAE AARP, AARP FOUNDATION, CALIFORNIA HISPANIC CHAMBER OF COMMERCE, SMALL BUSINESS CALIFORNIA, SMALL BUSINESS MAJORITY, UNIDOSUS, UNITED WAYS OF CALIFORNIA, and THE WESTERN CENTER ON LAW AND POVERTY, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

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AARP and UnidosUS are 501(c)(4) nonprofit corporations. AARP Foundation, Small Business Majority, United Ways of California, Western Center on Law and Poverty, are 501(c)(3) nonprofit organizations. Small Business California and the California Hispanic Chamber of Commerce are 501(c)(6) nonprofit organizations.

No amici have parent corporations, nor have any issued shared stock or securities.

Dated: October 20, 2020

/s/ Dara S. Smith
Dara S. Smith

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment.

AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. AARP's and AARP Foundation's efforts to increase the security and adequacy of older individuals' retirement savings include litigation and participation as amici curiae in state and federal courts.

Small Business California (SB-CAL) is a proactive, non-partisan business advocacy organization whose only agenda is the well-being of California small businesses. Working for all California small businesses for a better business

[1] In accordance with Fed. R. App. P. 29(c)(5), amici hereby state that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than amici, contributed money intended to fund preparing or submitting this brief. Counsel for all parties have consented to the filing of this brief.

environment, SB-CAL is responsive to the needs of California small business owners. SB-CAL's members welcome the opportunity to inform their employees that the opportunity to save their money for the future is an important benefit.

The California Hispanic Chamber of Commerce (CHCC) represents the interest of over 800,000 Hispanic business owners in California through its network of Hispanic chambers and business association. The CHCC is the premier and largest regional ethnic business organization in the nation that promotes the economic growth and development of Hispanic entrepreneurs and California's Emerging Businesses. CHCC's goals are to promote, support and encourage the advancement and development of Hispanic and minority owned businesses; to provide an organizational forum for the exchange of ideas, information, technical assistance, procurement opportunities, and any other form of business opportunities that enhance the Hispanic and minority business communities; to develop a program of advocacy in order to inform and educate elected and appointed officials, legislative bodies, agencies and public and private organizations about the concerns, needs, and opportunities which affect the Hispanic and minority business communities California; and to foster unity and communication between organizations, corporations, and individuals who support the goals and objectives of the CHCC.

Small Business Majority is a national small business organization that empowers America's diverse entrepreneurs to build a thriving and inclusive economy. The organization engages its network of more than 70,000 small businesses and 1,000 business and community organizations to advocate for public policy solutions and delivers resources to entrepreneurs that promote equitable small business growth. Small Business Majority's connections with the small business community along with its scientific research enables them to educate the public about key issues impacting America's entrepreneurs, with a special focus on advancing the smallest businesses and those facing systemic inequalities. The organization is particularly focused on advancing solutions for public policy issues such as retirement security and wealth building, healthcare and access to responsible capital.

UnidosUS, previously known as NCLR (National Council of La Raza), is the nation's largest Hispanic civil rights and advocacy organization and has built a stronger country by creating opportunities for Latinos for more than 50 years. Through its unique combination of expert research, advocacy, programs, and an Affiliate Network of nearly 300 community-based organizations across the United States and Puerto Rico, UnidosUS simultaneously challenges the social, economic, and political barriers at the national and local levels. The UnidosUS Californiabased Affiliates include 58 community-based organizations that invest more than $1.8 billion and employ more than 15,000 staff to provide direct services to approximately 1.8 million Californians annually. UnidosUS is headquartered in Washington, DC, and has an office in Los Angeles and staff in Sacramento. Through partnerships, community investments, and state research and advocacy on housing, health, and education, UnidosUS advances opportunities for the more than 15 million Latinos who call California home. UnidosUS is extremely concerned with the lack of retirement savings in the Latino community. We view the CalSavers program as a safe and innovative option for the millions of Latinos who do not have retirement savings.

United Ways of California, the state network of California's 30 local United Ways, advances health, education and financial results for low-income children and families by enhancing and coordinating the community impact work of local United Ways. As a nonprofit, nonpartisan state organization, we believe the involvement of all sectors—public, private, nonprofit, business, philanthropy, government, advocates and community members—are required to make progress on vital challenges facing low-income children and families. United Ways across California work hard to strengthen the financial security and self-sufficiency of Californians including a secure retirement. More than one in three families in California were already struggling to cover the cost of basic needs before the COVID-19 global pandemic, let alone save for retirement, according to *Struggling to Get By: The Real Cost Measure,* our report on household financial stability. Saving for retirement is something that needs to be done throughout our working lives, yet millions of workers, particularly low and moderate wage workers face major barriers trying to save. Workers who have access to a workplace retirement plan are 15 times more likely to save for retirement, yet an estimated 7.5 million workers in California do not have access to a workplace retirement savings plan. Increasing access to retirement savings is critical to building financial stability and reducing the racial wealth gap; of those workers without access to a workplace retirement plan, two-thirds work for small businesses with less than 100 employees, 58 percent are women, and two-thirds are Black, Indigenous, and workers of color.

The Western Center on Law and Poverty advocates on behalf of low-income Californians in every branch of government—from the courts to the Legislature. Through the lens of economic and racial justice, we litigate, educate and advocate around health care, housing, public benefits and economic justice. Ensuring that low-income Californians have equitable access to retirement programs is critical to Western Center's anti-poverty mission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Older Americans are retiring at record rates. As the Baby Boomer generation ages, approximately 10,000 individuals retire each day. Univ. of Mich. Health & Ret. Study, *Aging in the 21st Century: Challenges and Opportunities for Americans* 8 (2017). By 2030, twenty percent of the U.S. population will be at typical retirement age. *See id*. Yet, Americans are financially unprepared for retirement. Since the Covid-19 pandemic began, workers have lost their jobs in record numbers, leading to 55% of Americans having insufficient savings to retire securely as of this July. Alicia Munnell, Anqi Chen, and Wenliang Hou, Center for Retirement Research at Boston College, *How Widespread Unemployment Might Affect Retirement Security* 4 (2020), https://bit.ly/3khCqNo.

This savings crisis is leading to catastrophic results not only for individuals, but for the public benefits system. Traditionally, Americans expected to rely on a "three-legged stool" for retirement security: pensions, personal savings, and Social Security. Barclay Palmer, *What is the Three-Legged Stool?*, Investopedia (Oct. 28, 2019), https://bit.ly/3fCPmu4. When individuals without pensions—that is, most people—also have insufficient retirement savings, they have no choice but to lean heavily on public benefits. Indeed, lower- and middle-income retirees have long depended on public benefits for the majority of their incomes. Elizabeth Bell, Adam Carasso, &

C. Eugene Steuerle, Urban Inst., *Strengthening Sources of Retirement Savings for Low-Income Families* 1 (2005) https://urbn.is/30spah8. A recent study showed that 40.2% of older Americans rely *solely* on Social Security, putting tremendous pressure on the retirement security stool's remaining leg and putting it at risk of breaking. Press Release, *Nat'l Inst. on Ret. Sec.*, *New Report: 40% of Older Americans Rely Solely on Social Security for Retirement Income* (Jan. 13, 2020), https://bit.ly/31fr43O. Helping low-income retirees save enough to increase their retirement income by even $1,000 per year would save public benefits $33 billion nationwide. William Shiflett & Catherine Harvey, AARP Pub. Policy Inst., *The US Could Save $33 Billion by Helping People Save for their Own Retirement* (2018), https://bit.ly/30uQgo1.

To address this need, California created the California Secure Choice Retirement Program, CalSavers. This program helps primarily low- and moderate-income workers who need savings the most, while providing a way to save through work at businesses that want to, but cannot, provide their own employee retirement plans. CalSavers fills a gap that the federal Employee Retirement Income Security Act (ERISA) does not cover by automatically enrolling workers employed by companies that do *not* have ERISA plans into a payroll deduction system that puts money away for retirement in a tax-deferred Individual Retirement Account ("IRA"). It does not affect ERISA plans or require any employer to have such a plan—it just benefits workers and employers who do not have ERISA plans. With tens of thousands of workers already enrolled and over a million expected within the first year of the program's operation, CalSavers is a creative, mutually beneficial system for workers and employers. ERISA was never intended to prevent this kind of gap-filling measure that operates where federal law does not, shoring up cracks in the system through which the most vulnerable Americans fall. That is especially true because the system is completely voluntary—i.e., employees can choose to opt out of it with no negative consequences. CalSavers is neither an employee benefit plan nor a program that interferes with any ERISA-related activity.

The Court should uphold the decision below dismissing the Complaint, both because the law clearly permits CalSavers to operate outside of ERISA's territory, and because work-and-save programs like CalSavers around the country are a critical tool states can use to help avert financial disaster.

ARGUMENT

I. Many Millions of Older Americans Do Not Have Significant Personal Savings or Access to Employer-Sponsored Retirement Savings Plans, Leading to a Dire Economic Future.

A. A Current and Growing Retirement Savings Crisis Affects Older Americans, Including Californians, and Especially Women and People of Color.

Even before the COVID-19 pandemic, half of Americans were at risk of being unable to retire securely, primarily due to lack of retirement savings. Alicia Munnell, Anqi Chen, and Wenliang Hou, Center for Retirement Research at Boston College, *How Widespread Unemployment Might Affect Retirement Security*, https://bit.ly/3khCqNo (July 2020), at 4. As of March 2019, 21% of Americans had no savings whatsoever. Amanda Dixon, *Survey: 21% of Working Americans Aren't Saving Anything at All*, BANKRATE (Mar. 14, 2019), https://bit.ly/33Ayj9g. Twenty percent of Americans save only five percent or less of their annual income, and less than a third save at least eleven percent of their annual income. *Id.* California is no exception to this rule: 29% of California households with adults age 55 and over have no retirement savings at all. John Longstaff, THE BUSINESS JOURNAL, *Blog: Could Calsavers be Good for your Business?* (Oct. 18, 2019), https://bit.ly/3kkBs2l.

The pandemic has accelerated this crisis dramatically, decimating individual retirement accounts, pensions, and payments into the Social Security system.

Researchers estimate that a staggering seventy-five percent of adults who have lost their jobs during the pandemic will not be able to retire securely—a 20% increase in only four months. *See* Alicia H. Munnell, Anqi Chen, & Wenliang Hou, Center for Retirement Research at Boston College, *How Widespread Unemployment Might Affect Retirement Security* 4 (2020), https://bit.ly/3khCqNo.

For people of color—and particularly women of color—retirement security is even likelier to be out of reach. Corresponding to the gender pay gap, women's retirement savings are, on average, only 2/3 of men's savings. Heather McCullough, *Closing the Women's Wealth Gap, What It Is, Why It Matters, and What Can Be Done About It* (January 2017), https://bit.ly/3hw8QRR, at 13. Black and Hispanic Americans are significantly more at risk of retirement insecurity than Whites, with 61% of Hispanic households falling into the at-risk category. Munnell, Hou, and Sanzenbacher, Center for Retirement Research at Boston College, *Trends in Retirement Security by Race/Ethnicity* (November 2018), https://bit.ly/3mnukE1, at 3. And for women of color, the gap is "a chasm—pennies on the dollar compared to both white women and men." *Id.*

Lack of retirement savings translates directly into poverty for older Americans who stop working, whether voluntarily or otherwise. Due to improved life expectancy, individuals are now spending more time in retirement than ever before.

Anne Obersteadt et al, Nat'l Ass'n of Ins. Comm'rs and the Ctr. for Ins. Policy & Research, *State of the Life Insurance Industry: Implications of Industry Trends* 53, 75 (2013), https://bit.ly/3i3jgJs. This extended retirement period magnifies the adverse effects of insufficient savings: the National Council on Aging found that "over 25 million Americans aged 60+ are economically insecure—living at or below 250% of the federal poverty level[.]" National Council on Aging Fact Sheet, https://bit.ly/33t3tOk. For these older adults, economic insecurity has serious consequences. In recent years, 21% of married Social Security recipients and 43% of single recipients aged 65+ depended on Social Security for 90% or more of their incomes. *Id.* Approximately 2.9 million households with a senior aged 65+ experienced food insecurity, and 3.5 million older homeowners are underwater on their loans and have no home equity. *Id.*

Californians experience problems similar to those of their peers throughout the nation, with nearly half of workers likely to have retirement incomes that place them at or near poverty. Nari Rhee, UC Berkeley Labor Center, *Meeting California's Retirement Security Challenge*, https://bit.ly/35JElpv (October 2011). This problem is growing rather than dwindling. In five years, the number of impoverished residents age 65 and older increased by 85 percent, to approximately 520,000. Claudia Buck and Phillip Reese, The Sacramento Bee, *Poverty Rate Jumps Among California Seniors*, https://bit.ly/3bZaMRI (March 26, 2016).

Moreover, consistent with the research on savings shortfalls, both in California and nationwide, older people of color are more likely to fall into poverty than their White cohorts. Older Black and Hispanic Americans experience a disproportionate level of poverty, with 19.3% of older Black adults and 17% of older Hispanic adults living below the poverty line even when public benefits are included, compared to 7% of older non-Hispanic White adults who experience poverty. Congressional Research Service, *Poverty Among Americans Aged 65 and Older*, https://bit.ly/3bZIcQh (July 1, 2019). Similarly, 14% of Black Californians and 16% of Hispanic Californians over age 65 have incomes below the poverty line, compared to 7% of older White Californians. Claudia Buck and Phillip Reese, The Sacramento Bee, *Poverty Rate Jumps Among California Seniors*, https://bit.ly/3bZaMRI (March 26, 2016). Both statewide and nationally, the retirement savings crisis is already taking a heavy toll on older adults and hitting historically disadvantaged groups the hardest.

B. Saving Money Through Work is Now The Only Realistic Route to a Secure Retirement, But Many Americans, Including Many Californians, Do Not Have Access to Retirement Savings Plans At Work, and Many Small Businesses Cannot Afford to Provide Them.

Over the past several decades, the onus for retirement savings has shifted from the employer to the employee. In 1990, eighty-four percent of full-time workers employed by large and medium employers were enrolled in defined benefit plans—i.e., traditional pension plans in which the employer guarantees the payment of a specific benefit in retirement. *Id.* at 50. By 2019, only twenty-six percent of all civilian workers had access to a defined benefit plan. U.S. Dep't of Labor, Bureau of Labor Statistics, Bulletin No. 2791, *National Compensation Survey: Employee Benefits In the United States,* March 2019 3 tbl.2 (2019), https://bit.ly/3greC7A.

Accordingly, saving money through work—frequently through defined contribution plans such as 401(k) plans—is the only way for most Americans to retire securely. *See* Munnell, Hou, and Sanzenbacher, Center for Retirement Research at Boston College, *How Would More Saving Affect the National Retirement Risk Index?* (October 2019), https://bit.ly/35FqyQw, at 1 ("increasing saving is a realistic option only for those workers who have access to a retirement plan at work."). The Center for Retirement Research estimates that if all working older adults had access to workplace payroll deduction savings plans, and they increased work duration and savings contributions only mildly, the National Retirement Risk Index would be cut in half. *Id.*

Unfortunately, while many employers now offer defined contribution plans, a significant number of employers, particularly small businesses, do not offer any savings plan whatsoever. *See generally* U.S. Gov't Accountability Office, GAO-13-748T, *Retirement Security, Challenges and Prospects for Employees of Small Businesses* (2013), https://bit.ly/3a28oJ8; Sarah Max, *Many Small Business Don't Offer Retirement Plans. Some States are Trying to Fix That*, Barron's: Retirement (Jan. 31, 2020), https://bit.ly/2Ptngqs. An estimated 51 to 71% of employees of small businesses lack access to even a defined contribution plan because their employers often cannot afford to provide them. U.S. Gov't Accountability Office, *supra* at 1. Indeed, 40 million American households with working-age adults do not have a traditional retirement account such as a 401(k) or IRA. Fed. Ins. Office, U.S. Dep't of the Treasury, *Report on Protection of Insurance Consumers and Access to Insurance* 36, (2016), https://bit.ly/2C1wsiH.

California mirrors this national trend. As of 2011, fewer than half of all private sector workers in California had access to any employer-sponsored retirement plan. Nari Rhee, UC Berkeley Labor Center, *Meeting California's Retirement Security Challenge*, https://bit.ly/35JElpv (October 2011). In 2019, an estimated 7.4 million workers age 25-64 had no such access. UC Berkeley Labor Center, *RELEASE: Troubled Future: Half of California Private Sector Employees Have No Retirement Assets*, https://bit.ly/33ungwN (July 2019). Nearly 80% of those working for small businesses did not have access to a retirement savings program through work. Small Business Majority, *Calsavers Retirement Savings Program: What Small Businesses Need to Know*, https://bit.ly/3iujc62 (last visited September 15, 2020).

Furthermore, workers of color are more likely than White workers to lack access. UC Berkeley Labor Center, *RELEASE: Troubled Future: Half of California Private Sector Employees Have No Retirement Assets*, https://bit.ly/33ungwN (July 2019). For Latinos in particular, 7 out of 10 employed in the private sector, or 69%, lack access to a pension or 401(k), compared to 55% of White workers. *Id.*

Against this background, to address its aging population's dire growing need, California enacted the California Secure Choice Retirement Savings Program ("CalSavers").

II. State Work-and-Save Programs Like CalSavers Help Address a Critical Need for Both Employees and Small Businesses.

The CalSavers Program, like many state Work-and-Save Programs, helps to address the retirement savings crisis in a way that fulfills needs of both workers and small businesses by creating an automatic payroll deduction system through which employees may contribute part of their paychecks to a state-created Individual

Retirement Account. Empirical research has repeatedly demonstrated that automatic payroll deduction systems help employees save. In general, employees are *fifteen times* more likely to save for retirement if they have access to a workplace payroll deduction savings plan. AARP, *Work and Save* 101, https://bit.ly/351cKOB (last visited October 14, 2020). In fact, even workers with lower incomes are far more likely to save through a workplace payroll deduction plan with automatic enrollment. A study conducted to analyze the 401(k) savings behavior of employees in a large, publicly-traded Fortune 500 company with employees in 38 states, the District of Columbia, and Puerto Rico over a two-year period found that the implementation of automatic enrollment for new hires saw participation rates increase from 13 percent to 80 percent for workers earning under $20,000 a year. Brigitte C. Madrian and Dennis F. Shea, *The Power Of Suggestion: Inertia In 401(k) Participation And Savings Behavior*, Quarterly Journal of Economics, 2001, v116 (4 Nov), 1149-1187. In short, automatic payroll deduction programs like CalSavers work as intended for employees.

These programs benefit employers as well. In particular, "small businesses would like to offer retirement options to their employees—to help attract a talented workforce and boost employee morale—but can't afford the overhead and administrative costs." Small Business Majority, *Calsavers Retirement Savings Program:*

What Small Businesses Need to Know, https://bit.ly/3iujc62 (last visited September 15, 2020). Through a work-and-save program, employers who cannot themselves offer any benefits are still able to facilitate their employees' savings and security with minimal administration costs and burdens. Indeed, ease of administration was one of the California legislature's primary goals from the inception of the CalSavers program. *Final Report to the California Secure Choice Retirement Savings Investment Board*, https://bit.ly/3iyn8CZ (March 2016) at 9 (describing "[s]implicity of administration, compliance and enforcement" and "[m]inimization of the administrative and decision-making burden on employers" as two of the "primary considerations" in designing the program).

Numerous businesses and employees have begun participation in the CalSavers program. As of September 30, 2020, 3,500 employers had already registered for the program, and over 51,000 employees were already enrolled. *CalSavers Retirement Savings Program Participation and Funding Snapshot*, https://bit.ly/33XDLDh (September 30, 2020). By a year after the program has been fully implemented, it is projected to include 1.6 million participants. *Final Report to the California Secure Choice Retirement Savings Investment Board*, https://bit.ly/3iyn8CZ (March 2016) at 16. Of these, the workers expected to benefit most are those that have been historically vulnerable or disadvantaged most, and who need increased savings most acutely to secure their retirement. Low-income adults comprise the majority of eligible workers, whose median annual income is $23,000, with a mean wage of $35,000. *Id.* at 29. Two thirds of eligible workers are people of color, with Latino workers constituting 46% of the group. *Id.* at 29, Fig. C-3. In addition, eligible businesses are those who are least able to provide employee benefit programs. 54% of eligible employees work at small businesses with less than 100 employees, and 43% work at firms with fewer than 50 employees. *Id.* at 30. In short, CalSavers is designed to help—and is already beginning to work for—exactly the employees who need retirement savings the most and the employers who are unable to offer retirement benefits.

III. By Design, CalSavers Supplements and Fills Gaps in ERISA Coverage in California, Rather Than Undermining or Conflicting With ERISA Plans.

A. CalSavers Does Not Contain an Impermissible "Reference to" ERISA Plans Because it Performs a Similar Interstitial Function to the Government Program That Withstood a Preemption Challenge in *Golden Gate.*

ERISA preempts all state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). This provision forbids states from requiring employers to establish or maintain an employee benefit plan and also preempts laws that contain an impermissible "connection with or reference to" such a plan. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 653 (1995). Appellees have fully explained why CalSavers is not an employee benefit plan and does not govern a matter of central plan administration that would impermissibly "relate to" ERISA plans. *See generally* Appellees' Brief, *Howard Jarvis Taxpayers' Ass'n, et al. v. Cal. Secure Choice Ret. Savings Prog., et al.*, No. 20-15591, at In addition, Appellees explain why there is no impermissible "reference to" an ERISA plan in the CalSavers Program. *Id.* at 19-25. This last point is particularly salient because the program's design specifically avoids interfering with ERISA plans.

Just as CalSavers fills a gap in the need for worker savings, it also fills a legal gap rather than intruding on ERISA's territory. By its express terms, it only operates where ERISA does not, applying only to employers that have no ERISA retirement plan. Cal. Gov't Code § 100032(b)-(d). Indeed, that was its intentional design. As a report created to gauge the feasibility of the program explained in 2016:

> If implemented, the Program would provide a voluntary, automatic-enrollment retirement savings plan for more than 6 million California workers *who currently lack access to retirement savings plans through their employers*. The Program would require private employers with five or more employees *not currently offering a retirement savings plan* to provide their employees access to, and payroll deductions for, Secure Choice retirement accounts.

Final Report to the California Secure Choice Retirement Savings Investment Board, https://bit.ly/3iyn8CZ (March 2016) at 5 (emphasis added).

This gap-filling function was one of the key features that convinced this Court to find that ERISA did not preempt a similarly structured healthcare-spending ordinance in *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639, 646 (9th Cir. 2008), on which the district court properly relied. As this Court explained in *Golden Gate*, "the Ordinance does not require employers to establish their own ERISA plans or to make any changes to any existing ERISA plans." *Id.* It simply required nondiscretionary payments to employees *without* sufficient healthcare coverage under an ERISA plan. *Id.* The literal mention of ERISA used to describe this gap-filling function was not enough to preempt the ordinance. *Id.* at 659 ("Where a law is fully functional even in the absence of a single ERISA plan . . . it does not make an impermissible reference to ERISA plans."). As the Supreme Court has recently reaffirmed, a state law does not make an impermissible reference to ERISA plans unless it it "acts immediately and exclusively upon ERISA plans ... or where the existence of ERISA plans is essential to the law's operation." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (citing *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 336 (1997)). CalSavers does neither of these.

B. CalSavers' Automatic Enrollment Feature Does Not Remove the Program From the 1975 Safe Harbor's Ambit Because the Ability to Freely Opt Out Makes the Program Completely Voluntary.

Under the Department of Labor's 1975 regulations, a state-funded IRA program is not preempted so long as (1) no contributions are made by the employer; (2) participation is completely voluntary for employees; (3) the employer does not "endorse" the program; and (4) the employer receives no consideration, other than reasonable compensation for services rendered, relating to the payroll deductions. 29 C.F.R. § 2510.3-2(d). The Appellees' brief explains thoroughly why this safe harbor applies to CalSavers. It is worth noting in addition, however, that notwithstanding its automatic enrollment feature, CalSavers is certainly "voluntary" under the definition that would apply in any other employment context as well as ERISA-specific circumstances.

"Voluntary" means "acting or done of one's own free will without valuable consideration" or "acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs." Webster's Third New International Dictionary, 2564 (1986). One salient example of how this definition applies to wages and benefits is the Fair Labor Standards Act ("FLSA"), which provides that an employer does not have to compensate an employee for "voluntary trainings." *See, e.g.*, *Lundy v. Catholic Health System of Long*

Island Inc., 711 F.3d 106, 112 (2d Cir. 2013) ("Time spent at training is not compensable . . . if attendance is voluntary . . . ."). DOL regulations interpreting the term "voluntary" for purposes of trainings under the FLSA confirm that only when an employee is "given to understand . . . that his present working conditions or the continuance of his employment would be *adversely affected* by nonattendance . . . attendance is not voluntary. *See* 29 C.F.R. § 785.28 (emphasis added). In other words, activities at work are "voluntary" if employees are not punished for refusing to participate in them. *Id.*

Case law has embraced the DOL's interpretation of "voluntary" under the FLSA. In *DeBraska v. City of Milwaukee*, 189 F.3d 650 (7th Cir. 1999), for example, the Seventh Circuit held that attendance at a police preliminary discipline hearing was voluntary because police who failed to appear did "not forfeit anything" and because the outcome of the hearing did not adversely affect working conditions or continuation of employment. *Id.* at 652-653; *see also Dade County, Florida v. Alvarez*, 124 F.3d 1385 (11th Cir. 1997), (off-duty physical training completed by police officers to maintain the physical fitness standards mandated by their employer was voluntary because the employer did not require any specific training). These cases demonstrate that in the employment context, an act is voluntary if it is uncompensated and uncoerced.

CalSavers easily falls within this definition of "voluntary" because employees are not compensated for participating in the program, nor are they penalized for non-participation. While automatic enrollment makes participation a default, employees are free to opt out without "forfeit[ing] anything" other than the opportunity to participate in the program. *DeBraska*, 189 F.3d at 652-53. Their employment conditions are not adversely affected, and they do not lose any compensation. The program's current approximately 33% opt-out rate demonstrates that employees can and do choose not to participate in the program if they do not want to do so. *Calsavers Retirement Savings Program Participation and Funding Snapshot*, https://bit.ly/35FRgsg (August 31, 2020). No negative consequences follow from that decision.

Accordingly, consistent with principles of voluntariness from other areas of employment law governing wages and benefits, the automatic enrollment feature does nothing to prevent CalSavers from falling within the 1975 Safe Harbor.

CONCLUSION

For the forgoing reasons, the Court should affirm the district court's decision dismissing the Complaints.

Respectfully submitted,

/s/ Dara S. Smith

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 4,839 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in Goudy Old Style 14-point font.

Dated: October 20, 2020

/s/ Dara S. Smith
Dara S. Smith

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on October 20, 2020 the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals of the Ninth Circuit using the appellate CM/ECF system which will send notice of such filing to all registered CM/ECF users.

Dated: October 20, 2020

/s/ Dara S. Smith
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