No. 20-15591

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD JARVIS TAXPAYERS ASSOCIATION, JONATHAN MARK COUPAL, and DEBRA A. DESROSIERS,

Plaintiffs-Appellants,

v.

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM and JOHN CHIANG, California State Treasurer,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of California, No. 2:18-cv-01584

BRIEF OF AMICI CURIAE ILLINOIS AND OREGON SUPPORTING DEFENDANTS AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICI STATES

The amici States of Illinois and Oregon submit this brief in support of Defendants-Appellees California Secure Choice Retirement Savings Program ("CalSavers") and California State Treasurer John Chiang (collectively, "California") pursuant to Federal Rule of Appellate Procedure 29(a)(2). The amici States urge this Court to affirm the decision of the district court, which correctly determined that CalSavers—a state-sponsored retirement savings program—is not preempted by the Employee Retirement Income Security Act ("ERISA").

The amici States have an interest in the proper resolution of this appeal because they too have implemented state-sponsored retirement savings programs for the benefit of their residents, as well as to protect the availability of state safety net programs. Illinois passed the Illinois Secure Choice Savings Program Act, *see* 820 ILCS 80/ *et seq.*, in 2015, and began a phased implementation of the Illinois Secure Choice Program in 2018.[1] At present, Illinois Secure Choice manages more than 71,000 funded accounts that have a combined $35 million in

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[1] Illinois Secure Choice, 2019 Annual Report, https://cdn.unite529.com/jcdn/files/ILU/pdfs/en_US/Final_SCAnnualReport.pdf.

assets.[2] Likewise, Oregon passed legislation creating the Oregon Retirement Savings Plan ("OregonSaves"), *see* Or. Rev. Stat. Ann. § 178.200 *et seq.*, in 2015. OregonSaves launched in 2017 and is slated to complete its phased rollout in 2021.[3] Currently, OregonSaves manages over 75,000 funded accounts with a total of $71 million saved since the program's inception.

These state-sponsored retirement savings programs, which mirror CalSavers in many material respects, provide tens of thousands of workers with an effective and secure way to save for retirement. And, as the district court rightly concluded, they have done so without interfering with ERISA or the operation of employee benefit plans. This Court should reject plaintiffs' flawed attempts to invalidate these legitimate and important programs.

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[2] Illinois Secure Choice, Monthly Dashboard (Sept. 2020), https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/secure%20choice%20monthly%20dashboard_september%202020.pdf.

[3] OregonSaves, Program Details, https://employer.oregonsaves.com/home/employers/program-details.html.

SUMMARY OF ARGUMENT

The American workforce faces a monumental retirement savings deficit that, if left unchecked, will devastate workers and their families for decades to come. One of the primary reasons behind this growing problem is that workers too often lack access to retirement savings programs through their employers. To address this problem, California created CalSavers, a state-sponsored retirement savings program available to those who work for employers that do not offer an employee benefit plan. Once enrolled, participants contribute to a Roth IRA account that is managed by CalSavers.

This program has been nothing short of a tremendous success with no discernible downside: tens of thousands of residents of California, as well as Illinois and Oregon, which have adopted similar programs, have already begun saving for retirement at little to no cost to their employers. Additionally, increased savings will lower the amount that these States spend on social safety net programs and reduce the number of retirees who live in poverty. Indeed, as one scholar has noted, of all the efforts undertaken over the past 25 years, "nothing currently in effect holds as much promise of working a dramatic breakthrough in coverage" for retirement savings as state-sponsored retirement savings programs like CalSavers.[4]

Moreover, as the district court rightly concluded, CalSavers is not preempted by ERISA because it is not an "employee benefit plan" under ERISA, nor does it "relate to" an ERISA plan. Doc. 50 at 13; *see also, e.g.*, Cal Br. at 15-16. Additionally, as California explains, CalSavers does not conflict with the objectives of ERISA by imposing inconsistent regulations on employers offering employee benefit plans or by interfering with plan operation. *See* Cal. Br. at 59-64. On the contrary, California made the policy choice to create an entirely separate retirement savings program that is provided and operated by the State at little to no cost to employers and provides a savings vehicle to employees who lack access to an employee benefit plan. In other words, California specifically chose *not* to regulate employee benefit plans or the employers offering them.

Illinois and Oregon, which enacted state-sponsored retirement savings programs based on similar policy choices, agree with California

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[4] J. Mark Iwry, *Observations on Coverage, CalSavers, and ERISA Preemption*, 33 Benefits L.J. 6, 8 (2020).

that CalSavers is not preempted by and does not interfere with the objectives of ERISA. The two States write separately, however, to highlight the growing retirement savings crisis facing their States and the ways in which state-sponsored retirement savings programs mitigate those negative outcomes. Indeed, Illinois and Oregon have designed their popular programs to facilitate worker participation and promote retirement savings, with a particular focus on groups that have historically lacked access to savings vehicles. Notably, they have done so with the support of employers, who report high satisfaction with the programs and little to no burden or cost throughout the registration and enrollment process. The district court's decision, which upheld the validity of these important programs, should be affirmed.

ARGUMENT

I. The American Workforce Faces A Significant Retirement Savings Shortfall Due In Part To A Retirement Savings Coverage Gap.

Most American workers do not have sufficient funds for retirement, as demonstrated by a number of different metrics. In 2015—the year that enabling legislation for Illinois Secure Choice and OregonSaves were enacted—the Employee Benefit Research Institute estimated "that the current American workforce will face an aggregate retirement savings shortfall of $4.13 trillion."[5] According to an analysis of U.S. Census Bureau data, "the median retirement account balance among all working individuals is $0.00," and "57% (more than 100 million) of working age individuals do not own any retirement account assets in an employer-sponsored 401(k)-type plan, individual account or pension."[6] Indeed, in 2019, only 52% of private-sector workers participated in a workplace retirement plan.[7]

One of the primary reasons that workers face a savings shortfall is that they do not have access to a retirement savings plan through their employer. In Illinois and Oregon, approximately 47 percent of private-

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[5] Pew Charitable Trusts, *How States Are Working to Address The Retirement Savings Challenge*, at 6 (June 2016), https://www.pewtrusts.org/~/media/assets/2016/06/howstatesareworkingtoaddresstheretirementsavingschallenge.pdf (citing Employee Benefit Research Institute, *Retirement Savings Shortfalls* (Feb. 2015)).

[6] National Institute on Retirement Security, *New Report Finds Nation's Retirement Crisis Persists Despite Economic Recovery* (Sept. 17, 2018), https://www.nirsonline.org/2018/09/new-report-finds-nations-retirement-crisis-persists-despite-economic-recovery/.

[7] Pension Rights Center, *How many American Workers participate in workplace retirement plans?* (July 15, 2019), http://www.pensionrights.org/publications/statistic/how-many-american-workers-participate-workplace-retirement-plans.

sector workers are not offered a retirement savings plan through their employer.[8] Nationally, 49 percent of private-sector workers between the ages of 21 and 64 do not have access to an employer-sponsored plan.[9] The number of Americans affected by this coverage gap is significant; according to one report, "55 million U.S. wage and salary workers between the ages of 18 and 64 lack access to an employer-related payroll deduction plan."[10] In California alone, there are 7.5

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[8] David John & Gary Koenig, *Fact Sheet: Illinois*, AARP Public Policy Institute (Aug. 2015), https://www.aarp.org/content/dam/aarp/ppi/2015-08/aarp-illinois-fact-sheet.pdf; David John & Gary Koenig, *Fact Sheet: Oregon*, AARP Public Policy Institute (Aug. 2015), https://www.aarp.org/content/dam/aarp/ppi/2015-08/aarp-oregon-fact-sheet.pdf;

[9] Jennifer Erin Brown *et al.*, *Retirement in America: Out of Reach for Working Americans?*, National Institute on Retirement Security (Sept. 2018), https://www.nirsonline.org/wp-content/uploads/2018/09/SavingsCrisis_Final.pdf.

[10] AARP Public Policy Institute, *Achieving Economies of Scale in State-Facilitated Retirement Savings Programs* (June 2019), https://www.aarp.org/content/dam/aarp/ppi/2019/06/achieving-economies-of-scale-in-state-facilitated-retirement-savings-programs.doi.10.26419-2Fppi.00065.001.pdf (citing David John & Gary Koenig, *Workplace Retirement Plans Will Help Workers Build Economic Security*, AARP Public Policy Institute (2014)).

million workers who lack access to an employer-sponsored retirement savings plan.[11]

This coverage gap disproportionately affects younger workers, women, people of color, and those with low or moderate incomes.[12] Additionally, the coverage gap is further exacerbated for those employed by small businesses. According to Brookings, "[o]nly about 14 percent of businesses with 100 or fewer employees offer their employees a retirement plan."[13] In other words, "between 51 and 71 percent of the roughly 42 million people who work for a small business" do not have access to an employer-administered retirement plan.[14]

When employees are offered retirement savings options, they are more likely to build wealth. According to one study, "workers are 15

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[11] Lorie Konish, *California is the latest state to help millions of workers join retirement savings plans*, CNBC (July 1, 2019), https://www.cnbc.com/2019/07/01/california-is-the-latest-state-to-help-millions-join-retirement-plans.html.

[12] David C. John & William C. Gale, *Structuring State Retirement Saving Plans*, Brookings Institute, at 2 (Oct. 7, 2015), https://www.brookings.edu/research/structuring-state-retirement-saving-plans-a-guide-to-policy-design-and-management-issues/.

[13] *Id.* (citing Statement of Charles A. Jeszeck, *Retirement Security: Challenges and Prospects for Employees of Small Businesses*, Government Accountability Office (July 16, 2013)).

[14] *Id.*

times more likely to save for retirement if they have access to a payroll deduction savings plan at work."[15] And in 2014, another study found that while "62 percent of employees with access to an employer-sponsored plan held more than $25,000 in savings balances and 22 percent had $100,000 or more," only 6 percent of those without access to a plan held more than $25,000 and 3 percent held more than $100,000.[16]

Increasing retirement savings among younger workers is especially important given the other financial challenges that retirees can now expect to face, including being saddled with debt when entering retirement. According to a 2015 report, approximately 80 percent of baby boomers (who are now entering retirement) still hold debt, as compared with 56 percent of the "silent generation" retirees born between 1928 and 1945.[17] As baby boomers "approached retirement in

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[15] Catherine Harvey, *Access to Workplace Retirement Plans by Race and Ethnicity*, AARP Public Policy Institute (Feb. 2017), https://www.aarp.org/content/dam/aarp/ppi/2017-01/Retirement%20Access%20Race%20Ethnicity.pdf.

[16] *Structuring State Retirement Saving Plans*, *supra* note 12.

[17] Pew Charitable Trusts, *The Complex Story of American Debt*, at 2 (July 2015), http://www.pewtrusts.org/~/media/Assets/2015/07/ Reachof-Debt-Report_ARTFINAL.pdf?la=en.

2013, they carried nearly double the housing debt that the silent generation held at that same age."[18] In other words, "older generations are increasingly carrying debt into retirement."[19] In addition to an increased debt load, Americans at the precipice of retiring are less likely to participate in defined benefit plans than older generations and are more likely to have lost money in the stock market or in the value of their homes during the Great Recession.[20] And now, American workers are feeling the economic consequences of the Covid-19 pandemic, as nearly one third have withdrawn funds from their retirement or other savings accounts to pay their bills.[21]

If these trends continue, many Americans will experience a decline in their standard of living once they reach retirement. According to the Center for Retirement Research's National Retirement

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[18] *Id.* at 7.

[19] *Id.* at 1.

[20] Alana Semuels, *This Is What Life Without Retirement Savings Looks Like*, The Atlantic (Feb. 22, 2018), https://www.theatlantic.com/business/archive/2018/02/pensions-safety-net-california/553970/.

[21] Kim Parker *et al.*, *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, Pew Research Center (Sept. 24, 2020), https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.

Risk Index, "the proportion of households facing a decline in their standard of living in retirement increased from 30 percent in 1989 to 52 percent in 2013."[22] A 2012 study projects that "30 to 40 percent of late boomers"—individuals who were born between 1956 and 1965—"may be unable to maintain their preretirement living standards at age 70."[23]

Financial insecurity in retirement often leads to an inability to afford food, medicine, or utilities.[24] A lack of savings can also affect housing; indeed, in 2016, "nearly half of all single homeless adults were aged 50 and older, compared with 11 percent in 1990."[25] These effects are particularly pronounced in minority communities, as economic insecurity impacts retirees of color more than white retirees.[26]

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[22] *How States Are Working to Address The Retirement Savings Challenge*, *supra* note 5, at 6.

[23] Melissa M. Favreault, *et al.*, *Boomers' Retirement Income Prospects*, Urban Institute, at 2 (Feb. 2012), http://www.urban.org/uploadedpdf/412490-boomers-retirement-income-prospects.pdf.

[24] *See, e.g.*, National Conference of State Legislatures, *State-Facilitated Retirement Savings Programs for Private Sector Workers* (Sept. 26, 2018), https://www.ncsl.org/research/fiscal-policy/state-facilitated-retirement-savings-programs-for-private-sector-workers.aspx.

[25] Semuels, *supra* note 20.

[26] *How States Are Working to Address The Retirement Savings Challenge*, *supra* note 5, at 6.

Furthermore, individuals facing financial insecurity often depend on state social safety net programs to provide housing, food, and other essentials.[27] And although increased reliance on these programs by those who lack retirement savings may strain state budgets in the future, studies show that modest increases in retirement savings will meaningfully reduce the amount that States spend on these programs. A 2017 AARP report, for instance, estimates that if low-income retirees in California, Illinois, and Oregon were to increase the income produced by retirement savings by $1,000 per year, those States would save $1.4 billion, $140 million, and $240 million, respectively, in public assistance between 2018 and 2032.[28]

Indeed, when enacting CalSavers, the California legislature found that "the lack of sufficient retirement savings poses a significant threat to the state's already strained social safety net programs and also threatens to undermine California's fiscal stability and ongoing

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[27] *Id.* at 7.

[28] William Shiflett & Catherine Harvey, *California Could Save $1.4 Billion by Helping People Save for Their Own Retirement*, AARP Public Policy Institute (May 2017), https://www.aarp.org/content/dam/aarp/ppi/2017/04/AARP1150_FS457_California_May1v2.pdf.

economic recovery."[29] Similarly, the Oregon Retirement Savings Task Force recommended in a 2014 report that the legislature take action to address the retirement savings shortage, warning that "[i]mproving participation as soon as possible is critical."[30] In short, the lack of retirement savings threatens serious financial harm to American workers and the stability of state safety net programs if these trends are not reversed.

II. State-Sponsored Retirement Savings Programs Promote Retirement Savings And Minimize The Coverage Gap Without Burdening Employers.

Against this backdrop, Illinois, Oregon, and California created state-sponsored retirement savings programs designed to reduce the retirement savings coverage gap and promote retirement savings.[31] These States understand that taking such measures is critical to

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[29] See California Senate Bill 1234, Chapter 734, Section 1(c).

[30] Report and Recommendations of the Oregon Retirement Savings Task Force, at 13 (2014), https://olis.leg.state.or.us/liz/2013I1/Downloads/ CommitteeMeetingDocument/40906.

[31] *See, e.g.*, 820 ILCS 80/10 (establishing Illinois Secure Choice "for the purpose of promoting greater retirement savings for private-sector employees in a convenient, low-cost, and portable manner"); Cal. Gov. Code § 100004 (establishing CalSavers "for the purpose of promoting greater retirement savings for California private employees in a convenient, voluntary, low-cost, and portable manner").

mitigate the retirement savings crisis that awaits workers, their families, and the States if the current trends continue unabated.

To accomplish these goals, the States have incorporated numerous features shown to increase retirement savings and participation rates, including by expanding access to groups that have historically not had access to retirement savings programs, automatically enrolling employees at participating employers, and providing default investment options to make the savings process simple and seamless. Employees always retain full control over their accounts and can opt-out or change their investment options or savings rates at any time.

Early reports confirm not only that these measures are effective, but also that they have been implemented without burdening employers. Indeed, employers have indicated their satisfaction with the state-sponsored retirement savings vehicle and its ease of operation. All told, these state-sponsored programs provide much-needed benefits to American workers and the States at little to no burden to employers.

A. State-sponsored retirement savings programs close the coverage gap and facilitate retirement savings among workers who have historically lacked access to employer-sponsored plans.

In response to the retirement savings deficit facing their residents, Illinois, Oregon, and California created Illinois Secure Choice, OregonSaves, and CalSavers, respectively. These programs include a number of carefully calibrated features designed to reduce the retirement savings deficit, eliminate the coverage gap, and lessen retirees' reliance on social safety net programs.

To begin, CalSavers, Illinois Secure Choice, and OregonSaves focus on workers who lack access to an employer-sponsored retirement plan. As discussed, access to retirement savings vehicles is often the primary reason that individuals lack retirement savings, let alone sufficient savings. By the same token, "[i]ncreasing access to retirement savings plans has proved to be one of the most effective ways" to boost retirement savings.[32]

Consistent with these principles, these programs require, with certain exceptions, that employers without qualified retirement

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[32] *How States Are Working to Address The Retirement Savings Challenge*, *supra* note 5, at 22.

programs facilitate employee participation in the state-sponsored retirement savings program. *See* Cal. Gov. Code § 100000; 820 ILCS 80/60(a), 80/5; Or. Rev. Stat. Ann. § 178.210(1)(b). In other words, all employees who have historically lacked access to an employer-based plan will now be able to save for retirement as part of a state-sponsored savings vehicle.

The availability of these programs has already had a significant impact: in less than three years, more than 175,000 workers have opened a retirement savings account through CalSavers, Illinois Secure Choice, or OregonSaves, and these programs currently manage more than $115 million in combined assets.[33] In other words, these programs "prove[ ] that individuals will save if provided the vehicle."[34]

The early results also show that certain demographic groups that have historically not invested in retirement accounts—whether due to

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[33] *See supra* pp. 1-2; CalSavers, CalSavers Retirement Savings Program Participation & Funding Snapshot (Oct. 12, 2020), https://www.treasurer.ca.gov/calsavers/meeting/2020/20201019/staff/2a.pdf.

[34] Betsy Gardner & Stephen Goldsmith, *Innovating for Equity: Anti-Poverty Nudges in California*, Harvard Kennedy School (Nov. 19, 2019), https://datasmart.ash.harvard.edu/news/article/innovating-equity-anti-poverty-nudges-california.

lack of access or for other reasons—are taking advantage of these programs. For instance, the 2019 Illinois Secure Choice Annual Report reveals that younger employees are participating in the programs in high numbers; indeed, nearly 40 percent of all contributions had been deposited in funds targeting retirement years between 2050 and 2065.[35] Early data out of Oregon likewise shows that the participants "are more likely to be younger."[36] Providing younger workers with a vehicle to save for retirement is a particularly important component of reducing the retirement savings deficit, as those workers will benefit from decades of returns on their initial contributions.

On a similar note, employers in sectors that have traditionally not provided benefits to employees are utilizing these programs. In Illinois, more than 80 percent of employers that have signed up for Illinois Secure Choice are in the service industry, with a particular concentration in the leisure and hospitality sector. Extending

[35] 2019 Annual Report, *supra* note 1.

[36] Tobias Read, *"Work Hard. Save Easy." The OregonSaves Retirement Program is Off to a Promising Start* (Nov. 2018), https://cri.georgetown.edu/work-hard-save-easy-the-oregonsaves-retirement-program-is-off-to-a-promising-start/.

retirement savings opportunities to employees in these sectors—which have traditionally offered lower-wage, higher-turnover jobs—will go a long way toward reducing the coverage gap.[37]

Additionally, all three of the state programs automatically enroll employees who work for eligible employers, although employees are able to opt out at any time (as many do). *See* Cal. Gov. Code § 100032(f); 820 ILCS 80/10; Or. Rev. Stat. Ann. § 178.210(1)(c). This feature is very popular with employees. A recent Pew survey of employees at small and midsize employers that lack access to retirement plans found that employees had "largely positive responses" to the automatic enrollment feature.[38] The survey also found that the vast majority of employees would participate in a state-sponsored program; indeed, only 13 percent of participants indicated that they

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[37] Woodstock Institute, *Coming Up Short: The Scope of Retirement Insecurity Among Illinois Workers*, at 6 (Sept. 2012), https://woodstockinst.org/wp-content/uploads/2015/01/comingupshort_sept2012_cowan_0.pdf.

[38] Pew Charitable Trusts, *Worker Reactions to State-Sponsored Auto-IRA Programs* (Oct. 5, 2017), https://www.pewtrusts.org/en/research-and-analysis/reports/2017/10/worker-reactions-to-state-sponsored-auto-ira-programs.

would opt out.[39] Notably, any "[d]ifferences in attitudes across demographic groups" were minimal.[40] As researchers have noted, broad support for state-sponsored programs suggests that such programs "could help shrink gaps in availability and enrollment in retirement savings programs."[41]

One reason that this feature is so popular among employees is that it makes retirement savings programs more accessible by eliminating the range of barriers employees may face in attempting to identify and sign up for a plan, such as inertia and paperwork.[42] By making the process easier for employees, automatic enrollment "has two effects: participants join sooner, and more participants join eventually."[43] The initial data from OregonSaves supports these

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Pew Charitable Trusts, *Automatic Enrollment Can Boost Retirement Plan Participation* (Aug. 15, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/15/automatic-enrollment-can-boost-retirement-plan-participation.

[43] Richard H. Thaler & Shlomo Benartzi, *The Behavioral Economics of Retirement Savings Behavior*, AARP Public Policy Institute, at 2 (Jan. 2017), https://assets.aarp.org/rgcenter/econ/2007_02_savings.pdf.

conclusions. During the first two phases of Oregon's pilot program, there was a 71% initial participation rate among employees, which grew to 80% within the first six months.[44] Although many Oregonians have participated in OregonSaves, this data further confirms that there is no imperative for employees to do so; consistent with the program's design, employees who are not interested in participating can, and do, opt-out.

Research also shows that participation increases when programs are structured to minimize the number of decisions that participants must make.[45] CalSavers, Illinois Secure Choice, and OregonSaves incorporate this principle by creating default savings rates and default investment options. Although the default rates and investment options differ slightly among the programs, workers who maintain the default options will ultimately have their contributions deposited in target date

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[44] John Scott & Andrew Blevins, *Early Participation Levels for Oregon Retirement Savings Program Indicate Promising Start* (Mar. 13, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/03/13/early-participation-levels-for-oregon-retirement-savings-program-indicate-promising-start.

[45] *See, e.g.*, John & Gale, *supra* note 12, at 2.

funds that adjust the investment risk depending on the person's estimated age of retirement.[46]

Data confirms that the default savings rate selected by the States "is generally acceptable to savers and that most people tend to stick with default settings."[47] In California and Illinois, for instance, the average contribution rate among participants is 5.02 percent, which closely tracks the 5 percent default rate.[48] And in Oregon, the data shows that workers are saving at an average rate of 5.2 percent, which is slightly higher than the 5 percent default rate.[49] Had the default rate been too high or too low, participants would have made necessary changes.

If participants decide to change the default settings, however, they may select among a variety of investment options. In Illinois, for instance, participants may invest in target date retirement funds,

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[46] Pew Charitable Trusts, *State Efforts Could Help Alleviate Effects of Volatility in Economy Roiled by Coronavirus* (Apr. 2, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/04/02/state-efforts-could-help-alleviate-effects-of-volatility-in-economy-roiled-by-coronavirus; 2019 Annual Report, *supra* note 1.

[47] Gardner & Goldsmith, *supra* note 34.

[48] *Id.*; Monthly Dashboard, *see supra* note 2.

[49] Read, *supra* note 36.

growth funds, conservative funds, or capital preservation funds.[50] In California, participants are able to choose from target date retirement funds, money market funds, core bond funds, global equity funds, and a sustainable balanced fund.[51] And in Oregon, participants may elect to contribute to a capital preservation fund, a growth fund, or one of the target retirement funds.[52] All of the funds, however, are available at low cost to participants.[53]

Given these program features, residents who have contributed to these programs are better able to withstand financial downturns like the current recession. In a recent report, Pew has noted that although "the pandemic-induced downturn is affecting retirement plan investments," state-sponsored retirement programs "may help savers weather market volatility and provide some cushion in the face of

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[50] Illinois Secure Choice, Investments, https://saver.ilsecurechoice.com/home/savers/investments.html.

[51] CalSavers, Investment Options For How You Want To Save, https://saver.calsavers.com/home/savers/investments.html.

[52] OregonSaves, OregonSaves Investment Options, https://saver.oregonsaves.com/home/savers/investments.html.

[53] 820 ILCS 80/30(m); Read, *supra* note 36; *CalSavers*, Frequently Asked Questions, https://www.calsavers.com/home/frequently-asked-questions.html.

economic shocks."[54] Indeed, these programs are structured to encourage participants to make initial contributions in funds that present minimal risk, as discussed. And those facing a cash flow shortage can withdraw contributions from their accounts without penalty.[55] Finally, participants may be eligible for a tax credit up to $1,000 through the Retirement Savings Contributions Credit.[56]

In sum, state-sponsored retirement savings programs are tailored to close the coverage gap, promote retirement savings, and provide a beneficial investment product to participants. The early data confirm that these programs are delivering in each of these areas. And, as now explained, they are able to effectuate these significant benefits without burdening employers.

B. State-sponsored retirement savings programs impose minimal to no burden on employers.

A critical component of state-sponsored retirement savings programs is the requirement that employers facilitate employee

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[54] *State Efforts Could Help Alleviate Effects of Volatility in Economy Roiled by Coronavirus*, *supra* note 46.

[55] *Id.*

[56] *Id.*

contributions through their payroll systems. As discussed, this feature expands access to employees who have historically not saved for retirement, thus reducing the coverage gap. Equally important to the programs' success, however, is accomplishing these goals without burdening employers. As now explained, the programs created by the States have imposed, at most, only minimal burdens on employers.

As an initial matter, employers are not required to create, maintain, or operate the programs, as California explains in its brief. *See, e.g.*, Cal. Br. at 20-22, 33-36. On the contrary, the States have created boards to oversee the programs, hired investment managers responsible for the funds, and program administrators to provide all recordkeeping and customer service support for participating employees. *See* Cal. Gov. Code § 100002; 820 ILCS 80/15, 80/30; Or. Rev. Stat. Ann. § 178.210. Additionally, employers pay no fees and are not allowed to contribute financially to the programs in any way.[57] Instead, all that employers are required to do is register with the programs, provide employee information to the program for enrollment

[57] *See, e.g.*, Illinois Secure Choice, Frequently Asked Questions, Fees and Costs, https://www.ilsecurechoice.com/home/faq.html.

purposes, and "process the employee contributions through payroll deductions."[58] As one commentator put it, this is not "onerous"; employers "are already making payroll deductions," so it is "simply a matter of filling in one more box."[59]

Participating employers have expressed satisfaction with the state-sponsored programs. A survey of employers in OregonSaves reported that "nearly three quarters" had a "positive or neutral experience with OregonSaves when asked about both the registration and ongoing facilitation of the program."[60] Similarly "[h]igh percentages" reported not "feel[ing] burdened"; indeed, 76 percent responded that they were satisfied or felt neutral about the time it took them to register their business and 82 percent were satisfied or felt

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[58] John Scott & Mark Hines, *Employers Express Satisfaction With New Oregon Retirement Savings Program* (July 30, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/07/30/employers-express-satisfaction-with-new-oregon-retirement-savings-program.

[59] *What others are saying: Illinois Secure Choice a rare state win-win*, Associated Press (July 29, 2018), https://herald-review.com/what-others-are-saying-illinois-secure-choice-a-rare-state-win-win/article_f15f2a40-b0d3-5e22-85ef-af3cd91f5c92.html.

[60] John Scott & Mark Hines, *supra* note 58.

neutral about the customer service they received from OregonSaves throughout the process.[61]

During the pilot program in California, the Executive Director of CalSavers Investment Board and her team visited small business owners across the State to discuss their experiences with CalSavers.[62] Most of the feedback they received was "very positive," and the CalSavers team was able to address any issues that were reported by making "small tweaks necessary to improve the process."[63]

Feedback in Illinois has also been positive. A Chicago property management company, for instance, reported that "[o]ther than time spent on getting herself and employees up to speed, and adding a deduction to state payroll tax paperwork, there was no cost to implement the plan."[64] An officer manager at a Chicago-based restaurant similarly found that it was "extremely easy to set up. It's

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[61] *Id.*

[62] Gardner & Goldsmith, *supra* note 34.

[63] *Id.*

[64] Lynn Marek, *Deadline looms for smaller firms to provide employee savings plan*, Crain's Chicago Business (Oct. 25, 2019), https://www.chicagobusiness.com/news/deadline-looms-smaller-firms-provide-employee-savings-programs.

just a matter of downloading and uploading. You can do it while you're eating your sandwich."[65]

In many cases, the reason that employers are unable to provide their own retirement savings program is due to cost, administrative burden, or the potential fiduciary liability associated with sponsoring their own plan, and not a desire to withhold benefits from their employees.[66] As one employer explained, although his business is successful, it does not yield sufficient profits to sustain his own retirement savings program.[67] But when OregonSaves was made available, he joined immediately and was able to register his employees "in 10 minutes."[68] Those employees have collectively saved more than $56,000 over an 18-month period.[69] Likewise, an Illinois employer that registered for Illinois Secure Choice noted: "If, while people work for us,

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[65] Employer Testimonials, *Secure Choice – The Dearborn Restaurant*, at 2:00, available at https://www.youtube.com/watch?v=jCgxAkfcXcE.

[66] Gardner & Goldsmith, *supra* note 34.

[67] Alessandra Malito, *Don't have a 401(k)? State governments have a retirement plan for you*, Market Watch (Oct. 29, 2018), https://www.marketwatch.com/story/dont-have-a-401k-state-governments-have-a-retirement-plan-for-you-2018-10-0.

[68] *Id.*

[69] *Id.*

we can do something to help them think about retirement, that's a win."[70]

All told, state-sponsored retirement savings programs secure significant benefits for employees at little to no cost to their employers. It is thus unsurprising that employers report high levels of satisfaction with these programs and that their employees participate in high numbers.

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[70] Anne Tergesen, *States Boost Access to Retirement Plans, Seeking to Close Savings Gap*, Wall Street Journal (Dec. 8, 2018), https://www.wsj.com/articles/states-boost-access-to-retirement-plans-seeking-to-close-savings-gap-1544284801.

CONCLUSION

For these reasons, this Court should affirm the district court.

RESPECTFULLY SUBMITTED this 20th day of October 2020.

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FOR THE NINTH CIRCUIT

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