No. 21-558

In the Supreme Court of the United States

HOWARD JARVIS TAXPAYERS ASSOCIATION, *et al.*,
Petitioners,

v.

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

California's CalSavers Retirement Savings Trust Act and its implementing regulations require certain employers to provide the State with employees' names, dates of birth, and contact information, so the State can make available to those employees a state-administered Individual Retirement Account savings program that is funded by employee paycheck-deductions. Employers that offer another tax-qualified retirement plan are exempt from the statute. The question presented is:

Whether the CalSavers Retirement Savings Trust Act is preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA).

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STATEMENT

1. In 2016, California enacted the CalSavers Retirement Savings Trust Act. Cal. Gov't Code §§ 100000 *et seq*. The Act responded to concerns that many California workers did not have convenient ways to save for retirement.[1] The lack of retirement savings, in turn, posed future risks to retirees and public safety-net programs.[2] To address those concerns, the Act created an individual retirement savings program, known as CalSavers. Pet. App. 4. CalSavers, as established by the Act and its implementing regulations, *see* Cal. Code Regs. tit. 10, §§ 10000 *et seq.*, is a state-administered program for workers to establish Individual Retirement Accounts (IRAs) funded by voluntary deductions from their paychecks. Pet. App. 4.

The CalSavers statute applies to those who work in California for an "eligible employer." Cal. Gov't Code § 100032. An eligible employer is an employer that has five or more California employees, at least one of whom is at least 18 years old, and has no tax-qualified retirement program. *Id.* § 100000(d)(1), (3); *id.* § 100032(g)(1); Cal. Code Regs. tit. 10, §§ 10001(a), 10000(m). The tax-qualified retirement savings plans that exempt employers from CalSavers include defined-benefit plans, 401(k) plans, "Simplified Employee Pension" plans, "Savings Incentive Match Plan for Employees" plans, and automatic enrollment payroll deduction IRAs. Cal. Code Regs. tit. 10, § 10000(z). To determine whether an employer has

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[1] *See* Rep. of Assem. Comm. on Lab. & Emp., S.B. 1234, at 3-4 (June 18, 2012); ER 440.

[2] *See* Assem. Comm. Rep. 4; Sen. Rules Comm., Floor Analysis, S.B. 1234, at 10 (Aug. 29, 2012).

five or more employees, the State reviews the employer's unemployment insurance reports, and notifies employers who appear to be covered. *Id.* § 10001(a).

The Legislature intended CalSavers to be "a state-administered program." Cal. Gov't Code § 100034(b). The Act therefore requires that CalSavers be "established," "designed," and "operated," *id.* § 100012(a), by a nine-member board, consisting of the state Treasurer, the state Controller, and seven other governmentally appointed officials, *id.* § 100002(a)(1). The Board is responsible for all program operations. It determines the program's "investment policy," "objectives," and "procedures," *id.* § 100002(e)(2); selects and monitors its investment managers and trustee, *id.* § 100002(f); and selects and monitors all vendors, *id.* §§ 100016-100030.[3]

CalSavers sends information packets, disclosures, and opt-out forms directly to eligible workers, without using employers as intermediaries. *See* Cal. Code Regs. tit. 10, § 10004(a). Correspondingly, workers communicate directly with CalSavers if they wish to opt out, change their withholding rate, or choose a particular type of IRA or investment. *Id.* §§ 10004(d), 10005; Cal. Gov't Code § 100032(f)(1). Workers who do not communicate such instructions are enrolled in CalSavers, with a Roth IRA and an initial withholding rate of 5 percent. Cal. Code Regs. tit. 10, § 10005. CalSavers also processes any subsequent requests by workers to stop making contributions, alter their con-

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[3] Under 26 C.F.R. § 1.408-2(b) and (e), the Board must administer the program through a bank or through a non-bank trustee approved by the Internal Revenue Service. *See* Cal. Gov't Code § 100043(a), (b)(1)(B) (requiring CalSavers to comply with IRA requirements under federal law).

tribution rates, change investments, or take distributions from their IRAs. *Id.* §§ 10004(d), 10005(b). Each pay period, CalSavers receives from the employers of enrolled workers the appropriate percentage of each worker's paycheck, which CalSavers deposits into the workers' IRAs. Like participants in other IRAs, a CalSavers participant may withdraw money or transfer the account to a non-CalSavers IRA at any time. *See generally* IRS Pub. 590-B, at 7, 30; *see also* 26 U.S.C. §§ 408(d), 408A(d), (e).

California employers have certain responsibilities that facilitate the administration of the program. If CalSavers notifies an employer that its unemployment insurance reports show the requisite number of California employees, the employer must register with CalSavers unless it has a tax-qualified plan. Cal. Code Regs. tit. 10, § 10002; Cal. Gov't Code § 100032(g)(1). After registering, a covered employer must provide CalSavers with basic identifying and contact information for employees. Cal. Code Regs. tit. 10, § 10003(a), (b).[4] Employees may opt out of the program—but for any employee who does not, CalSavers will direct the employer to deduct from that employee's paycheck and remit to CalSavers a specific percentage of that employee's earnings each payroll period. *Id.* § 10003(c). Many California employers do not have to take all (or any of) these steps: Employers that have a tax-qualified retirement plan covering any employee in or out of California, or that do not have such a program but have fewer than five employees in

[4] *See* Cal. Code Regs. tit. 10, § 1003(a) (requiring employer to provide name, social security number, birth date, and contact information). Once received from the employer, the information is subject to the protections of the California Information Practices Act, Cal. Civ. Code §§ 1798 *et seq.*

California, do not need to do anything at all. Employers who have registered with CalSavers and provided employee information, but whose employees have all informed CalSavers of their desire to opt out of the program, do not need to implement paycheck deductions.

2. a. Petitioners are the Howard Jarvis Taxpayer Association (Howard Jarvis), a nonprofit association dedicated to the assertion of taxpayer interests, and two of its employees. C.A. E.R. 355 (First Am. Compl.). Petitioners allege that Howard Jarvis has between five and eight employees but no tax-qualified retirement plan, and that Howard Jarvis itself and some of its members will be subject to the CalSavers statute. *Id.*[5] Petitioners assert that "CalSavers is an ERISA plan and/or set of ERISA plans," and that no safe-harbor regulation applies. *Id.* at 357, 359-361. Petitioners seek a declaratory judgment that CalSavers violates 29 U.S.C. § 1144(a), the ERISA preemption provision. *Id.* at 359. The individual petitioners, asserting taxpayer-standing under state law, also seek an order enjoining CalSavers from "wasting taxpayer funds." *Id.* at 364-365.

b. The district court dismissed petitioners' original complaint, *see* Pet. App. 57-79, and later dismissed their amended complaint, *see id.* at 37-56. The court determined that Howard Jarvis had individual standing to assert its own rights as an employer subject to CalSavers, but not associational standing to assert its

[5] Although the CalSavers statute was passed in 2016, *see supra* p. 1, employers of Howard Jarvis's size will not be subject to CalSavers' requirements until June 2022, *see* Cal. Code Regs. tit. 10, § 10002(a)(3).

members' rights, and that the individual petitioners lacked standing altogether.[6] It then held that Howard Jarvis's preemption claim failed on the merits.

The court first addressed petitioners' argument that the CalSavers statute was preempted because CalSavers was itself an ERISA plan. Pet. App. 46-51. The court agreed with petitioners that a 1975 Department of Labor safe-harbor regulation for certain IRAs, 29 C.F.R. § 2510.3-2, did not itself exempt CalSavers from treatment as an employee benefit plan subject to ERISA. Pet. App. 47 n.5. But the court reasoned that the 1975 regulation was irrelevant because CalSavers did not meet the statutory definition of an employee benefit plan to begin with. *Id.* at 47-51. CalSavers could be an ERISA employee benefit plan only if it was "'established or maintained by an employer.'" *Id.* at 47 (quoting 29 U.S.C. § 1002(2)(A)(i)). It did not meet that definition, however, because CalSavers was established and maintained by the State. *Id.* at 49-51.

The court next concluded that California's statute was not preempted as a law "'relat[ing] to'" employee benefit plans covered by ERISA. Pet. App. 51 (quoting 29 U.S.C. § 1144(a)); *see id.* at 51-54. In that regard, the court explained, CalSavers did not "reference" ERISA plans or risk "interfer[ing] with existing

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[6] *See* Pet. App. 46 n.4 ("individuals cannot assert taxpayer standing to gain access to Federal Court."); *id.* at 70 (individual petitioners lacked standing because they were "not yet participating in an ERISA plan, and their potential injuries, if any, are too remote to confer standing"); *id.* at 70-71 (Howard Jarvis lacked associational standing but had standing as an eligible employer under the program). The court also declined to exercise supplemental jurisdiction over the state-law taxpayer-standing claim, after it concluded that that petitioners' federal preemption claim failed on the merits. *Id.* at 55 n.16.

ERISA or retirement plans provided by actual employers." *Id.* at 52. Nor did CalSavers have an impermissible "connection with" ERISA plans or impose "additional burdens or requirements" on them. *Id.* at 53-54.

3. The court of appeals affirmed, in a unanimous opinion authored by Judge Bress. Pet. App. 1-36.

The court began by addressing petitioners' arguments concerning the 1975 safe-harbor regulation and a 2016 safe-harbor regulation that was later disapproved by Congress under the Congressional Review Act. Pet. App. 12-17. The court reasoned that, if CalSavers did not meet the statutory definition of an employee benefit plan, then there was no need to determine whether the 1975 regulation applied to it: because that regulation did not alter the statutory definition of "employee benefit plan," "'[t]he fact that a plan is not excluded from ERISA coverage by this regulation does not compel the conclusion that the plan is an ERISA plan.'" *Id.* at 16 (citing, *e.g., Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.3d 460, 463 (10th Cir. 1997), and *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir. 1995)).

As to the 2016 regulation, the court noted that the regulation would have "obviated or made easier" the preemption question of whether ERISA applied, by stating categorically that programs like CalSavers are not ERISA employee benefit plans. Pet. App. 15. The 2016 regulation would have "automatically exempt[ed]" certain state-run IRA programs from ERISA coverage, eliminating the need to conduct a more detailed preemption analysis. *Id.* By eliminating the safe harbor, Congress left the preemption question subject to ERISA's statutory test alone. But

Congress did not go further: "Nothing about the repeal forecasts any answer, much less any definitive answer," to the statutory question "whether ERISA preempts programs like CalSavers." *Id.* That question had to be resolved based on ERISA itself. *Id.*

Proceeding to that task, the court of appeals noted that the Supreme Court "has identified 'two categories of state laws that ERISA pre-empts.'" Pet. App. 18 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). First, it preempts state laws that impermissibly make "reference to" an employee benefit plan as defined by ERISA. *Id.* Second, it preempts state laws that have impermissible "connection[s] with" ERISA employee benefit plans—such as laws governing central matters of plan administration or interfering with plans' nationally uniform administration. *Id.*

The court of appeals first considered whether CalSavers "creates an ERISA plan," reasoning that if it does "then it almost certainly makes an impermissible reference to an ERISA plan." Pet. App. 18 (internal quotation marks omitted). The court noted that ERISA defines an "employee benefit plan" as one "'*established or maintained by an employer*.'" *Id.* at 19 (quoting 29 U.S.C. § 1002(2)(A)). CalSavers does not fit that definition because it is established and maintained by the State, not by employers. *Id* at 25. Nor are the State's actions in regard to CalSavers done "'indirectly in the interest of an employer.'" *Id.* at 21 (quoting 29 U.S.C. § 1002(5)). CalSavers does not "represent employers in any relevant sense" and "employers have no say over how CalSavers is operated." *Id.* at 21-22. Employers' ministerial "administrative duties" under the program were not "the type of conduct that ERISA seeks to regulate." *Id.* at 25-26. The court observed that "'[m]any federal, state and local

laws, such as income tax withholding, social security, and minimum wage laws, impose similar administrative obligations on employers; yet none of these obligations constitutes an ERISA plan.'" *Id.* at 26-27.

The court of appeals next addressed "whether CalSavers otherwise 'relates to' ERISA benefit plans because it has a forbidden 'reference to' or 'connection with' such plans," and held that it does not. Pet. App. 29. CalSavers "does not regulate ERISA plans or the benefits provided under them." *Id.* at 30; *see id.* ("If an employer has an existing ERISA plan or later chooses to adopt one, CalSavers has nothing to say about those plans or their administration."). And although an employer's existing tax-qualified ERISA plan can provide a basis for an exemption from CalSavers, the court concluded that a finding of preemption could not be based on that connection without engaging in the sort of "'uncritical literalism' that the Supreme Court has rejected in interpreting ERISA's preemption provision." *Id.* at 32 (quoting *Gobeille v. Liberty Mut. Ins. Corp.*, 577 U.S. 312, 319 (2016)). Indeed, it would be a "strange result" if CalSavers' "effort to wall off ERISA plans from its ambit could somehow turn out to be the very feature that leads to preemption." *Id.*[7]

Petitioners' request for rehearing en banc was denied, with no judge requesting a vote. Pet. App. 80.

ARGUMENT

The court of appeals correctly rejected petitioners' preemption challenge. CalSavers is not an "employee

[7] The court of appeals disagreed with the district court as to whether the individual petitioners had standing, and did not address whether Howard Jarvis had associational standing in addition to its standing as an employer. *Id.* at 10-11.

benefit plan" under ERISA because it is not established or maintained by the participants' employers. And as the court of appeals realized, CalSavers likewise does not "relate to" ERISA-regulated employee benefit plans in any sense that would cause it to be preempted: the program does not regulate employee benefit plans or pose any risk to their uniform national administration. In so holding, the court of appeals did not create any conflict with a decision of another lower court; indeed, this was the first time any appellate court has considered an ERISA preemption challenge to a state-run IRA program like CalSavers. There is thus no need for further review by this Court. Even if the Court did perceive a need to consider whether ERISA preempts state-run IRA programs, it should wait to grant review until after more than one circuit has had an opportunity to address that issue—and in a case that lacks the multiple vehicle problems associated with this one.

1. The court of appeals correctly held that CalSavers is not preempted by ERISA. ERISA's preemption provision, 28 U.S.C. § 1144(a), directs that ERISA "supersede[s]" state laws "insofar as they . . . relate to any employee benefit plan described in [29 U.S.C. § 1003(a)] . . . ." CalSavers neither itself constitutes such a plan nor "relate[s] to" any other such plan within the meaning of that statute.

a. The court of appeals accurately explained why CalSavers is not itself an employee benefit plan. Pet. App. 18-29. The "employee benefit plan[s]" covered by Section 1144 are those "established or maintained" "by an[] employer." 29 U.S.C. § 1003(a); *see also id.* § 1002(2)(A) (definition of "employee pension benefit

plan").[8] As the court of appeals recognized, the entities that "employ[]" CalSavers participants are those for which the participants work. Pet. App. 22. CalSavers was established not by those employers but by the California Legislature and the CalSavers Board. *Id.* at 25; *see supra* pp. 1-2. And it is that Board—rather than any employer or group of employers—that maintains the program. The CalSavers Board manages the program, selects an IRS-compliant trustee, and has created processes by which employees may enroll or withdraw—and manage their accounts—all without any involvement by employers. *See supra* pp. 2-3 & n.3. The CalSavers program also communicates with participants directly—again without employer involvement. *Id.*[9]

In undertaking those duties, moreover, the CalSavers Board does not act "'in the interest of an employer,'" Pet. App. 21 (quoting 29 U.S.C. § 1002(5)), or on behalf of any "group or association of employers,"

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[8] An "employer" is a "person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5). An "employee pension benefit plan" may also be one "established" or "maintained" by "an employee organization." *Id.* § 1002(2)(A); *see id.* § 1002(4) (defining employee organization). Such employee organizations are not at issue in this case.

[9] *See also, e.g.,* Cal. Gov't Code § 100014(c) (requiring CalSavers' communications to employees to make clear that the program is "not sponsored by the employer," that "employers do not provide financial advice," that "employees are not to contact their employers for financial advice," and that "employers are not liable for decisions employees make" with respect to CalSavers); Cal. Code Regs. tit. 10, § 10003(d)(1) (employers must not "[r]equire, endorse, encourage, prohibit, restrict, or discourage employee participation").

29 U.S.C. § 1002(5); *see* Pet. App. 22 n.3. Employers do not select or control Board members and may not "[e]xercise any authority, control, or responsibility" under the program. Cal. Code Regs. tit. 10, § 10003(d).[10] Employers do not contribute to employee accounts, or underwrite CalSavers expenses. Cal. Code Regs. tit. 10, § 10005(c)(1); Cal. Gov't Code §100004(a). CalSavers exists to further the State's legislatively specified goals, and Board members are required to act solely in the interests of CalSavers participants. Cal. Gov't Code § 100004(a); *id.* § 100002(d). "[I]n every relevant sense, it is the State that has established CalSavers and the State that maintains it—and not eligible employers." Pet. App. 25.

b. The court of appeals also correctly determined that CalSavers does not "relate to" ERISA employee benefit plans within the meaning of Section 1144(a). Pet. App. 29-36. A state law impermissibly "relates to" an employee benefit plan if it has a forbidden "connection with" or "reference to" such plans. *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 479-480 (2020). CalSavers does not present either problem.

The "connection" test is "primarily concerned with pre-empting laws that require providers to structure benefit plans in particular ways," such as "by requiring payment of specific benefits," or "by binding plan administrators to specific rules for determining beneficiary status." *Rutledge,* 141 S. Ct. at 480 (discussing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)). It can also

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[10] Board members are either state officials (the State Treasurer, Controller and Director of Finance) or appointed by the Governor or the Legislature. *See* Cal. Gov't Code § 10002(a)(1).

be implicated by state laws that "'govern[] a central matter of plan administration or interfere[] with nationally uniform plan administration.'" *Id.* (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016)). And it bars state laws with "'acute, albeit indirect, economic effects,'" which "'force an ERISA plan to adopt a certain scheme of substantive coverage.'" *Id.* (quoting *Gobeille*, 577 U.S. at 320).

No such concerns are present with CalSavers. CalSavers does not impose on existing ERISA plans any substantive or administrative requirements. *See* Pet. App. 30. It does not indirectly pressure an employer with such a plan to structure its benefits or administration in a particular way—to the contrary, an employer with *any* tax-qualified retirement plan covering *any* of its employees (whether in or outside the State) is exempted from CalSavers, regardless of the particulars of the employer's plan. *See supra* pp. 1, 3. And there is no sense in which CalSavers, through "acute" economic effects, "force[s] an ERISA plan to adopt a certain scheme of substantive coverage." *Rutledge,* 141 S. Ct. at 480. Employers with tax-qualified plans have literally no duties at all under the CalSavers statute. *See supra* pp. 3-4. For those without such plans, CalSavers at most requires them to submit a basic online registration form, provide contact information for employees, and (for those employees who do not opt out of CalSavers) implement payroll deductions similar to the deductions employers routinely make under income tax, unemployment insurance, and garnishment statutes.[11]

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[11] *See, e.g.,* Cal. Unemp. Ins. Code §§ 13020-13021, 984(a)(1), 1110(b) (state income tax and unemployment insurance with-

2. Petitioners' counterarguments are not persuasive.

a. Petitioners primarily argue that Congress implicitly forbade CalSavers when it disapproved a 2016 Department of Labor regulation that would have provided a new safe harbor for state-run IRAs. Pet. 13-22 (discussing Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464 (Aug. 30, 2016)). The preface to that regulation reported that California, Connecticut, Illinois, Maryland, and Oregon had authorized such programs, and that "concern" had been expressed about the possibility of ERISA preemption. 81 Fed. Reg. at 59,464-59,465. The regulation therefore "set[] forth safe harbors under which certain specific plans, funds and programs would not constitute employee pension benefit plans." *Id.* at 59,476. Congress overrode that regulation in 2017 by a joint resolution under the Congressional Review Act. *See* Pub. L. No. 115-35, 131 Stat. 848 (2017); Pet. App. 14.

Petitioners contend that if CalSavers is not preempted, then Congress's abrogation of the safe-

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holding); Cal. Code Civ. Proc. §§ 706.020 *et seq.* (garnishment responsibilities); Cal. Judicial Council, Form WG-002, at 2 (garnishment and civil withholding order procedures). CalSavers' requirement to report employees' identification and contact information also does not pose any substantial burden: employers must already track employee names, social security numbers, dates of birth, and addresses to comply with other reporting requirements under state and federal law. *See, e.g.,* IRS, Form W-2 (annual wage and withholding report); Cal. Employment Development Dept., Form DE-34 (new hire report required by 42 U.S.C. § 653a(b)); Department of Homeland Security, Form I-9 (employment eligibility verification record).

harbor regulation would be "[m]eaningless." Pet. 13. As the court of appeals recognized, however, that argument misunderstands the nature of both the regulation and its repeal. Pet. App. 12-15. Determining whether a state law "relate[s]" to "an employee benefit plan" for purposes of 29 U.S.C. §§ 1144(a), 1002, and 1003(a) can be a fact-intensive inquiry.[12] The "uncertainty" associated with that inquiry can lead cautious providers to refrain from offering programs that would survive the statutory test. *See, e.g.,* 81 Fed. Reg. at 59,465. To address that concern, the Secretary of Labor occasionally exercises authority to provide safe harbors that assure providers and employers that a given program will not be covered by ERISA. *See generally* 29 U.S.C. § 1135; *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989). The 2016 regulation was one such exercise. It did not reflect any judgment that CalSavers-type IRA programs needed the safe harbor to establish that they are not ERISA-regulated plans. *See* 81 Fed. Reg. at 59,476 (stating that the new safe harbor "should not be read as implicitly indicating the Department's views on the possible scope of [29 U.S.C. §§ 1002(2)]"). Instead, it aimed to obviate any "uncertainty" that might discourage providers from offering such plans, *id.* at 59,465-59,477, and to shield state plans from "the costs and delay of ERISA preemption litigation," Pet. App. 15 (citing 81 Fed. Reg. at 59,466); *see* 81 Fed. Reg. at 59,473 discussing ("reduction in states' uncertainty-related costs").

In 2017, Congress "disapprov[ed] the rule" and stated that it had "no force or effect." Pub. L. 115-35, 131 Stat 848. That eliminated the rule's simple assurance of non-preemption. Pet. App. 15. But it did not

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[12] *See, e.g., Combined Mgmt., Inc. v. Superintendent of Bureau of Ins. of Me.,* 22 F.3d 1, 3 (1st Cir. 1994).

alter in any way, let alone repeal, Section 1002's longstanding statutory requirement that ERISA addresses only plans "established" or "maintained" by "employer[s]." *Cf. Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) ("We will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.") (internal quotation marks omitted). Where a plan falls outside that statutory definition—as here—there is no need to consider any safe harbor, and the repeal of a former safe harbor is not relevant.

b. Petitioners' argument that CalSavers is preempted under the terms of the Department of Labor's 1975 safe-harbor for employer IRA plans (Pet. 20-21, 34-38) is also meritless. Petitioners contend that CalSavers' opt-out system does not qualify for that safe harbor because the 1975 regulation requires that contributions be "completely voluntary." *Id.* at 38. That argument is not persuasive.[13] In any event, it is beside the point. Like the 2016 safe harbor, the 1975

[13] The design of the CalSavers program—including its easy opt-out methods and lack of employer involvement—eliminates any risk of employer pressure, which the "completely voluntary" requirement in the 1975 safe harbor was designed to prevent. CalSavers allows employees to opt out at any time by telephone, on a website, or by mailing a "simple and concise" form. Cal. Code Regs. tit. 10, § 10004(d); Cal. Gov't Code § 100014(e). CalSavers informs workers that employers have no role in the program, Cal. Gov't Code § 100014(c), and prohibits employers from encouraging or discouraging participation, Cal. Code Regs. tit. 10, § 10003(d). As of October 2020, about one-third of eligible employees had opted out of CalSavers, demonstrating that the procedures are simple and effective. C.A. Dkt. 16, Ex. 1; *see* Pet. App. 8 n.1 (granting judicial notice of relevant records).

safe harbor did not rewrite the statutory prerequisites that must be present for ERISA to apply. "A program that satisfies the [safe-harbor] regulation's standards will be deemed not to have been established or maintained by the employer." Pet. App. 16 (internal quotation marks omitted). But "[t]he converse . . . is not necessarily true; a program that fails to satisfy the regulation's standards is not automatically deemed to have been 'established or maintained' by the employer, but, rather, is subject to further evaluation under the conventional tests." *Id.* (internal quotation marks omitted); *see, e.g., Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir. 1995); *Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.3d 460, 463 (10th Cir. 1997). Because CalSavers passes those statutory tests, the court of appeals correctly recognized that there was no need to decide whether CalSavers was additionally within the 1975 safe harbor.

c. Another argument advanced by petitioners is that the safe-harbor regulations, along with statements by the Department of Labor at one point in this litigation, constitute agency interpretations to which courts must grant "*Chevron* deference [and] *Auer* deference." Pet. 18 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997)); *but see infra* p. 17 n.15 (discussing Department of Labor's subsequent notification that it had "reconsider[ed]" its position and was no longer supporting either party). Petitioners criticize the courts below for not addressing that argument. Pet. 18. But they fail to mention *why* the lower courts did not address the deference argument: because petitioners failed to properly raise it. Petitioners' district court briefing did not mention *Chevron*, *Auer*, or deference. *See* D. Ct. Dkt. 37; D. Ct. Dkt. 21; D. Ct. Dkt. 16. Nor did petitioners raise the issue

in their opening brief in the court of appeals. C.A. Dkt. 5. Petitioners first argued for deference in their reply brief in the court of appeals, C.A. Dkt. 36, at 8-12; by that point, however, it was too late.[14]

The deference arguments that petitioners advance here are also incorrect. Among other things, the federal agency pronouncements on the issues central to this case differ greatly from how petitioners describe them.[15] And to the extent that deference principles

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[14] *See, e.g.*, *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) ("Issues raised for the first time in the reply brief are waived."); *Ill. Pub. Telecomm. Ass'n v. FCC*, 752 F.3d 1018, 1023 n.4 (D.C. Cir. 2014) (similar); *United States v. Henry*, 852 F.3d 1204, 1207 n.1 (10th Cir. 2017). The federal government also did not argue for deference, during the period in which it participated in the case. *See* C.A. Dkt. 10; D. Ct. Dkt. 43.

[15] For instance, petitioners assert that the 2016 safe-harbor regulation "stated clearly that, without the 2016 exemption, state-run automatic-enrollment programs would be preempted by ERISA." Pet. 20. The 2016 regulation in fact stated the opposite: that it "should not be read as implicitly indicating the Department's views on the possible scope of [29 U.S.C. § 1002(2)]." 81 Fed. Reg. at 59,467. Petitioners also represent that the Department of Labor "has been clear since 1975 that each time employees are automatically enrolled in an IRA program, an ERISA plan is created." Pet. 21. In actuality, the Department has stated that "an employer may demonstrate its neutrality with respect to an IRA sponsor in a variety of ways, *including (but not limited to)* by ensuring . . . that the IRA payroll deduction program is completely voluntary." 29 C.F.R. § 2509.99–1 n.2 (emphasis added). And petitioners contend that a Department of Labor amicus brief submitted in the Ninth Circuit "remain[s] [the Department's] official analys[i]s, and ha[s] not been changed." Pet. 19. As the court of appeals recognized, however, the Department's top official advised the court that, after "reconsider[ing] the matter," the agency now did "not support either side" in this case. C.A. Dkt. 43; *see* Pet. App. 11 n.2.

(continued…)

might bear on ERISA preemption of state-run plans, that would counsel in favor of awaiting a case in which the issue was properly raised for analysis by the courts below. *See infra* p. 24.

d. Petitioners next argue that CalSavers "relates" and "refers" to ERISA plans because an employer that has such a plan need not register, provide contact information for workers, or implement payroll deductions. Pet. 21.[16] But as the court of appeals recognized, petitioners' argument relies on an over-expansive notion of the words "relat[ing] to" in Section 1144(a). Pet. App. 17. This Court has not understood that term "to extend to the furthest stretch," reasoning that such a view would result in preemption to an extent "no sensible person could have intended." *Gobeille*, 577 U.S. at 319 (internal quotation marks omitted). The key question is whether the CalSavers program refers to ERISA plans in a way that "affect[s]" them. Pet. App. 33. It does not, as the court of appeals explained. *See supra* p. 8.

Petitioners contend that CalSavers effectively "forces" an employer to offer "either an ERISA plan or the CalSavers plan[] or else face fines and penalties." Pet. 9. This does not match the reality of CalSavers. First, exemption from CalSavers is not limited to ERISA plans, but applies to other tax-qualified plans, so it is not an either/or proposition, as petitioners posit. Second, even for employers that are not exempt, the costs of submitting a one-time online registration and providing employee-contact information will be negli-

[16] That is an incomplete description of California's statute, under which the operative trigger is the absence of a *tax-qualified* retirement plan rather than an ERISA plan. *See supra* p. 1.

gible, especially in light of the employee data that employers must already maintain and submit to the government for other reasons. *See supra* pp. 12-13 n.11. And the burden of implementing paycheck deductions for employees who do not opt out of CalSavers will likewise be negligible given employers' preexisting obligation to make paycheck deductions in other contexts. *See supra* p. 12 n.11. The minimal obligations that CalSavers imposes will in no sense force employers to offer an employee benefit plan.

e. Finally, petitioners raise a variety of policy objections to CalSavers. Of course, as the court of appeals recognized, these "policy debate[s]" are questions for the elected branches of government: "for California's lawmakers and those who elect them, or for Congress should it choose to take up this issue." Pet. App. 36. The courts below decided only that Congress has not "outlawed" CalSavers under ERISA's existing text, *id.*, and petitioners' policy criticisms do not show that the lower courts' unanimous conclusion on that question was incorrect.

In any event, petitioners' criticisms are unfounded. Petitioners argue that CalSavers allows the State too much involvement in the retirement savings of non-state-employees and that the State cannot be trusted to safeguard contributors' savings. *See, e.g.*, Pet. i, 5, 25. In fact, the statute contains multiple safeguards to ensure that CalSavers acts in the sole interest of its participants. [17] Petitioners express concern that

[17] Among other things, the Board is held to strict conflict-of-interest requirements, Cal. Gov't Code § 100002(c), and its members must act as fiduciaries and "solely in the interest of the program participants," *id.* § 100002(d). The CalSavers program is audited by an independent certified public accountant,

CalSavers leaves workers unprotected against employers who might deduct money from their paychecks without sending the money to CalSavers. Pet. App. 26. But California provides numerous protections against employers who convert employee wages to their own use. *See, e.g.,* Cal. Pen. Code § 484 (petty theft); *id.* § 487 (grand theft); *id.* § 487m (theft of wages). CalSavers presents no greater risk in that regard than the risk inherent in any regime that requires employer deductions for government purposes such as taxes, unemployment insurance, or garnishments. *See supra* p. 12 & n.11. Petitioners also argue that, if multiple States establish CalSavers-like programs, then workers who move between States will be forced to track multiple IRAs. Pet. 12. But IRA accounts can be easily consolidated or transferred under the "rollover" provisions of federal law. *See* 26 U.S.C. §§ 408(d)(3), 408A(e).

3. This case does not implicate any conflict between lower courts. Indeed, petitioners repeatedly highlight the "novel" nature of the preemption question they are seeking to raise here. Pet. 7, 25, 26; *see id.* at 5 ("This is a case of first impression."); *id.* at 28 (no other court has "direct[ly]" addressed the issue).

Petitioners contend that the court of appeals' analysis below is in tension with a four-factor test adopted by the Eleventh Circuit in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). Pet. 31-32. But the *Donovan* test addresses a different question from the

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id. § 100038(a), and CalSavers must report to and cooperate in investigations by the state auditor, *id.*; *see generally id.* §§ 8545.2 *et seq*. CalSavers must also comply with all federal regulations on IRAs, *id.* § 100043(a), (b)(1)(B), such as the requirement to hold all IRA assets through a bank or through a non-bank trustee approved by the IRS, *see* 26 C.F.R. § 1.408-2(b), (e).

one at issue here. In *Donovan*, the Secretary of Labor sued the trustees of a multiple-employer trust which obtained a group health insurance policy for the benefit of its subscribers. 688 F.2d at 1369-1370. The question was whether the trust was an employee benefit plan subject to ERISA. *Id.* *Donovan*'s analysis focused on when "[a] decision to extend benefits" becomes enough of "a reality"—through "financing or arranging to finance . . . the intended benefits, establishing a procedure for disbursing benefits, [and] assuring employees that the plan or program exists"—that an actual "plan" has in fact been "established." *Id.* at 1373. Such questions, *Donovan* held, should be answered by asking whether a reasonable person could ascertain the program's "intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *Id.* Those factors address whether a "plan" has been "established." 29 U.S.C. § 1003(a). They have no relevance to the issue in this case: whether a plan has been "established *by an employer*." *Id.* (emphasis added); *see also id.* § 1002(2)(A).[18]

Petitioners also mention that the opinion below relied in part on an earlier Ninth Circuit opinion in *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639 (9th Cir. 2008), *cert. denied,* 561 U.S. 1024 (2010) (No. 08-1515). Pet. 29. Some Ninth Circuit judges had previously described *Golden Gate* as conflicting with the Fourth Circuit's

[18] The D.C. Circuit's decision in *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254 (D.C. Cir. 1994), similarly has no relevance to whether CalSavers is established by an employer. *See* Pet. 31-32. Like *Donovan*, *Kenney* concerns whether a program is sufficiently concrete to qualify as a "plan" that has been "established." *Kenney*, 28 F.3d at 1257; *see id.* (a "plan need not be formalized; the plaintiff can prevail if the existence of a plan can be inferred from the 'surrounding circumstances.'").

decision in *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007). *See Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 558 F.3d 1000, 1006 (9th Cir. 2009) (M. Smith, J., dissenting from denial of rehearing en banc). But petitioners do not contend that *this* case conflicts with *Retail Industry*.

And any concerns with the analysis in *Golden Gate* would not provide a basis for granting review here. That case concerned a San Francisco ordinance that required employers to spend a certain amount of money on employee healthcare. *Golden Gate*, 558 F.3d at 1004 (M. Smith, J., dissenting). Employers who did not spend that amount on employee benefit plans subject to ERISA were required to make "alternative contributions" to city accounts. *Id.* The judges who dissented from the denial of rehearing en banc in *Golden Gate* worried that the court's approval of that plan conflicted with *Retail Industry*'s holding that a State cannot "force[] employers either to make minimum health care contributions to ERISA plans for its employees or to make contributions to" a state fund, because such a requirement pressures employers to change their ERISA plan expenditures or coordinate their spending across ERISA and non-ERISA programs. *Id.* at 1006-1007. Here, in contrast, there is no plausible argument that CalSavers will require such coordination or pressure employers to change existing ERISA plans—because "[i]f an employer offers its own retirement plan," then CalSavers simply "does not apply." Pet. App. 34. Moreover, unlike the program in *Golden Gate*, CalSavers does not require

employer contributions to the government-run program—indeed, CalSavers prohibits them. Cal. Code Regs. tit. 10, § 10005(c)(1).[19]

Finally, petitioners argue that by citing "health plan cases to decide a pension plan case," Pet. 23 (capitalization altered), the Ninth Circuit contradicted its own prior decisions indicating that the two types of plans require fundamentally different analyses, *see id.* at 24 (discussing *Golden Gate*, 546 F.3d at 651-652); *id.* at 25, 30-31 (discussing *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374 (9th Cir. 1994)). Of course, purported intra-circuit conflicts provide no basis for certiorari. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). And here that is especially so, because the outcome below is consistent with prior Ninth Circuit precedent, for reasons the unanimous panel decision explained at length. Pet. App. 19-20, 23-25. For both health and pension plans, ERISA

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[19] For similar reasons, there is no overlap between Howard Jarvis's claims here and the recently filed petition in *ERISA Industry Committee v. City of Seattle*, No. 21-1019. That petition alleges that ERISA's preemption provision is violated by a Seattle law that "requires covered employers to make minimum monthly healthcare expenditures on behalf of their covered employees" through a "'play-or-pay'" mechanism, under which employers must pay to the government (or to employees) particular sums if the employer does not provide "certain levels of ERISA-covered benefits," determined according to a complex formula. No. 21-1019 Pet. at 1, 7, 30. CalSavers, in contrast, does not require employers to spend anything on benefits or on a government-mandated substitute, and requires no detailed calculations. *See generally supra* pp. 3-4. The *ERISA Industry* petition also challenges the Ninth Circuit's application of a "presumption against preemption" in that case. No. 21-1019 Pet. at 4, 15, 31-33. The Ninth Circuit opinion upholding CalSavers, however, did not rely on any presumption against preemption. *See* Pet. App. 1-36.

applies only if the plan is established or maintained "by an employer." 29 U.S.C. §§ 1002(1), 1002(2)(A). And as the court of appeals correctly recognized, regardless of the nature of a plan, the State is not the "employer" of people who do not work for the State.

4. This case would be a particularly poor vehicle for addressing underlying questions about the extent of ERISA preemption of state-run IRA programs. As noted above, petitioners' arguments rely heavily on a theory of agency deference (*see* Pet. 18-22) that was not raised or addressed below. *See supra* pp. 16-17. The actual regulatory history significantly differs from what petitioners portray. *See supra* p. 17 n.15. And if agency interpretations of ERISA might be pertinent to the underlying preemption question, this Court would benefit from a proper airing and consideration of the issue in the lower courts.

Moreover, petitioners began this suit in May 2018, before CalSavers' regulations or trustee were in place. *Compare* C.A. E.R. 845 (docket), *with* Cal. Code Regs. tit. 10, §§ 10000 *et seq.* (first enacted Nov. 2018). Although petitioners later amended their complaint, they still barely even cite—let alone address—the regulations that have governed CalSavers for the past three years. *See* Pet. ix-x. Petitioners' challenge addresses only the broad strokes of the statute that authorized CalSavers' establishment and says little about the program in its actual, current form.

Plenary review in this case would also be complicated by jurisdictional difficulties that the petition does not acknowledge. With respect to the individual petitioners, it is not obvious that the injuries they claim they would suffer as future CalSavers participants are "actual or imminent" rather than "conjectural or hypothetical," *Carney v. Adams*, 141 S. Ct. 493,

498 (2020), given that they can easily opt out of CalSavers. *See generally TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("standing is not dispensed in gross"); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (state plaintiff lacked standing where it could have eliminated its purported injury by passing a law).[20] And the court of appeals left undisturbed the district court's conclusion that Howard Jarvis has standing only to contest CalSavers' effect on itself as an employer rather than the program's effect on its members. *See* Pet. App. 10, 70-71. Howard Jarvis has no ERISA plan and no apparent intent to create one. *See* C.A. E.R. 355. It is not obvious why it should be allowed to press the rights of employers who do have such plans. *See generally Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties'").

[20] *Compare* Pet. App. 70 (district court's conclusion that individual plaintiffs lacked standing because any injury to them as a future CalSavers participant was "too remote" and plaintiffs "cannot assert taxpayer standing to gain access to Federal Court"), *with id.* at 11 (court of appeals' conclusion that the individual plaintiffs "have standing as future participants in what they claim is an ERISA plan").

CONCLUSION

The petition for a writ of certiorari should be denied.

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