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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION, JONATHAN COUPAL, and DEBRA DESROSIERS,

Plaintiffs,

vs.

THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM and JOHN CHIANG, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD

Defendants.

Case No. 2:18-cv-01584-MCE-KJN

NOTICE OF MOTION AND MOTION BY DEFENDANTS CALSAVERS RETIREMENT SAVINGS PROGRAM AND JOHN CHIANG TO DISMISS PLAINTIFFS' "COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF"; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Fed. R. Civ. P. 12(b)(1), 12(b)(6)

DATE: September 6, 2018
TIME: 2:00 p.m.
CTRM: 7, 14th Floor

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 6, 2018, at 2:00 p.m. or as soon thereafter as the matter may be heard in the United States District Court, Eastern District of California, located in Courtroom 7, 14th Floor at 501 I Street, Sacramento, California 95814, Defendants CalSavers Retirement Savings Program, formerly the California Secure Choice California Secure Choice Retirement Savings Program, and John Chiang, in his official capacity as Chair of The California Secure Choice Retirement Savings Investment Board ("Defendants") will, and hereby do, move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for dismissal of the "Complaint for Declaratory and Injunctive Relief" filed by Plaintiffs Howard Jarvis Taxpayers Association, Jonathan Coupal, and Debra Desrosiers (collectively, "Plaintiffs").

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Defendants' motion will be based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Request for Judicial Notice and exhibits thereto filed concurrently herewith, on all of the files and records in this action, and on such further argument as may be offered at the hearing of this motion.

DATED: July 25, 2018

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Attorney General of California
PAUL STEIN
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SHARON L. O'GRADY
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Millions of Californians do not have sufficient retirement savings, due in part to the fact that many employers do not offer their employees retirement plans. To address this looming financial crisis, the California Legislature in 2012 established the CalSavers program. Once it opens for enrollment, CalSavers will create a State-sponsored payroll deduction savings program, through which employees of eligible, non-exempt employers may save for retirement via individual retirement accounts ("IRAs").

Howard Jarvis Taxpayer Association ("HJTA") alleges that the program is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Ironically, HJTA argues that the CalSavers program is bad for employees because it does not contain protections ERISA provides for employer-sponsored plans, while HJTA has declined to offer its own employees an ERISA-governed retirement plan or even a payroll deduction IRA, like the CalSavers program will establish. HJTA's objective is not to require the State to create an ERISA plan, which is not legally possible because ERISA only governs plans established or maintained by employers (or employee organizations), but to prevent the State from providing employees access to a payroll deduction IRA, a well-recognized retirement savings device that has never been subject to ERISA.

In this action HJTA is joined by two of its employees. These individuals do not claim any injury from the CalSavers program, in which they need not participate. Instead, they appear to assert only a pendent state law claim under a California statute giving taxpayer standing to challenge illegal government expenditures in state court.

None of the plaintiffs has standing. Plaintiffs cannot establish Article III standing because they do not and cannot allege an injury-in-fact from a program that is still in the planning stages. Indeed, even when implemented, the CalSavers program will not apply to HJTA for years, if ever. Plaintiffs also cannot establish that they have statutory standing to sue under ERISA, since HJTA cannot be a fiduciary of, and the individual plaintiffs cannot be participants in, a program that does not yet exist, and that in any event is carefully designed to be exempt from ERISA. Plaintiffs' preemption claim fails on the merits as well because the CalSavers program will establish an IRA, not an employee benefit plan subject to ERISA. Finally, because plaintiffs have no viable federal claim, the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claim. In any event, that claim is barred by the Eleventh Amendment and suffers from other fatal defects that mandate dismissal.

II. BACKGROUND

A. Relevant ERISA Provisions.

As a general matter, ERISA governs employee benefit plans that are "established or maintained" by an employer, an employee organization, or both. 29 U.S.C. § 1003(a). "Employee benefit plan" or "plan" means an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." ERISA § 3(3), 29 U.S.C. § 1002(3). "Employee pension benefit plan," in turn, means any

> plan, fund, or program which was heretofore or is hereafter *established or maintained by an employer or by an employee organization*, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program - (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."

ERISA § 3(2)(A), 29 U.S.C. § 1002(A) (emphasis added).

IRAs are a distinct form of retirement savings vehicle described in 26 U.S.C. § 408. IRAs are intended to encourage employees whose employers do not offer a pension plan to save for retirement. *See In re Yee*, 147 B.R. 624, 626 (Bankr. D. Mass. 1992). An individual may set up his or her own IRA with a financial institution. 26 U.S.C. § 408 (a) & (b). An employer also may offer an IRA program for its employees, and may allow the employees to contribute to the IRA via payroll deduction. *See* Dep't of Labor, Interpretive Bulletin Relating to Payroll Deduction IRAs, 29 C.F.R. § 2509.99–1, 64 Fed. Reg. 33001 (June 18, 1999).

B. The CalSavers Program.

California faces an impending retirement crisis. Close to half of California workers are currently estimated to retire with incomes below 200% of the federal poverty level, and at least 62%

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of retirees rely on Social Security for more than half of their retirement income. *See* https://www.treasurer.ca.gov/scib/fact.pdf.[1] According to the University of California, Berkeley, Center for Labor Research and Education, "middle class families in California are at significant risk of not having enough retirement income to meet even basic expenses, as nearly 50 percent of middle-income California workers will retire at or near poverty." *Id.* A significant contributor is that some 7.5 million Californians work for employers who do not offer a retirement program. *See* https://www.treasurer.ca.gov/scib/fact.pdf. Sixty-two percent of California private sector workers do not participate in a retirement program through their workplace, and that percentage increases to 84% for employers with 25 or fewer workers. Rep. of Assemb. Comm. on Pub. Emp., Ret. & Soc. Sec. on Sen. Bill 1234 (June 27, 2012).[2]

The Secure Choice Retirement Savings Trust Act, Cal. Gov't Code §§ 100000-100050 (the "Act"), was enacted to address these concerns. It directs the CalSavers governing board (the "Board") to establish a savings program for employees whose employers do not offer either a retirement plan or a payroll deduction IRA through which their employees may save for retirement. *Id*. §§ 100004, 100032, 100046. It will establish an IRA to be funded through voluntary employee payroll deductions. *Id*. § 100000(h). The contributions are to be received by the California Secure Choice Retirement Savings Trust (the "Trust"). *Id*. §§ 100000(i), 100004(a). The program is structured to ensure that the state incurs no liabilities associated with administering the program or its investments. *Id*. §§ 100000(i), 100004(a), (b), 100046(b), 100050. The Act provides that employers may make voluntary contributions to their employees' IRAs, but only if such contribution "would be permitted under the Internal Revenue Code and would not cause the program to be treated as an employee benefit plan under ERISA." *Id*. § 100012(j). Current federal regulations do not permit employer contributions to non-ERISA IRAs. U.S. Dep't of Labor, Interpretive Bulletin 99-1, 29 C.F.R. § 2509.99-1; *see Cline v. Indus. Maint. Eng'g & Contracting*

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[1] A copy of relevant pages from the California Treasurer's website is attached as Exhibit 1 to the Request for Judicial Notice ("RJN") filed concurrently herewith.

[2] A copy of the report is attached as Exhibit 2 to the RJN.

Co., 200 F.3d 1223, 1230 (9th Cir. 2000). Accordingly, under the Board's current proposed regulations, employer contributions to the CalSavers program will not be allowed. Proposed Regulations, CAL. CODE REGS. tit. 10, § 10010(b).[3]

The Act defines an "eligible employer" subject to the Act generally as a non-governmental employer that does not offer a retirement plan or automatic enrollment payroll deduction IRA and has five or more employees. *Id.* §§ 100000(d)(1), (d)(3), 100032(g)(1). But the program will be phased-in according to the size of an employer's workforce. *Id.* § 100032. The program will not become mandatory for employers with fewer than 50 employees until 36 months after the program opens for enrollment, and even that deadline may be extended by the Board. *Id.* § 100032(a)-(e). As stated on the program's official website, the program is still under development and has not opened for enrollment.

> The California Secure Choice Retirement Savings Investment Board, chaired by State Treasurer John Chiang, is in the midst of developing and implementing the CalSavers Retirement Savings Program. The Board anticipates the Program will open with a pilot program in late-2018 and officially open for statewide enrollment in 2019.[4]

Before opening enrollment, the Board must adopt regulations consistent with the Internal Revenue Code and its regulations, "to ensure that the program meets all criteria for federal tax-deferral or tax-exempt benefits." Act § 100010(b). The Board must also design and disseminate an employee information packet, which must include a disclosure form describing how employees may opt out. *Id.* § 100014(a), (b)(3). The not-yet completed employee information packet is to be prepared by the Board and disseminated through the California Employment Development Department ("EDD"). *Id.* § 100014(a). The opt-out notation on that form is statutorily required to be "simple and concise and drafted in a manner that the Board deems necessary to appropriately evidence the employee's understanding that he or she is choosing not to automatically deduct earnings to save for retirement." *Id.* § 100014(e). That disclosure form must include a method for employees to

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[3] A copy of the proposed regulations is attached as Exhibit 3 to the RJN.

[4] *See* https://www.treasurer.ca.gov/scib, Exhibit 1 to the RJN.

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acknowledge that they have read and understand the disclosures. *Id*. §100014(d).

The Act expressly states that participating employers shall not be considered to be fiduciaries with respect to CalSavers or the Trust and shall have no authority, control or responsibility for the design, administration, or operation of the program. *Id*. § 100034(b). The disclosure form will state that CalSavers is not sponsored by the employer, and that the employer is not responsible for the plan or liable as a plan sponsor. *Id*. §§ 100014(c)(2), 100034(b). Before CalSavers is opened for enrollment, the Board is required to report to the Governor and the Legislature the specific date on which it will start to enroll participants. *Id*. § 100043(b)(1)(A).

C. The Allegations of the Complaint.

The Complaint alleges that HJTA is "an employer of five to eight employees without a private retirement plan." (Complaint ¶ 6.) It alleges that plaintiffs Jonathan Coupal and Debra Desrosiers are employees of HJTA and California taxpayers. (*Id*. ¶¶ 7-8.) The Complaint asserts two claims for relief. The first claim seeks a declaration pursuant to ERISA section 502(a)(3) that the Act "violates the Supremacy Clause of the United States Constitution because it is expressly preempted by [ERISA]." (*Id.* ¶ 2, Prayer item 1.)

The second claim seeks injunctive relief under California Code of Civil Procedure section 526a, and alleges that plaintiffs, as California taxpayers, have standing to challenge "wasteful government action." (*Id.* ¶¶ 29-30.) The Complaint alleges that defendant California State Treasurer John Chiang, through the Board, has spent taxpayer dollars in implementing CalSavers. (*Id.* ¶ 31.)

III. ARGUMENT

A. Legal Standard.

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure seeks dismissal for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party seeking to invoke the jurisdiction of the federal court bears the burden of proving all jurisdictional prerequisites have been met. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The court is not limited to the complaint's allegations but may consider other extrinsic evidence.

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Hornsby v. Lufthansa German Airlines, 593 F. Supp. 2d 1132, 1135 (C.D. Cal. 2009).

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In deciding a Rule 12(b)(6) motion, a court must assume the plaintiffs' allegations of fact are true and must draw all reasonable inferences in their favor. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the court generally looks only to the face of the complaint and its exhibits, *Van Buskirk v. Cable News Network, Inc*., 284 F.3d 977, 980 (9th Cir. 2002), it may also consider documents that are proper subjects of judicial notice, *Zucco Partners, LLC v. Digimarc Corp*., 552 F.3d 981, 991 (9th Cir. 2009). Leave to amend need not be granted if "it is clear that the complaint could not be saved by an amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

B. The Complaint Fails to Allege a Case or Controversy Under Article III of the Constitution.

"[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *Maya v. Centex Corp*., 658 F.3d 1060, 1067 (9th Cir. 2011). "Where a plaintiff lacks standing to bring a claim, courts lack jurisdiction to hear that claim, and a motion to dismiss under Rule 12(b)(1) is appropriate." *Alexander v. Kujok*, 158 F. Supp. 3d 1012, 1017 (E.D. Cal. 2016) (England, J.). "The jurisdictional question of standing precedes, and does not require, analysis of the merits." *Maya 658 F.3d.* at 1068; *see also Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1038 (N.D. Cal. 2014). "[I]f a plaintiff does not allege standing in its complaint, [the court has] no jurisdiction to hear the case." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir. 2007) (citing *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002)).

In a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the moving party can challenge the allegations of jurisdiction on the face of the complaint or on issues of fact. *People ex rel. Lockyer v. U.S. Dep't of Agric.*, No. CIV.A05-0211 MCE GGH, 2005 WL

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1719892, at *1 (E.D. Cal. July 18, 2005) (England, J.). A facial attack contends that the complaint fails to allege grounds for federal subject matter jurisdiction. *Id.* (citing *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)). Here, it is clear from the face of the Complaint, and matters of which the Court may take judicial notice, that subject matter jurisdiction does not exist.

The "first and foremost" minimum requirement of constitutional standing is injury-in-fact.[5] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)). "The party invoking federal jurisdiction bears the burden of establishing" the elements of constitutional standing. *Lujan*, 504 U.S. at 560-61; *see also Spokeo*, 136 S. Ct. at 1547. The injury-in-fact requirement consists of an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Paulsen v. CNF Inc*., 559 F.3d 1061, 1072 (9th Cir. 2009) (quoting *Lujan*, 555 U.S. at 560).

For an injury to be "particularized," it must affect the plaintiff in a personal and individual way; the plaintiff must allege some actual or threatened injury. *Spokeo*, 136 S. Ct. at 1548. While particularization is necessary to establish injury-in-fact, it is not sufficient by itself; the injury-in-fact must also be "concrete." *Id.* A "concrete" injury must be "de facto"; that is, it must actually exist. *Id.* "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Lujan*, 504 U.S. at 571 (emphasis added); *see also Skaff*, 506 F.3d at 839, n.5 ("Standing must exist at the time the action is filed and cannot be established by showing later actions of post-filing intent.").

Here, the Complaint fails to allege facts that show plaintiffs have sustained any injury-in-fact, because CalSavers was not opened for enrollment at the time the Complaint was filed (and has not opened for enrollment even yet). The Complaint at paragraph 16 alleges that CalSavers was implemented January 1, 2017, citing Act § 100046, but that section simply authorized the Board to

[5] The other two necessary elements of Article III standing are (1) a causal link between the injury and the conduct of which the plaintiff complains (2) a likelihood that a favorable decision will redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Skaff*, 506 F.3d at 837.

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proceed with the design and implementation of the program. *Id.* As discussed in Section II.B. above, there are several steps that must be taken before CalSavers may start to enroll participants, including issuing final regulations, designing and disseminating information packets, and providing a formal report to the Governor and the Legislature.

Not only does HJTA[6] currently lack standing, but whether it ever would have standing is a matter of pure speculation, including whether, as of 2022, the earliest date HJTA could be required to participate: (i) HJTA will still exist, (ii) it will have a sufficient number of employees to be affected, (iii) it will not be exempt because it will have continued its present policy of denying its employees a retirement plan or a payroll deduction IRA, and (iv) if HJTA is not exempt, any of its employees will actually participate in the CalSavers program.

Where, as here, an allegation of injury is conjectural or hypothetical and not clean-cut and concrete, concepts of standing and ripeness overlap and provide additional ground for dismissing a complaint. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010); *see Texas v. United States*, 523 U.S. 296, 300 (1998); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). "The Supreme Court has consistently held that the ripeness doctrine aims to 'prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.' [citations] … For a declaratory judgment to be issued, the claim must be constitutionally ripe, that is the facts demonstrate there is a controversy 'of sufficient immediacy and reality.'" *Owner-Operator Independent Drivers Ass'n, Inc. v. California*, 2010 WL 4982956, at * 1, No. 2:10-CV-02010 (E.D. Cal. 2010) (England, J.) (citing *Educ. Credit Mgmt. Corp. v. Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009), and holding in December 2010 that a dispute involving a California statute regarding the sale of handgun ammunition that was to take effect in February 2011 was not ripe for review because "[n]o one can yet anticipate how California's bill will affect Plaintiffs and/or their

[6] To the extent the First Claim is asserted by plaintiffs Coupal and Desrosiers, which is not entirely clear, the Complaint does not purport to allege any present injury, or even any future injury when the program ultimately goes into effect. (See Complaint ¶¶ 7-8, 30 (the only mentions of Coupal and Desrosiers). Nor could it, since any participation by them in the CalSavers program would be strictly voluntary. Act § 10032(f)(1).

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business”).

Because plaintiffs do not, and cannot, adequately allege an injury-in-fact that is anything but speculative and contingent, plaintiffs’ Complaint states no Article III case or controversy. The Court therefore lacks subject matter jurisdiction to consider Plaintiffs’ claims.

C. Plaintiffs Lack Statutory Standing Under ERISA to Pursue Their Claims.

Even if plaintiffs had Article III standing to pursue their claims, and they do not, that would not be sufficient because plaintiffs lack statutory standing to bring an action under ERISA.

“A plaintiff must also satisfy the non-constitutional standing requirements of the statute under which he or she seeks to bring suit.” *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004). In the Ninth Circuit, “a dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction.” *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). Motions to dismiss for lack of statutory standing are therefore reviewed under Federal Rule of Civil Procedure 12(b)(6). *Norris v. Mazzola*, 2016 WL 1588345, at *1, No. 15-CV-04962-JSC (N.D. Cal. Apr. 20, 2016).

Here, plaintiffs seek relief under §section 502(a)(3) (Complaint ¶ 19), which contains specific standing requirements:

> A civil action may be brought - *** (3) *by a participant, beneficiary, or fiduciary* (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (emphasis added).

The terms “participant,” “beneficiary” and “fiduciary” are all defined by ERISA, and each connotes a specific relationship of a person to an employee benefit plan, which is also an ERISA-defined term. In other words, if there is no ERISA *plan* in play here, plaintiffs cannot be either a “participant” or “fiduciary” with standing to pursue a claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).[7] “Participant” means “any employee or former employee of an employer, or any

[7] Plaintiffs do not allege in their Complaint that they are or may become “beneficiaries” of a “participant” under an employee benefit plan. Regardless, it is equally clear that plaintiffs do not qualify as “beneficiaries” within the meaning of ERISA. *See* ERISA § 3(8), 29 U.S.C. § 1002(8).

member or former member of an employee organization, who is or may become eligible to receive a benefit of any type *from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." ERISA § 3(7), 29 U.S.C. § 1002(7) (emphasis added). With exceptions not relevant here, a person is a "fiduciary"

> *with respect to a plan* to the extent (i) he exercises any discretionary authority or discretionary control respecting management *of such plan* or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property *of such plan*, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration *of such plan*.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (emphasis added).

Thus, to determine whether plaintiffs have statutory standing as either a participant or fiduciary, the Court must determine whether CalSavers (or more accurately, the IRA Trust established by CalSavers) constitutes an employee benefit plan under ERISA. If it is not, then plaintiffs cannot be "participants" or "fiduciaries" as defined by ERISA, and therefore cannot have statutory standing. This is an appropriate inquiry on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) where the allegations of a complaint and matter subject to judicial notice establish as a matter of law that the program at issue is not an employee benefit plan governed by ERISA *See Daniels-Hall*, 629 F.3d at 1007 (holding action was properly dismissed under Rule 12(b)(6) there was "no scenario in which this 'Plan' fits the definition of an employee pension benefit plan subject to Title I of ERISA").

Preliminarily, plaintiffs lack ERISA standing for the same reasons that they lack Article III standing—the program is still in the planning and development stages and is not yet open for enrollment, and therefore plaintiffs are not "participants" in or "fiduciaries" of an ERISA plan.[8]

But even if the CalSavers program were open for enrollment now and it would be certain

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[8] Plaintiffs suggest that CalSavers may be "a pension benefit plan or both a pension benefit plan and welfare benefit plan" because it "includes life insurance." (Complaint ¶ 22.) The program does not, in fact, provide "life insurance." (See Act, *passim*).

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that HJTA's employees will be able to participate, plaintiffs still would not have standing as a matter of law, because the CalSavers program and the IRA Trust it will establish will not be an ERISA plan. First, the program will establish an IRA for enrolled employees, which is excluded from ERISA coverage. Second, the program would fall within the "safe harbor" established by regulation. And third, even if the safe harbor did not apply, CalSavers will not create an employee benefit plan within the meaning of ERISA.

1. The Program Will Establish an IRA Exempt from ERISA.

Once it is open for enrollment, CalSavers will establish an IRA for employees of eligible employers who do not opt out of the program. "IRAs are specifically excluded from ERISA's coverage." *Charles Schwab & Co. v. Debickero*, 593 F.3d 916, 919 (9th Cir. 2010). "There is nothing in the Congressional Record or in the language of the legislation dealing with ERISA, to indicate that ERISA was designed to include IRAs within the definition of 'employee benefit program or a plan.'" *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 522 B.R. 41, 58 (Bankr. S.D.N.Y. 2014). Therefore, plaintiffs do not, and cannot, adequately allege that they have statutory standing as fiduciaries of or participants in an ERISA plan.

As indicated above, the Act itself provides for an IRA, and its structure is intended to keep it from being classified as an employee benefit plan subject to ERISA. *See* Act § 100043(b)(1)(A). Employers are not involved in managing the IRA Trust; monies deposited into the IRA Trust are invested by the Treasurer or private money managers (or others) as determined by the Board—not employers. *Id*. § 100004(c). The Board, not employers, decide what information will be provided to the employees. *Id*. § 100014. The Act specifically provides that employers shall not be liable for an employee's decision to participate in or opt out of the program, or for the investment decisions of the employees who choose to participate. *Id*. § 100034(a). Employers "shall not bear any responsibility for the administration, investment, or investment performance of the program," and are not liable with regard to "investment returns, program design, and benefits." *Id*. § 100034(b). Indeed, the Board is charged with establishing a process by which employees of *non-participating* employers may participate in the program. *Id*. § 100012(k). Thus, the CalSavers program is run by

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the Board, not by employers, a conclusion underscored by the fact that employees may participate in the program *even if their employers are not required to participate*. *Id.* Indeed, the only obligations imposed on employers by the Act itself are the requirement that they provide employees with the information packets and that they deduct from employees' payroll their contributions and remit those contributions to the IRA Trust. *Id.* §§ 100012(g) & (i), 100014.[9] These are activities employers may engage in with respect to IRAs they offer voluntarily to their employees without making those plans subject to ERISA. *See* Dep't of Labor Interpretive Bulletin Relating to Payroll Deduction IRAs, 29 C.F.R. § 2509.99–1 (June 18, 1999) (employer may set up a payroll deduction system for contributions to IRAs and may forward information from the IRA sponsor to the employees and engage in other activities without creating an ERISA plan). Here, the employers are yet a further step removed, since they are not setting up the program, the State is. For these reasons, the program as structured is plainly an IRA not subject to ERISA.

2. The CalSavers Program Falls Within a Department of Labor Safe Harbor.

In addition to the fact that the CalSavers program is designed to be an IRA and not an ERISA plan, the program also falls within a safe harbor issued by the Department of Labor ("DOL") in 1975. 29 C.F.R. § 2510.3-2(d). Section 2510.3-2(d) is part of a regulation intended to "clarif[y] the limits of the defined terms 'employee pension benefit plan' and 'pension plan' for purposes of Title I of the Act ... by identifying specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes." *Daniels-Hall*, 629 F.3d at 1003–04. The DOL expanded upon this safe harbor regulation in 1999 by issuing Interpretive Bulletin 99-1, 29 C.F.R. § 2509.99-1, which was "intended to clarify the application of the IRA safe harbor set forth at 29 CFR 2510.3-2(d) and, thereby, facilitate the establishment of payroll deduction IRAs." Pursuant to that regulatory guidance, "certain IRAs which have little or no employer involvement, including no employer contributions, are excluded from the definition of 'employee pension benefit

[9] As previously noted, the Board will be issuing regulations before the program is launched.

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plan' and thereby completely excluded from ERISA coverage." *Cline*, 200 F.3d at 1230. Thus, a finding that the CalSavers program satisfies all of the requirements of the safe harbor provision would mandate dismissal of plaintiff's ERISA preemption claim. As set forth below, the safe harbor requirements are met here.

The 1975 safe harbor regulation provides:

> (d) Individual Retirement Accounts.
>
> (1) For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that—
>
> (i) No contributions are made by the employer or employee association;
>
> (ii) Participation is completely voluntary for employees or members;
>
> (iii) The sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
>
> (iv) The employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-2(d).

CalSavers meets each of these requirements. First, the Act provides that employers may make voluntary contributions to their employees' IRAs *only* if such contribution "would be permitted under the Internal Revenue Code and would not cause the program to be treated as an employee benefit plan under ERISA. Act § 100001(j). Since the current federal regulations do not permit employer contributions to non-ERISA IRAs, under the Board's current proposed regulations, employer contributions to the CalSavers program will not be allowed. Proposed Regulations, Cal. Code Regs. tit. 10, § 10010(b). Therefore, the safe harbor requirement prohibiting employer contributions is met.

Second, employee participation in CalSavers is "completely voluntary" as required by the safe harbor provision. As indicated above, under the Act's express provisions, employees have an absolute right to opt out of the program. Act § 100032(f).[10] The ability of employees to opt out renders their participation "completely voluntary." *See, e.g., Byard v. QualMed Plans for Health, Inc.*, 966 F. Supp. 354, 358 (E.D. Pa. 1997) (holding that employee participation in an employer's health insurance program was "completely voluntary" within the meaning of the DOL safe harbor regulation relating to employee welfare benefit plans (29 C.F.R. § 2510.3-1(j)) (which contains conditions identical to the safe harbor at issue here) when "employees could discontinue their membership in the plan simply by stopping their monthly payments to" the company representative who was responsible for collecting those payments and remitting them to the insurance company, and therefore, the plan at issue did not constitute an ERISA welfare benefit plan). Moreover, the purpose of the "voluntariness" prong "is to identify programs sponsored by the employer and *meant to be a benefit of employment*." *Ames v. Jefferson Pilot Fin. Co.*, 515 F. Supp. 2d 1050, 1055-56 (D. Ariz. 2007) (emphasis added) (quoting *Meadows v. Employers Health Ins.*, 826 F. Supp. 1225, 1229 (D. Ariz. 1993)); *see also Scott v. Assurant Employee Benefits*, No. 04-2714 M1/V, 2005 WL 2436819, at *6 (W.D. Tenn. Sept. 30, 2005). The court in *Ames* held that employee participation in a benefit plan was "completely voluntary" within the meaning of the safe harbor even though the plan had a minimum participation level imposed by the insurance provider, concluding that the minimum participation requirement imposed by the *insurance provider* "does not suggest [*the employer's*] intent to offer the Plan as a benefit of employment" (emphasis added).[11] Here, the opt-out feature of the CalSavers program is a requirement imposed by the State, not the employer, and does not suggest any employer's intent to provide "a benefit of employment." *Ames*, 515 F. Supp.

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[10] Since the CalSavers program is still being designed, the details of the opt-out procedure have not yet been established, including the content and appearance of the opt-out form. Nothing in the Act suggests that the program as ultimately implemented will be other than transparent and easy to navigate.

[11] In contrast, in *Meadows*, the employer agreed with an insurance carrier that 100% of eligible employees would be covered by the group life and AD&D insurance and 75% of all eligible employees would be covered by the group medical insurance being offered. In holding that the plan was not completely voluntary, the court concluded that "[i]f the benefit was meant to be an option for employees there would be no participation requirement of 75% or 100%." *Meadows*, 826 F. Supp. at 1229.

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2d at 1055-56.

Third, there is no basis upon which HJTA could conceivably suggest that it—or any employer—"endorses" the program. "So long as an employer maintains neutrality with respect to an IRA sponsor in its communications with its employees, the employer will not be considered to 'endorse' an IRA payroll deduction program for purposes of 29 CFR 2510.3–2(d)." 29 C.F.R. § 2509.99-1(c). The "endorsement" issue garners the bulk of the attention in most cases. *See Edwards v. Prudential Ins. Co. of Am.*, 213 F. Supp. 2d 1376, 1382 (S.D. Fla. 2002) (noting that "in the lion's share of cases addressing this safe harbor provision, the 'endorsement' inquiry is the one upon which the analysis acutely focuses"). The Court here, however, need not labor over the issue. The Act provides expressly that "the program is a state-administered program, not an employer-sponsored program." Act § 100034(b). The Proposed Regulations make even clearer that employers may not endorse the program, even if they wanted to do so: "Participating Employers shall remain neutral about the Program" and shall not "[r]equire, endorse, or discourage employee participation in the Program." Proposed Regulations, CAL. CODE REGS. tit. 10, § 10006(e), RJN, Exh. 3.[12] Merely providing employees with written materials generated by the EDD as instructed by CalSavers cannot, as a matter of law, constitute "endorsement" of the CalSavers program, as DOL regulations make clear:

> An employer may provide to employees informational materials written by the IRA sponsor describing the sponsor's IRA programs or addressing topics of general interest regarding investments and retirement savings, provided that the material does not itself suggest that the employer is other than neutral with respect to the IRA sponsor and its products.

29 C.F.R. § 2509.99-1(c)(2).

Finally, no employer will receive any consideration of any kind in connection with CalSavers' implementation. The Act makes no provision for any employer to receive any benefit from the program, and the Complaint makes no allegation that would allow the Court to draw any contrary inference. Accordingly, CalSavers and the IRA Trust that it establishes satisfy all the

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[12] Since CalSavers has not yet gone live, there is nothing for any employer - including HJTA - to "endorse." This is yet another reason why this matter is not ripe for resolution.

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requirements of the DOL regulatory safe harbor applicable to IRAs.

The Complaint refers to a "new safe harbor" adopted by the DOL in 2016 relating to state sponsored payroll deduction savings programs, and notes that that regulation (previously appearing at 29 C.F.R. § 2510.3-2(h)) was revoked in 2017 by a Joint Resolution of Congress pursuant to the Congressional Review Act. (Complaint ¶¶ 13-14.) On this basis, HJTA claims that "… there is no potentially valid DOL regulation permitting this state-run retirement arrangement." (*Id.* ¶ 25.) That is incorrect as a matter of law. While Congress disapproved of 29 C.F.R. § 2510.3-2(h), it did *not* revoke or otherwise take any action with respect to either the DOL 1975 safe harbor regulation or Interpretive Bulletin 99-1. Since the earlier safe harbor regulation is not affected by the 2017 Joint Resolution, the Court may not infer that Congress intended to disapprove of it: "If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval." 5 U.S.C. § 801(g). The original 1975 safe harbor regulation, therefore, remains in full force and effect, and the CalSavers program falls within that safe harbor.

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3. Even if the Safe Harbor Requirements Were Not Met, CalSavers Does Not Create an Employee Benefit Plan.

Since CalSavers satisfies all four of the requirements of the DOL safe harbor regulation applicable to IRAs, the Court's inquiry should end there. But even if there was any basis for finding that the program did not meet all of the regulation's requirements, it would not mean that CalSavers constitutes an employee benefit plan. "A program that satisfies the [safe harbor] regulation's standards will be deemed not to have been 'established or maintained' by the employer. The converse, however, 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." *Stuart v. UNUM Life Ins. Co. of Am.*, 217 F.3d 1145, 1153 n.4 (9th Cir. 2000) (interpreting identical safe harbor requirements applicable in the context of group insurance programs, and citing *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir. 1995)); *see also Gaylor v. John Hancock Mutual Life Ins. Co.*, 112 F.3d 460, 463 (10th Cir. 1997); *Ames*, 515 F. Supp. 2d at 1053-54

To be a "plan" under ERISA, the plan, fund, or program must be "established or maintained" by an employer. The CalSavers program does not meet this basic criterion because it is a state-administered program. Act §100034(b) ("The program is a state-administered program, not an employer-sponsored program.") In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987), the Supreme Court held that a Maine statute requiring employers to make a severance payment to employees in the event of a plant closing "neither establishes, nor requires an employer to maintain, an employee benefit *plan*." (Emphasis in original.) Similarly, the IRAs to be established by CalSavers will be neither established nor maintained by any employer, but rather by the State.

The Ninth Circuit has found that when employers have no discretion in the administration of a program other than to make payments required by law, and keep records of those payments, they cannot be found to have established or maintained the plan, and therefore, no employee benefit plan within the meaning of ERISA is created. In *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639, 651 (9th Cir. 2008), plaintiff alleged that a San Francisco Ordinance that required covered employers to make required health care expenditures to or on behalf of certain of their employees created an employee benefit plan as defined by ERISA, and argued that the employer's obligation to make payments to the City of San Francisco satisfied the criteria for establishing a plan set forth in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), namely, that "the administrative burden on the covered employers, combined with the reasonable ascertainability of benefits to employees, creates an ERISA plan." HJTA here makes a similar claim, stating that employers subject to CalSavers "automatically become plan administrators with all attendant administrative and legal liabilities." (Complaint ¶ 24.) In *Golden Gate*, the Ninth Circuit rejected that argument, holding that "[w]e would be very hesitant to hold that the *Donovan* criteria apply to statutory administrative burdens imposed on an employer where, as here, that employer has made no promises whatsoever to its employees. . . ." 546 F.3d at 652.[13] The Court held that "an

[13] As a counter-example, in *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323–24 (9th Cir. 1992), the

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employer's administrative duties must involve the application of more than a modicum of discretion in order for those administrative duties to amount to an ERISA plan." *Id.* at 650. Here, employers subject to the CalSavers program have no discretion. They simply have a ministerial obligation to distribute a Board-created employee information packet, and to remit the payroll deductions for those employees who elect not to opt out.[14] In sum, because the CalSavers program can in no sense be considered a program established or maintained by an employer, as a matter of law neither CalSavers nor the IRA Trust that it will establish, can constitute an employee benefit plan as defined by ERISA. Therefore, plaintiffs do not, and cannot, allege that they have statutory standing to bring their claim under ERISA § 502(a)(3), 29 U.S.C. § 1002(a)(3), as fiduciaries of or participants in an ERISA plan.

D. Because CalSavers Will Not Create an ERISA Plan, ERISA Does Not Preempt the Act.

For the same reasons that plaintiffs lack statutory standing, plaintiffs' preemption claim should be dismissed on the merits, as well. Plaintiffs contend that the Act is preempted by ERISA. (Complaint ¶ 2.) ERISA, however, only preempts state laws "insofar as they may now or hereafter relate to any employee benefit plan" as defined by ERISA. ERISA § 514(a), 29 U.S.C. § 1144(a). But, as a matter of law, the CalSavers program will not establish an ERISA plan. See Section III., *supra*. Just as in *Daniels-Hall*, 629 F.3d at 1007, there is "no scenario in which [any IRA to be established by CalSavers] fits the definition of an employee pension benefit plan subject to Title I of

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Court held that where a corporation established an employee benefit plan for the employees of a wholly owned subsidiary and administered that plan, and the subsidiary funded the plan, the plan was "'established or maintained by an employer' and is accordingly controlled by ERISA." None of those factors are present here. Neither HJTA nor any other employer will have "established" CalSavers, they will have no duty to administer it, and they will not bear the financial burden of funding it.

[14] The Court in *Golden Gate* found it significant that "[a] covered employer may choose to adopt or to change an ERISA plan in lieu of making the required health care expenditures to the City. An employer may be influenced by the Ordinance to do so because, when faced with an unavoidable obligation to make a payment at a certain level, it may prefer to make that payment to an ERISA plan. However, as [*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)] makes clear, such influence is entirely permissible." *Golden Gate*, 546 F.3d at 656. The same is true here. Employers may, if they wish, offer an ERISA-governed plan to their employees, in which case CalSavers will not apply to them.

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ERISA." Consequently, the Act does not and will not relate to any employee benefit plan and is not preempted by ERISA.

E. Plaintiffs Also Lack Standing to Pursue Their State Law Claim, and the Claim Fails as a Matter of Law.

When a district court dismisses a predicate federal law claim, it should decline the exercise of supplemental jurisdiction over remaining state claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988). Therefore, plaintiffs' Second Claim for alleged violations of California Code of Civil Procedure section 526a should also be dismissed.

Even if the Court were inclined to entertain it, plaintiffs' Second Claim is barred by the Eleventh Amendment. "[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). Here, the State is the real, substantial party in interest to Plaintiffs' challenge to the CalSavers program. *See id.* at 92, 101; Complaint, Prayer item 2 (seeking to enjoin the program and the Treasurer).

Plaintiffs also lack standing to assert the claim. Code of Civil Procedure section 526a, which provides for state court taxpayer standing, does not satisfy Article III standing requirements for federal court. It is not enough for a plaintiff to be a California taxpayer, he or she must allege a "direct pocketbook injury." *Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001). Plaintiffs not only cannot allege a direct injury, but there can be no injury to California taxpayers, because the CalSavers program is structured to ensure that administrative costs are funded through employee contributions and the state incurs no liabilities associated with administering the program or its investments. Act §§ 100000(i), 100004(a), (b), 100046(b), 100050.

Finally, a claim under § 526a does not lie where the State's action is legal. *Lyons v. Santa Barbara County Sheriff's Office*, 231 Cal.App.4th 1499, 1501 (2014); *Humane Soc'y of the United States v. State Bd. of Equalization*, 152 Cal.App.4th 349, 361 (2007). The only illegality alleged in the Complaint is that the CalSavers program is preempted by ERISA. (Complaint ¶¶ 2, 25). But that argument fails because as shown above, the program does not establish an ERISA plan, and

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therefore, ERISA does not preempt the Act.[15]

IV. CONCLUSION

For the foregoing reasons, and because amendment would be futile, plaintiffs' Complaint should be dismissed with prejudice and without leave to amend.

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[15] Of course, if there were ERISA preemption, any derivative claim under Code of Civil Procedure section 526a would be preempted, as well. *See Oregon Teamster Employers Trust v. Hillsboro Garbage Disposal, Inc.*, 800 F.3d 1151, 1155-56 (9th Cir. 2015).

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