No. 20-15591

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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-Appellees.

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

APPELLANTS' OPENING BRIEF

Jonathan M. Coupal, SBN 107815
Timothy A. Bittle, SBN 112300
Laura E. Dougherty, SBN 255855
Howard Jarvis Taxpayers Foundation
921 Eleventh Street, Suite 1201
Sacramento, CA 95814
Telephone: (916) 444-9950

Attorneys for Appellants

RULE 26.1 DISCLOSURE STATEMENT

The Howard Jarvis Taxpayers Association (HJTA) is a 501(c)(3) nonprofit public benefit corporation. It has no parent corporation. No publicly held corporation owns stock therein.

Date: June 12, 2020.

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/Laura E. Dougherty
Laura E. Dougherty

Attorneys for Appellants

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INTRODUCTION

This case concerns a state-run mandatory automatic IRA payroll deduction program named "CalSavers." The State contends CalSavers is not preempted by the Employee Retirement Income and Security Act of 1974 (ERISA) because the State believes that ERISA's 1975 safe harbor for payroll deduction IRAs applies and because CalSavers originates in state legislation. But CalSavers fails the test for the 1975 safe harbor and the fact that CalSavers originates with the State does not exempt CalSavers from ERISA.

The District Court found correctly that CalSavers does not pass the test for the 1975 safe harbor. (ER30-31.) But it erred in its first order by finding, in spite of that failure, that "government mandates on employers" are not subject to ERISA at all, ER33, so even if they create an IRA program to which the 1975 safe harbor test should naturally apply, it does not matter. It erred in its second order by agreeing with the State of California that since CalSavers originated in legislation, it was not "established or maintained" as required by ERISA. (ER13-14.)

The District Court thus found two gray areas which are mere illusion. First, it concluded that the state mandate only places "ministerial" duties on employers, and thus this IRA program is exempt from ERISA. But, in so concluding, the District Court extracted one factor from the 1975 safe harbor test (minimal employer involvement) and assumed it may be used in isolation, ignoring the other three (no employer contributions, "completely voluntary" employee participation, and no consideration to the employer). (29 C.F.R. § 2510.3-2(d).) All four factors must be met for an IRA payroll deduction plan to be exempt from ERISA. Period.

Second, despite there being no exemption in ERISA for a state-legislated automatic IRA program, and despite Congressional repeal of the regulation specifically authorizing CalSavers, the District Court concluded that CalSavers still creates no ERISA plan or plans. The District Court concluded that CalSavers being a creature of legislation, no "employer" has or will "establish or maintain" the plan or plans. This gray area cannot be reconciled with ERISA's statutory provisions or preemption principles, all of which will be explained herein. In short, ERISA preempts CalSavers and there is no federal law saving it.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2, and 28 U.S.C. § 1331. Specifically, the District Court had exclusive original jurisdiction under the Employee Retirement Income and Security Act of 1974 (ERISA). (29 U.S.C. § 1132(e).) The District Court further had supplemental jurisdiction over the California Code of Civil Procedure § 526a claim pursuant to 28 U.S.C. § 1367 because federal preemption would automatically reveal taxpayer waste in the illegal status of the state program at issue — CalSavers, formerly known as Secure Choice or the California Secure Choice Retirement Savings Program.

The District Court had personal jurisdiction pursuant to 29 U.S.C. § 1132(e), because defendant State Treasurer Fiona Ma (formerly John Chiang) — chair of the

California Secure Choice Retirement Savings Investment Board — may be found in the district, and pursuant to 29 U.S.C. § 1132(d), because CalSavers is an employee benefit plan which may be sued as an entity.

Venue was proper in the District Court for the Eastern District of California pursuant to 28 U.S.C. § 1391, because the Defendant Fiona Ma, as a California Constitutional officer, has her office in the State Capitol of Sacramento, and because substantial events giving rise to the claim occurred and are occurring in this district.

This Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291 because the decision in the District Court disposing of all claims became final on March 10, 2020. (ER3.) Plaintiffs filed notice of appeal on April 1, 2020, which was timely under F.R.A.P. 4(a). (ER40-41.)

STATEMENT OF ISSUES

1. Did the District Court err by finding that the state-mandated automatic private employee retirement program known as "CalSavers" is not preempted under ERISA where it is an employee benefit plan, where employer autonomy under 29 C.F.R. § 2509.99-1(d) has been erased, and where the District Court found that CalSavers does not pass the applicable four-factor test for exemption at 29 C.F.R. 2510.3-2(d)[1]?

[1] This is commonly referred to as "the 1975 Safe Harbor."

2. Did the District Court err by finding standing only for HJTA as a putative fiduciary, not as an association when the legality or illegality of CalSavers will immediately determine the existence of taxpayer waste, and by finding no standing for the individual employee plaintiffs when ERISA defines a participant as one "who is or may become eligible to receive a benefit of any type from an employee benefit plan" under 29 U.S.C. § 1002(7)?

STATEMENT OF THE CASE

This is the first case in the nation to ask for legal assessment of a state-mandated automatic private employee retirement savings program under ERISA.

In 2012, the California Legislature began considering Senate Bill 1234, a proposal for a mandatory automatic private employee retirement savings program then named "Secure Choice" and now known as "CalSavers." The California Department of Finance expressed grave concerns for ERISA preemption, state liability thereunder, and pressure on the state's general fund. (ER420-424; 81 Fed.Reg. 59464, 59473, n. 40.) Once passed, the legislation created the nine-member Secure Choice Retirement Savings Investment Board chaired by the State Treasurer, and the California Secure Choice Retirement Savings Trust. By fiscal year 2017-2018, the Board was requesting a $170,000,000.00 general fund loan, to be repaid over four years, for "services necessary to route, receive, and invest contributions from Program participants." (ER377-379.) Requests continued to be made, money was lent from the general fund, and these taxpayer funds have been spent on the unsure promise of repayment from participant fees. (ER365.)

"Secure Choice" indirectly and directly proclaimed itself dependent on an anticipated U.S. Department of Labor regulation exempting it from ERISA, assuming the DOL could exempt such a program[2]. (Cal. Gov. Code, § 100043(a).) In requesting the $170,000,000.00 general fund loan, the Board said SB 1234 conditioned the opening of CalSavers on the Board "report[ing] to the Governor and the Legislature … [t]hat the United States Department of Labor (DOL) has finalized a regulation setting forth a safe harbor for savings arrangements established by states for nongovernmental employees for purposes of the federal Employee Retirement Income Security Act (ERISA)." (ER379.)

The Board's anticipated DOL regulation went into effect on October 31, 2016, as subsection (h) to 29 C.F.R. 2510-3.2. (81 Fed.Reg. 59464.) The DOL Summary of the addition of subsection (h) stated: "This document describes circumstances in which state payroll deduction savings programs with automatic enrollment would not give rise to the establishment of employee pension benefit plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA)." (81 Fed.Reg. 59464.) It specifically referenced the California "Secure Choice" program, along with similar

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[2] That issue is not before the Court.

programs in other states, throughout. (Id., n. 5; 59465; 59471, n. 34; 59472; 59473, n. 40; 59474, n. 44.)

The California Legislature implemented "Secure Choice" on January 1, 2017. (Cal. Gov. Code, § 100046.) The Board continued implementation and operations, formalized in documents such as Program Fund financial statements and Investment Policy Statements. (ER380-390; 404-419.)

However, Congress disapproved and repealed subsection (h) from 29 C.F.R. 2510-3.2 on May 17, 2017. (Pub.L. No. 115-35; 131 Stat. 848.)

The Board continued implementation regardless, without seeking advice from the United States in an ERISA Opinion Letter (a procedure available through the Employee Benefits Security Administration), advice from the DOL, or the courts. Responsibility for this nationwide issue fell to the first volunteer(s) to ask a District Court for resolution. (Cal. Gov. Code, § 100043(a) ["The board shall not implement the program … if it is determined that the program is an employee benefit plan under the federal Employee Retirement Income Security Act."].)

On May 31, 2018, HJTA and non-governmental employees Jonathan Coupal, and Debra Desrosiers filed a Complaint for Declaratory and Injunctive Relief in the District Court for the Eastern District of California. (ER820-843.) Plaintiffs alleged that ERISA preempts CalSavers and CalSavers thus creates taxpayer waste.

On July 25, 2018, Defendants filed a motion to dismiss under Federal Rule of Civil Procedure, Rules 12(b)(1) and 12(b)(6). (ER761-819.) Defendants argued that

Plaintiffs had no standing, that the case was not ripe because CalSavers hadn't opened for enrollment as of the complaint's filing date, that CalSavers qualified for safe harbor under 29 C.F.R. § 2510.3-2(d) despite the repeal of subsection (h), and that CalSavers is not an employee benefit plan under ERISA. After the parties completed the standard motion briefing, ER692-760, Judge Morrison England requested supplemental briefing on two questions:

1. How is the "completely voluntary" requirement of 29 C.F.R. § 2510.3-2(d) interpreted? How does it apply, if at all, to State-mandated retirement savings plans such as CalSavers?
2. How do principles of conflict and field preemption in the ERISA context apply, if at all, to CalSavers?

(ER35-36.)

Plaintiffs and Defendants filed supplemental briefs in response to these questions simultaneously on November 15, 2018. (ER667-691.)

On March 29, 2019, Judge Morrison England granted Defendants' motion to dismiss, finding that Plaintiff HJTA had standing as a putative employer fiduciary, that the case was ripe, and that the safe harbor in 29 C.F.R. § 2510.3-2(d) did not exempt CalSavers, but that CalSavers was nevertheless not preempted by ERISA because "eligible employers" (mandated employers) "are not required to make any promises to employees," meaning they "have no discretion regarding the funds." (ER19-34.) Judge England granted leave to amend. (ER34.)

Plaintiffs filed the First Amended Complaint on April 11, 2019. (ER341-424.) With additional exhibits and new promotional videos by CalSavers attached, the first amended complaint elaborated on why CalSavers is itself an ERISA plan or forces the creation of multiple ERISA plans by employers, and on the burdens upon employers, including the interference with their rights under ERISA to designate one or more IRA sponsors on their own.

Defendants filed their second motion to dismiss on May 28, 2019, arguing again that CalSavers does not create an employee benefit plan and that it is protected by the safe harbor in 2510.3-2(d) despite the repeal of subsection (h). (ER287-340.) Briefing on this motion completed August 1, 2019 for the parties, ER147-287, but on August 2, 2019, the United States filed a "Notice by the United States Concerning Potential Participation." (ER144-146.) It notified the Court of a potential intention to participate per its rights under 28 U.S.C. § 517.

Defendants' filed a Response on August 5, 2019, informally objecting to the participation of the United States. (ER141-143.) The United States filed a Status Update on August 30, 2019, requesting time until September 13, 2019.

On September 13, 2019, the United States filed a 19-page "Statement of Interest of the United States," arguing that ERISA preempts CalSavers on several grounds. (ER116-140.)

Defendants responded to the United States' Statement on October 15, 2019, urging the Court not to revisit its earlier decision. (ER59-72.) Plaintiffs filed a brief response on October 18, 2019, asking, in light of the employer discretion discussion, for a very close reading of 29 C.F.R. § 2510.3-2(d), California Government Code § 100032(g), and 29 C.F.R. § 2509.99-1(d). (ER57-58.)

On March 10, 2020, Judge England granted Defendants' second motion to dismiss and ordered judgment, finding that CalSavers is not an ERISA plan and does not relate to ERISA plans. (ER3-16.) Plaintiffs appealed on April 1, 2020. (ER40-41.)

SUMMARY OF ARGUMENT

1. ERISA preempts CalSavers through field preemption. Unlike health care regulation, private pension plan regulation has been exclusive to the federal government since 1974. States therefore do not have authority to establish mandatory automatic enrollment IRA programs. Congress affirmed this in 2017 by repealing a 2016 DOL regulation designed specifically to exempt CalSavers and similar state programs. As it stands, Congress could create a national automatic retirement plan act, but states may not do so individually. The Congressional repeal of exemption for CalSavers will be meaningless if CalSavers continues.

2. ERISA preempts CalSavers through reference. CalSavers expressly uses ERISA as its reference point to setup two systems in one state. Under CalSavers, private employers must adopt an ERISA plan or CalSavers. CalSavers is an ERISA plan itself or subjects the employer to the requirement of creating one. Under CalSavers, pre-existing ERISA plans are singled out for different treatment under the

law because employers who have them are exempt from CalSavers. The intent of CalSavers is to mandate an extension of benefits matching typical ERISA plans.

3. ERISA preempts CalSavers through connection. CalSavers mandates employee benefit structures by requiring employers to choose between an ERISA plan or CalSavers. This choice is enforceable by penalties and puts employers at risk of court action under ERISA over questions of whether they have an existing ERISA plan or may have unintentionally become an ERISA plan administrator while trying to navigate CalSavers.

4. CalSavers is an ERISA plan because it is not on the exemption list and it easily satisfies the *Donovan* test. Its origination in the State of California does not change this because the CalSavers Trust is the statutory employer under ERISA itself.

5. CalSavers forces employers to establish or maintain ERISA plans because each payroll deduction arrangement is not on the exemption list and easily satisfies the *Donovan* test. Direction from the State of California does not change this because employer discretion is more than ministerial. Unlike the making of one-time payments with the employer's own money, the employer is managing the employee's money while making determinations under a changing, ongoing administrative and regulatory scheme.

6. ERISA preempts CalSavers through conflict. CalSavers erases the employer autonomy established by existing ERISA regulation over IRA payroll deduction programs. In short, employers have autonomy under ERISA to select zero,

one, or more IRA payroll deduction providers, or to set criteria for working with such providers. CalSavers replaces that autonomy with its own mandatory program. Further, CalSavers puts small and multi-state employers at unavoidable risk of becoming ERISA administrators, if they were not already based on the establishment or maintenance of their plans.

7. The 1975 Safe Harbor specific to IRA payroll deduction plans is the only applicable test, and it does not exempt CalSavers. CalSavers is an automatic enrollment program and thus fails the "completely voluntary test." Further, employers are forced to endorse the program, and CalSavers is not compliant with IRC § 408(a).

8. Individual plaintiffs have standing because they are living, employable persons over age eighteen who "may become eligible" for CalSavers. They qualify for putative participant standing under ERISA's civil private enforcement statute.

9. HJTA has associational standing because it passes the three-part test. Its members would otherwise have standing to sue in their own rights as employers and employees who "may become eligible" under ERISA's civil private enforcement statute. A core interest HJTA seeks to protect — avoiding taxpayer waste through its California Code of Civil Procedure §526a claim — is germane to the association's purpose to protect taxpayers, and is inevitably dependent on the determination of ERISA preemption in federal court. Finally, neither the claim asserted nor the relief requested requires the participation of HJTA's individual members.

ARGUMENT

I. ERISA PREEMPTS CALSAVERS.

The District Court's decision regarding preemption is reviewed *de novo*. (*Hickcox-Huffman v. US Airways, Inc.* (9th Cir. 2017) 855 F.3d 1057, 1060; *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands* (9th Cir. 2016) 841 F.3d 1069, 107); *In re Korean Air Lines, Co.* (9th Cir. 2011) 642 F.3d 685, 692 n.3; *Whistler Investments, Inc. v. Depository Trust & Clearing Corp.* (9th Cir. 2008) 539 F.3d 1159, 1163.)

"More specifically, '"[w]e review the District Court's decision on ERISA preemption de novo because it is a question of federal law involving statutory interpretation."' *Wilson v. Zoellner* (8th Cir. 1997) 114 F.3d 713, 715 (quoting *In Home Health, Inc., v. Prudential Ins. Co.* (8th Cir.1996) 101 F.3d 600, 604)." (*Prudential Insurance Co. of America v. National Park Med. Center, Inc.* (8th Cir. 1998) 154 F.3d 812, 818.)

A. ERISA Preempts CalSavers Through Field Preemption, And Through Reference and Connection, Mainly Because it is an ERISA Plan.

The CalSavers statutes expressly refer to ERISA and ERISA plans. CalSavers connects to ERISA by interfering with national objectives. Further, CalSavers itself is an ERISA plan and requires employers to establish ERISA plans. Thus, CalSavers is preempted.

1. California has trespassed on exclusive federal turf.

In 1974, Congress occupied the field of private employee retirement savings plans with ERISA. The preemption clause at 29 U.S.C. § 1144(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." A uniform system would have been "difficult to achieve … if a benefit plan [were] subject to differing regulatory requirements in different States." (*Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 9.) Thus, the preemption clause was designed to "establish pension plan regulation as exclusively a federal concern." (*Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504, 505.)

This exclusive federal concern is extremely broad. Comments noted by the Supreme Court from the Congressional record explain:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the *sole* power to regulate the field of employee benefit plans. With the *preemption of the field*, we round out the protection afforded participants by *eliminating the threat of conflicting and inconsistent State and local regulation*." 120 Cong. Rec. 29197 (1974).
>
> Senator Williams echoed these sentiments: "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are *intended to preempt the field* for Federal regulations, thus *eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans*. This principle is *intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof*, which have the force or effect of law." Id., at 29933.

(*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 99, emphasis added.)

Accordingly, to this day, only Congress may implement any automatic IRA mandate. (See Automatic IRA Act of 2011, S. 1557, 112th Cong.; Automatic Retirement Plan Act of 2017 (H.R. 4253, 115th Cong.) States cannot do the same given 29 U.S.C. § 1144(a). In fact, the Automatic Retirement Plan Act of 2017 was proposed by the same Congress that repealed the 2016 DOL regulation on which CalSavers temporarily relied.

In 2017, Congress specifically disavowed CalSavers by expressly repealing the 2016 DOL regulation designed to authorize CalSavers itself. It reads:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.* That Congress disapproves the rule submitted by the Department of Labor relating to "Savings Arrangements Established by States for Non-Governmental Employees" (published at 81 Fed. Reg. 59464 (August 30, 2016)), and such rule shall have no force or effect.

(Pub. L. No. 115-35 (May 17, 2017) 131 Stat. 848.)

This Act of Congress is meaningless if CalSavers continues in existence.

The DOL regulation disapproved had been briefly codified as subsection (h) to 29 C.F.R. § 2510-3.2. (81 Fed.Reg. 59464.) The DOL Summary of the addition of subsection (h) had stated: "This document describes circumstances in which state payroll deduction savings programs with automatic enrollment would not give rise to the establishment of employee pension benefit plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA)." (*Ibid.*) It specifically referenced CalSavers throughout, by its former nomenclature — the California "Secure Choice" program. (Id., n. 5; 59465; 59471, n. 34; 59472; 59473, n. 40; 59474, n. 44.)

Simply put, no State has authority to implement an automatic savings arrangement for nongovernmental employees. But CalSavers has done so regardless.

2. CalSavers refers to ERISA and ERISA plans.

The CalSavers statutes refer expressly to ERISA. First, they incorporate and entwine ERISA plans and products with the CalSavers program. For example, California Government Code section 100008 provides, "The CalSavers Retirement Savings Program shall include, as determined by the board, one or more payroll deduction IRA arrangements." And Government Code section 100049 states, "A payroll deposit IRA arrangement offered pursuant to the CalSavers Retirement Savings Program shall have the same status as, and be treated consistently with, any other IRA ...." Payroll deduction IRAs, where the employee exercises no control over where the funds will be invested, are ERISA plans. (29 C.F.R. § 2510.3-2(d); 29 C.F.R. § 2509.99-1(d); 26 U.S.C. § 408(c).) By enacting a program that creates and invests IRAs, the State has established an ERISA plan.

Second, the statutes attempt to distinguish CalSavers from ERISA as a separate state program for regulating private retirement planning. (See Cal. Gov. Code, §§ 100000; 100012(j); 100032; 100043.) This attempt to create two regulatory programs is impermissible given federal preemption of the field. As will be discussed later, the only exemption for IRA payroll deduction programs is the 1975 Safe Harbor at 29 C.F.R.§ 2510.3-2(d) and further interpreted at 29 C.F.R. § 2509.99-1(d). The District Court has already declared that CalSavers fails this safe harbor. (ER30-31.) There is no other "gray area" available for states to establish IRA payroll deduction programs.

These express statutory references to ERISA and ERISA plans cause preemption. (*De Buono v. Nysa-Ila Med. & Clinical Servs. Fund* (1997) 520 U.S. 806, 815; *id.* at n. 15 ["See *Mackey v. Lanier* (1988) 486 U.S. 825, 828-830 (a provision that explicitly refers to ERISA in defining the scope of the state law's application is pre-empted); *District of Columbia v. Greater Washington Board of Trade* (1992) 506 U.S. 125, 130-131 ("Section 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted").].)

Mackey v. Lanier, *supra*, 486 U.S. 825 is helpful regarding the two-system problem. In *Mackey*, a well-intentioned Georgia statute attempted to exempt ERISA plan beneficiaries from certain garnishment procedures for their debts. But through "express reference" the Georgia statute "singled out" ERISA plans, causing them to be treated differently than other plans. (*Id* at p. 828, n.2.) CalSavers has done exactly the same, rendering specific ERISA plans exempt from general application of state law. Employers will be treated differently depending on the "choice" they make. (E.g., Cal. Gov. Code § 100032.)

Another well-intentioned statute in the District of Columbia attempted to require that employers with health insurance benefits provide equal insurance benefits to those who qualified for workmen's compensation benefits. (*District of Columbia v. Greater Washington Board of Trade*, *supra*, 506 U.S. 125.) The Supreme Court stated, "Section 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted." (*Id.* at p. 130-131.) CalSavers refers to pension plan benefits regulated by ERISA, both by setting up California as a two-system state, and by requiring what is intended to be a matching extension of ERISA benefits to CalSavers participants. The application of the CalSavers statutes to any employer is determined by the pre-existence or non-existence of an ERISA pension plan. The references to ERISA are not merely literal or severable, but are "essential to the law's operation." (*Gobeille v. Liberty Mutual Ins. Co.* (2016) 136 S. Ct. 936, 943.) ERISA determines CalSavers' application, and ERISA products are hijacked for its alternative regulatory program. Given that this ERISA-dependent law intrudes in a field exclusively occupied by the federal government, CalSavers cannot survive.

Moreover, California has set itself up as an alternative adjudicator of ERISA compliance. This is true because CalSavers applies automatically to California private employers unless they can show – to the State's satisfaction – that their employees are already covered by an ERISA compliant plan. (Cal. Gov. Code § 100032(g)(1)). If an employer must defend against an accusation of non-compliance with the mandatory CalSavers statutes, he or she will have to prove the existence of an ERISA-covered plan they provide under Government Code section 100032(g)(1). Ironically, litigation could be brought in federal court to validate the existence of an ERISA-covered plan or enforce CalSavers compliance on the accused employer. Even assuming that litigation will be rare, the State of California is putting itself in the position of determining the existence of ERISA plans on a regular basis, applied to hundreds of thousands of employers. Again, this is federal territory.

3. CalSavers connects with ERISA and ERISA plans.

Even if a statute does not expressly refer to any ERISA plan, it "relate[s] to" ERISA and is preempted if it has an impermissible "connection with" an ERISA plan. Courts must look "to both the [Congressional] objectives of the ERISA statute … as well as the nature and effect of the state law on ERISA plans." (*Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 147.) Anything interfering with ERISA objectives is preempted.

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at p. 97, state disability laws had a "connection with" ERISA plans because they mandated employee benefit structures. CalSavers likewise mandates employee benefit structures. It directs employers to: choose CalSavers, choose another ERISA plan, or pay penalties. ERISA also preempts state laws that create alternative enforcement mechanisms and bind employers to particular choices, likewise interfering with the national uniformity objective of ERISA. (80 Fed.Reg. 72006, 72007, n. 8, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 658; *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 142; *Egelhoff v. Egelhoff*, *supra*, 532 U.S. at p. 148; *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 14.) CalSavers binds employers with its own enforcement mechanisms, Cal. Unemp. Ins. Code, § 1088.9, forcing them to deduct contributions from their employees' pay and remit them to the State while the State assumes no fiduciary duty to the private employees, Cal Gov. Code, §§ 100036;

100046, and offers employers an illusory shield from ERISA liability, Cal Gov. Code, §§ 100014(c)(2); 100034. All of this is inconsistent with the ERISA objectives of protecting private employee retirement investments and standardizing rules for employers.

Besides national uniformity of regulation in general, core ERISA objectives include reporting of data, disclosure, fiduciary obligations, vesting requirements (*Shaw v. Delta Airlines Inc.*, *supra*, 463 U.S. at pp. 98-99) and payment of benefits (*Egelhoff v. Egelhoff*, *supra*, 532 U.S. at pp. 147-148). (See also *Gobeille v. Liberty Mutual Insurance Co.*, *supra*, 136 S.Ct. 936 [reporting of data].) CalSavers creates an ERISA plan with statutes and regulations all distinct from ERISA and its objectives. Even assuming CalSavers is not an ERISA plan, the mandate interferes with all ERISA objectives by forcing employers who don't yet have an ERISA plan to offer a lesser State plan. This "choice" compromises the employees' security and violates the employer's autonomy and administrative stability under ERISA, where Congress — not the states — regulates the field of private pensions.

4. CalSavers is an ERISA plan in denial.

a. CalSavers is not on the ERISA exemption list.

Employee benefit plans exempt from ERISA include governmental plans (i.e. plans for government employees), church plans, plans complying with workmen's compensation laws, unemployment laws, and disability laws, plans outside the U.S., and "excess benefit plans." (29 U.S.C. § 1003(b).) CalSavers is not on this list because it is a plan for nongovernmental employees.

b. CalSavers easily satisfies *Donovan.*

This Court has stated that "[v]ery few offers to extend benefits will fail the test laid out in *Donovan*, which requires neither formalities nor elaborate details." (*Winterrowd v. Am. Gen. Annuity Ins. Co.* (9th Cir. 2003) 321 F.3d 933, 939.) As previously summarized:

> We must remember that the existence of an ERISA plan is a question of fact, to be answered in the light of all the surrounding circumstances from the point of view of a reasonable person.

(*Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.* (9th Cir. 1987) 809 F.2d 617, 625, citing *Donovan v. Dillingham* (11th Cir. 1982)(en banc) 688 F.2d 1367, 1373.)

The *Donovan* test is simple and requires no formal writings:

> "[A] 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits."

(*Donovan v. Dillingham, supra,* 688 F.2d 1367, 1373.)

Any reasonable person can easily ascertain from CalSavers the intended benefits (retirement benefits), a class of beneficiaries (employees whose paychecks are debited), the source of financing (paycheck deductions), and procedures for receiving benefits (payments at retirement age). CalSavers tries to exempt itself from the *Donovan* test by arguing that the State is the originator of CalSavers. But as the United States put it, "[w]hether the employees invest money with a state-managed vehicle or private entities does not change the simple fact that CalSavers is an employment-based pension plan, which, aside from the state's involvement, would be indistinguishable from other ERISA-covered plans." (ER129.)

To allow states to "create" plans exempt from ERISA would expressly contradict the set list of exempt plans in 29 U.S.C. § 1003(b). This is affirmed by the 2017 Congressional repeal of the 2016 DOL regulation. That repeal evinces clear federal intent that there is no gray area in which an employment-based pension plan can be "created" by states and thus avoid being ERISA plans under *Donovan*.

c. CalSavers is still an "employee pension benefit plan" even though the State "created" it. ERISA covers this situation.

This argument that CalSavers is not an "employee pension benefit plan" at all is at the heart of both the State's argument and the District Court's error. But in addition to the absence of exemption in 29 U.S.C. § 1003(b), the expressed intent of Congress, the Judiciary's *Donovan* test, and ERISA itself resolve the question of how to characterize a "state-created" plan. A close reading of 29 U.S.C. § 1002, specifically subsections (5) and (9), reveals that when the State of California steps into the shoes of all of the private employers in its jurisdiction, the State and/or the CalSavers Trust becomes a statutory ERISA "employer" itself, creating an employee pension benefit plan under ERISA.

/ / /

/ / /

ERISA defines an "employee pension benefit plan" expansively as:

> 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) Provided retirement income to employees, or
>
> (ii) Results in a deferral of income by employees…

(29 U.S.C. § 1002(2)(A).)

The boiled-down point of contention seems to be whether CalSavers is "established or maintained by an employer or by an employee organization" because CalSavers is undisputedly a program for workplace retirement income savings as required by subsections (A)(i-ii). If the plan is "established or maintained by an employer or by an employee organization," it is an ERISA plan. Close attention should be paid to section 1002(5) which specifically defines "employer" for ERISA purposes. It incorporates a definition of "person" from section 1002(9), which includes a trust. CalSavers acts through a trust.

Section 1002(5) defines "employer" as "any *person acting directly* as an employer, *or indirectly in the interest of an employer*, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." (Emphasis added.) Like section 1002(2), this is another expansive definition. Section 1002(9) further defines "person" to include a "trust." The full title of the CalSavers Act is "The California Secure Choice Retirement Savings Trust Act." (ER367.) CalSavers creates a trust. (Cal. Gov. Code, § 100004.) The Trust is a person "acting…indirectly in the interest of an employer" by providing an employment benefit offered through the employer, by investing employee funds for the employer, and by making distributions to the employer's employees upon retirement. In plain language then, ERISA has already accounted for the possibility that an entity could step into the shoes of employers and act indirectly on their behalf for purposes of pension plan operations. ERISA incorporates those actors into its statutory definition of "employer," and thus continues to protect private employees in the circumstances presented here.

The closest example to the facts presented here can be found in this court's decision regarding another abstract entity deemed an ERISA employer under section 1002(5). (*Kanne v. Connecticut General Life Insurance* (9th Cir. 1988) 867 F.2d 489, 492-493[3].) In *Kanne*, an employee of a company called Harlow Carpets unsuccessfully contested the existence of an ERISA plan. Harlow Carpets belonged to an organization called ABC and subscribed to a group health insurance policy "established as a trust entity, called the ABC Trust." (*Id.* at p. 491.) Likewise, here, private employers are subscribing to a retirement plan established as the "CalSavers Trust." This court said "the problem with the Kannes' argument is their apparent

[3] However, in citing section 1002(5), the Ninth Circuit's citation is missing the semi-colon preceding the phrase, "and includes a group or association of employers acting for an employer in such capacity." The semicolon is significant because this is a separate phrase and thus a "group or association" is an alternate method of finding an "employer" for purposes of ERISA plan determination, not an additional condition on the phrases before the semicolon.

assumption that *Harlow Carpets'* functions with respect to the plan determine ERISA coverage." (Emphasis added.) Citing section 1002(5), this court concluded, "[u]nder this definition, *ABC* can be an ERISA employer for purposes of our analysis." (*Ibid.*, emphasis added.)

Similarly, here, the problem with the State's argument is that it assumes the functions of direct employers like Harlow Carpets determine ERISA coverage of CalSavers. Rather, like ABC in *Kanne*, the functions of the CalSavers Trust determine ERISA coverage. In *Kanne*, the ABC Trust was also an ERISA employer because ABC itself happened to be an employer association which is yet another type of ERISA employer under section 1002(5). But by plain language, the application of section 1002(9) here is simple. A "person" includes a "trust." (See also *Local 159 v. Nor-Cal Plumbing, Inc.* (9th Cir. 1999) 185 F.3d 978, 982 ["trust" is a "person" under section 1002(9) for purpose of finding fiduciary].) Therefore, not only is the State acting in the interest of actual employers, but another formalized "person" acting indirectly in the interest of employers in California is the CalSavers Trust.

Any employer must decide what to do (or not do) about workplace retirement savings. The State and its CalSavers Trust act indirectly in the interests of California employers by narrowing and mandating that choice, and then directing the process if an employer "chooses" CalSavers. Doing this is indirectly acting for the employer's interests with respect to pension planning, just as section 1002(5) plainly states.

On July 3, 2012, for further example, the Assembly Committee on Public[4] Employees, Retirement and Social Security stated, "Employers… need a way to help their employees save for retirement. Private sector employers often face significant barriers in setting up their own workplace retirement plans — in addition to the cost of hiring service providers and paying service fees, plans such as 401(k)s can be complex to maintain and administer, employers must accept fiduciary responsibility, and they are subject to an array of rules and regulations." (ER302.) This indicates that the CalSavers Trust intends to act in the interest of California employers by offering them a lower-cost, less-complex, option for providing a retirement plan, and by making that choice for them in the absence of another ERISA plan.

The CalSavers promotional videos (ER391-395) also show that CalSavers is designed to act indirectly in the interests of employers. The professed goal of the CalSavers Trust is to address the employer's "lack of access" to workplace retirement plans, to give employers something to "offer," to help employers remain competitive and able to retain their employees. (*Ibid.*) The CalSavers website says on behalf of the program: "CalSavers Retirement Savings Program was designed to give employers a simple way to help their employees save for retirement, with no fees, no fiduciary responsibility, and minimal maintenance." (ER396-398.) This is clearly acting

[4] Notably, the bill was not considered in a committee on *Private* Employees because private employee pensions are a matter of federal concern.

indirectly in the interests of employers with respect to pension plans, by attempting to enhance and direct what they offer their employees.

The very purpose of the CalSavers Trust is to step into the shoes of employers with respect to workplace retirement plans. This court and the Eleventh Circuit have looked to the purpose of the "person" acting indirectly for the employer when determining ERISA employer status. (See *Giardiello v. Balboa Ins. Co.* (11th Cir. 1988) 837 F.2d 1566, 1569 [surety not an ERISA employer because surety's purpose was to protect beneficiaries of a separate contract, not to serve the employees]; see also *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.* (9th Cir. 1994) 25 F.3d 849, 855-856.) Here, the sole and intentional purpose of the CalSavers Trust is the direction and management of the CalSavers plan and accounts of private employees. Thus, the CalSavers Trust is "acting … indirectly in the interest of an employer." This renders the CalSavers Trust the statutory ERISA employer for purposes of finding an employee pension benefit plan. Given this plain language and the other reasons stated above, it is inescapable that CalSavers is an ERISA plan.

5. CalSavers requires employers to establish and/or maintain ERISA plans.

Employers without existing ERISA plans must enroll their employees in CalSavers. Enrollment is based on the employment relationship. Broadly speaking, since employers must constantly determine eligibility for themselves and their employees and constantly determine proper deductions through ongoing administration, each employer's mandated actions create an ERISA plan.

a. Each employer's individual plan is not on the ERISA exemption list.

These plans are not on the exempt list because they are for nongovernmental employees. (29 U.S.C. § 1003(b).) The question is then whether they are "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization or both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program- (i) provide[s] retirement income to employees, or (ii) results in a deferral of income by employees…" (29 U.S.C. § 1002(2)(A).)

b. Each employer's individual plan easily satisfies *Donovan.*

Under *Donovan*, employees can easily ascertain the intended benefits (retirement benefits), the class of beneficiaries (employees whose paychecks are debited by their employer), the source of financing (the employer's paycheck deductions remitted to the State pooled fund), and procedures for receiving benefits (payments at retirement age). (*Donovan v. Dillingham, supra,* 688 F.2d 1367, 1373.) Enrollment is based on the employment relationship. (*Id.*, at p. 1371.)

c. Employers establish and/or maintain the plans.

Employers who don't yet have another ERISA plan (Cal. Gov. Code, § 100032(g)), must enroll in CalSavers on the timetable and subject to the required responsibilities (Cal. Gov. Code, § 100032(b)-(d)), or face penalties. (Cal. Unemp. Ins. Code, § 1088.9.) That employers participating in CalSavers "*shall have* a payroll deposit retirement savings arrangement" per sections 100032(b)-(d) naturally indicates that it is their plan, which they must arrange and keep in order with the program. Making the initial arrangement is "establishing" a plan and regularly reviewing the necessary determinations and administration is "maintaining" a plan. (29 U.S.C. § 1002(2)(A).)

The State contends CalSavers requires only ministerial work by California's employers, and thus, employers neither establish nor maintain any plans. The State likens the employer's automatic deductions to lines on a paystub for state disability insurance, taxes, etc. The truth, however, is that the work is neither ministerial nor akin to making regular paystub deductions.

The District Court relies on this Court's decision in *Golden Gate Restaurant Association v. City & County of San Francisco* (9th Cir. 2008) 546 F.3d 639, citing the "more than a modicum of discretion" requirement applied there. (ER13.) But *Golden Gate* is distinguishable, particularly because the money transferred from the employer to the program at issue was not the employee's own money.

In *Golden Gate*, San Francisco had created a healthcare program called Health Access Plan (HAP). HAP was a government entitlement program not based on employment relationships. (546 F.3d at p. 647.) Any resident meeting certain income requirements qualified for benefits. Employers without employee health plans basically had to pay a tax to the city to help fund the program. Employers who chose the "city-payment option" paid the city an amount per hour of employee-time worked. This required some paperwork, but was essentially a basic multiplication and check-writing process. Since payments are not plans, the employer's payment under the "city-payment option" was not preempted by ERISA nor was HAP itself preempted.

Similarly, in *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, a Maine statute required employers to make a one-time severance payment to employees in the event of a plant closing. This mandated payment was also not a "plan." There was "no administrative scheme whatsoever to meet the employer's obligation." (*Id.* at p. 12.) There were "no periodic demands on its assets that create a need for financial coordination and control." (*Ibid.*) Employers under CalSavers, however, must comply with an ongoing administrative scheme with regular open-enrollment periods and eligibility determinations for the employer and the employees.

Golden Gate is distinguishable for additional reasons. For one, the employer payments to the City in *Golden Gate* were not from the employee's own money. Any mistake made by the employer would not affect the employee. And unlike tax, worker's compensation, and state disability insurance withholdings, which become the property of the government, CalSavers' automatic deductions are still the employee's own money. Even Social Security, a federal law program, is a hybrid retirement and healthcare funding service, which does not hold an employee's money individually, and is relinquished on death. Employees do not expect an accounting of their tax withholdings and Social Security as a separate affair. In other words, no one expects to see their paycheck withholdings come back to them, unless they overpaid their taxes. And Social Security may not be cashed out at any time like an IRA or other retirement vehicles.

Relatedly, state and local governments traditionally regulate healthcare, thus justifying HAP which did not condition itself on employment relationships. (*Golden Gate, supra,* 546 F.3d at p. 648 ["The field in which the Ordinance operates is the provision of health care services to persons with low or moderate incomes. State and local governments have traditionally provided health care services to such persons."].) By contrast, private employee retirement savings is the exclusive turf of the federal government, as discussed earlier.

Shifting focus briefly to pension plans, *Golden Gate* references *Modzelewski v. Resolution Trust Corp.* (9th Cir. 1994) 14 F.3d 1374. *Modzelewski* declares that intent of the employer to establish or maintain a plan is not important. "Because ERISA's definition of a pension plan is so broad, virtually any contract that provides for some type of deferred compensation will also establish a de facto pension plan, whether or not the parties intended to do so." (*Id.* at p. 1377.) Intent being irrelevant, it does not matter whether the employers, here, promise the employees anything. The "promise" to fulfill the ongoing eligibility determinations and calculate and remit contributions from ongoing varying contribution rates, is mandated.

d. A DOL Advisory Opinion letter supports this view.

While CalSavers intends to be a single non-ERISA plan, it is alternatively forcing the formation of a collection of multiple ERISA plans. The Employee Benefits Security Administration wrote an ERISA Opinion Letter on May 12, 2012, to a law firm, inquiring about its client's similar practice. (ER400.) Its client intended to form a single "multiple employer" plan. (*Id.*) Like CalSavers, its trustee claimed to have "remove[d] every adopting employer from the liability associated with that role." (*Id.)* But, without an employment-based nexus, the multiple employers could not form a collective plan. (ER402.) With no "genuine organizational relationship" between the employers, there is no one central plan, even if multiple employers "execute identically worded trust agreements or similar documents as a means to fund or provide benefits." (*Id.*) So the client had tried to remove fiduciary liability from each employer, but it did not change the fact that each employer was creating an ERISA plan.

Applied here, CalSavers' intention to remove fiduciary duties from employers is irrelevant. When an employer signs up, he is creating a plan. Since CalSavers is not excepted from ERISA in 29 U.S.C. § 1003(b), each of these arrangements will be subject to separate ERISA analysis. And fiduciary duty has to fall somewhere. If it is on the employers, they are clearly ERISA fiduciaries. If it is on the State as the State claims, then the State should be following ERISA guidelines or enrolling employees directly without bothering the employers. The very fact that it is using the employment relationship makes it impossible not to find that the State is forcing ERISA planning on private employers if it has not created its own ERISA plan.

B. ERISA Preempts CalSavers Through Conflict Preemption.

Under conflict preemption, "relating to" a plan or plans is unnecessary. Any inherent conflict with ERISA "suffices to resolve the case." (*Boggs v. Boggs* (1997) 520 U.S. 833, 841.) CalSavers conflicts with ERISA in multiple ways. It overrides the ERISA presumption that employers are not bound to provide or maintain plans at all. It erases the employer autonomy in 29 C.F.R. § 2509.99-1(d). It forces small employers to take on risk of becoming an ERISA plan administrator when their number of employees drop below five. And it forces large multi-state employers to take on risk of ERISA liability as well.

1. CalSavers disrupts ERISA's policy encouraging formation of ERISA plans when employers so choose.

ERISA does not require private employers to offer or maintain retirement plans. The fact that California employers must choose between an ERISA plan and CalSavers is a novel situation. The forced choice itself is contrary to the purpose of ERISA, which is to "encourage the formation of employee benefit plans." (*Pilot Life Insurance Co. v. Dedeaux* (1987) 481 U.S. 41, 54.) If CalSavers does not create employee benefit plans under ERISA, it is discouraging the formation of employee benefit plans through displacement because it offers an option that is supposedly cheaper than an ERISA protected plan, and requires employers to choose one or the other. CalSavers, assuming it's not an employee benefit plan, literally competes with employee benefit plans.

Requiring employers to make that choice as soon as they have five or more employees will assuredly frustrate, not encourage the formation of employee benefit plans. Employers who were growing their business will be forced to sign up for CalSavers and then may never switch to their original goal of establishing a more comprehensive plan for their employees. If they do adopt an ERISA plan, they will become ineligible for CalSavers, Cal. Gov. Code, § 100000(d)(3), and their employees will need assistance in what to do with their existing CalSavers accounts. Employers will be forced to navigate this and seek counsel in how to avoid ERISA liability. And for employers who feel strongly that CalSavers is not the right plan for them, they must choose an ERISA plan, perhaps prematurely. While they can comply with state law by signing up for CalSavers anyway, this remains a policy interference with letting employers choose to form an ERISA plan when ready.

2. CalSavers erases employers' 29 C.F.R. § 2509.99-1(d) autonomy to select zero, one, or more IRA sponsors.

Another conflict is found in disruption to ERISA regulations. 29 C.F.R. § 2510.3-2(d) is entitled "Individual Retirement Accounts." This is *the* rule on which IRAs will not constitute ERISA plans. ERISA regulations thus accommodate payroll deduction IRAs that satisfy the safe harbor provisions of 29 C.F.R. § 2510.3-2(d) (no contributions are made by the employer, participation is completely voluntary, employers do not endorse the program, and the employer receives no consideration). In short, this means that qualifying payroll deduction IRAs are, per ERISA, a non-ERISA option for employers. So long as the employer makes no contributions, the employee's participation is completely voluntarily (i.e. no auto-enrollment), and the employer receives no compensation except for expenses, employers "may select one" or more IRA sponsors. (29 C.F.R. § 2509.99-1(d). This is an option afforded *by* ERISA itself. (*Id*.; See also 81 Fed.Reg. at p. 59465.)

The interpretive bulletin for payroll deduction IRAs includes a subsection (d) entitled "Employer Limitations on the number of IRA sponsors offered under the program." (29 C.F.R. § 2509.99-1(d).) Acknowledging that it can be expensive and burdensome for employers to work with multiple IRA sponsors, this subsection declares that "*an employer may limit* the number of IRA sponsors to which employees may make payroll deduction contributions." (*Ibid*., emphasis added.) CalSavers thus illegally tells the employer *which* payroll deduction IRA it must use. Further per the interpretive bulletin, *"[t]he employer may select* one IRA sponsor as the designated recipient for payroll deduction contributions, or it may establish criteria by which to select IRA sponsors, e.g., standards relating to the sponsor's provision of investment education, forms, availability to answer employees' questions, etc., and may periodically review its selectees to determine *whether to continue to designate them*." (Emphasis added [employer has continuing autonomy over IRA sponsors].) This federal law means that CalSavers may not be mandatory. California employers have a federal right to select an IRA sponsor on their own. They may choose "one" IRA payroll deduction sponsor and naturally, it does not have to be CalSavers. (*Id.*) They can even choose zero IRA program sponsors if they set criteria that has yet to be met by any provider.

3. CalSavers forces small employers to risk ERISA liability when they drop below having five employees.

When an employer's workforce drops below five employees, the employer is no longer eligible to participate in CalSavers. (Cal. Gov. Code, § 100000(d).) Then, any "continued participation in the program would reflect a voluntary decision to provide retirement benefits pursuant to a particular plan. Accordingly, [the employer] would thereby establish or maintain an ERISA-covered plan" and "be subject to ERISA's reporting, disclosure, and fiduciary standards." (81 Fed.Reg. 59464, 59471.) Under the short-lived 2016 DOL regulation from which this statement was made, it is clear that if the employer's decision to participate in a program such as CalSavers is "voluntary," then it becomes an ERISA plan. Thus, even a mandated CalSavers plan is an ERISA plan. It starts out involuntary per the CalSavers mandate, then involuntarily becomes voluntary.

For small employers whose staff size fluctuates significantly, either seasonally (e.g. as summer tourism or holiday shopping adds demand) or when big contracts are landed (e.g., construction jobs or manufacturing runs), participating in CalSavers is a Hobson's choice, because periods of ineligibility bring ERISA liability. (Cal. Gov.

Code, § 100034(b) [false state law promise to employers they will not be liable under federal law, even if CalSavers is preempted by federal law].) They "must obey the state law, and risk violating the provisions of the plan (and hence ERISA), [], or disobey the state law and then raise 'ERISA preemption as a defense in a state enforcement action' and 'risk breaking the law.'" (*Denny's, Inc. v. Cake* (2004 4th Cir.) 364 F.3d 521, 527-528; see also *Gobeille v. Liberty Mutual Insurance Co., supra,* 136 S.Ct. at p. 942 [unanimous determination of standing where voluntary reporter of employee information had to choose between violating ERISA fiduciary duties or violating Vermont state law].)

Determining ongoing employer eligibility will be tricky for small employers, who, if not at risk already, are put at risk by CalSavers of becoming ERISA plan administrators. (81 Fed.Reg. 59464, 59471.) Per CalSavers, an "eligible employer" is one that "has five or more employees and that satisfies the requirements to establish or participate in a payroll deposit retirement savings arrangement." (Cal. Gov. Code, § 100000(d)(1). Here is the definition of those eligible five or more employees:

> (1) "Eligible employee" means a person who is employed by an eligible employer.
>
> (2) "Eligible employee" does not include:
>
>> (A) Any employee covered under the federal Railway Labor Act (45 U.S.C. Sec. 151), or any employee engaged in interstate commerce so as not to be subject to the legislative powers of the state, except insofar as application of this title is authorized under the United States Constitution or laws of the United States.

> (B) Any employee on whose behalf an employer makes contributions to a Taft-Hartley pension trust fund.

(Cal. Gov. Code, § 100000(c).)

First, determining employment status itself under subsection (1) is often a legal and factual question. An independent contractor may assert employee status in a lawsuit or vice versa, and factors will be weighed by a trier of fact. Second, the exclusions under subsection (2) are not cut and dry determinations for any employer.

The CalSavers regulations attempt to clarify how to calculate eligibility, but not only could the regulations change at any time; they are not enough. For an employer to determine eligibility under current regulations, "an Employer's number of employees shall be the average number of employees during the previous calendar year, as reported to the Employment Development Department on Form DE 9C, 'Quarterly Contribution Return and Report of Wages (Continuation),' for the quarter ending December 31 and the preceding three quarters." (Cal. Code Regs. tit. 10 § 10001(a).) Employers are also ineligible once they sign up for, or participate in, a tax-qualified retirement plan. (*Id.* at § 10001(b).) As it stands then, employers must rush to calculate and file their Form DE 9C every January 1st on January 1st, and they must actively evaluate whether they are ever participating in a tax-qualified retirement plan. They must accurately know and factor in their employees' birthdays because employees only become eligible for CalSavers at age eighteen (Cal. Code Regs. tit. 10 § 10000(l).) The potential contribution rates are also quite varied. (See Cal. Code Regs.

tit. 10 § 10005.) Due to these complexities, if an employer were establishing its own criteria to select an IRA sponsor, as it may under ERISA at 29 C.F.R. § 2509.99-1, it might conceivably decline to select CalSavers if CalSavers were a voluntary option among IRA sponsors.

At any moment that the small employer miscalculates the number of employees or a contribution, or regulations change, or legal interpretation of employment status changes, the small employer runs the risk of becoming an ERISA fiduciary if they were not already. (81 Fed.Reg. 59464, 59471.) This is putting them in an unfair position, and conflicts with ERISA.

4. CalSavers forces large multi-state employers to risk ERISA liability and manage problems in the lack of national uniformity.

Uniformity of law is one of ERISA's means to encourage the formation of benefit plans. Uniformity gives employees consistent protection. (*Egelhoff v. Egelhoff, supra,* 532 U.S. at p. 148.) Uniformity gives employers consistent standards. (*Liberty Mutual Insurance Co. v. Donegan* (2d Cir. 2014) 746 F.3d 497, 503.) Uniformity "is difficult to achieve, however, if a benefit plan is subject to differing requirements in differing States." (*Fort Halifax Packing Co., supra,* 482 U.S. at p. 9; see also *ibid.*)

With CalSavers, multi-state employers are now charged with differing pension benefit plan requirements in different states. Assuming, as the State argues, that each state is free to adopt its own automatic retirement savings plan, that will make fifty different sets of rules. An eligible California employee does not include "any *employee* engaged in interstate commerce so as not to be subject to the legislative powers *of the state*, except insofar as application of this title is authorized under the United States Constitution or laws of the United States." (Cal. Gov. Code, § 100000(c)(2)(A), emphasis added.) But multi-state employers are not exempt. And even as to employees, the employer will be required to make ongoing legal determinations based on ongoing monitoring and analysis of the laws of California. ERISA intended employers to have one set of rules for private pension plans, not to have to monitor who is an eligible employee in each of fifty states. Further, like the small employers, if the multi-state employers calculate their number of California employees incorrectly or experience a drop below the number five, they too will become unwitting ERISA administrators regardless. (81 Fed.Reg. 59464, 59471.)

C. The 1975 DOL Regulation Does Not Save CalSavers, as Phyllis Borzi Expressly Stated Many Times in the 2016 DOL Regulation.

The 1975 DOL regulation was a "first do no harm" measure following ERISA's enactment. It intended to preserve existing IRAs and any voluntary deductions because it would have been wasteful to render them illegal. (See 40 Fed.Reg. 34526 (Aug. 15, 1975), 34527, citing former section 2002(a) of ERISA [comments were received indicating that silence on IRAs "would lead to a conclusion that the requirements of Title I of the Act were applicable and that, as a consequence of the expected burden of compliance, individuals and employers would terminate these programs. Such results would be clearly undesirable."]; Public Law 93-406; 88

Stat. 958 [ERISA section 2002(a) amendment to Internal Revenue Code permitting employees to deduct for IRA contributions, but declaring contributions by employers to be taxable income].) The 1975 Safe Harbor was thus never intended to authorize states to implement mandatory automatic IRA programs through which they may conveniently avoid ERISA's fiduciary duties. It was also not designed to safe harbor *pooled* IRAs as is happening here. (Cal Gov. Code, §§ 100012(b); 100050 [authorizing pooled investment]; §§ 100004(c) 100010(a)(8)(10) [authorizing CalSavers Board to contract with public retirement systems].)

In fact, subsequent interpretation of the 1975 safe harbor shows that the employers here are being forced to "establish or maintain" programs. In the first proposal by Phyllis Borzi to harbor state automatic IRA programs, she wrote:

> When a program meets the conditions of the [1975] safe harbor, employer involvement in the arrangement is minimal and employees' control of their participation in the program is nearly complete. In such circumstances, it is fair to say that each employee, *rather than the employer*, individually *establishes and maintains* the program.

(80 Fed.Reg. 72006, 72008, emphasis added.)

By deduction then, when the 1975 safe harbor is *not* met, the employer establishes and maintains the program, as discussed above. The District Court has correctly found that the 1975 safe harbor has not been met. (ER30-31.)

1. CalSavers fails under the 29 C.F.R. § 2510.3-2(d) four-part test.

The District Court correctly found that CalSavers is not saved by the 1975 safe harbor in 29 C.F.R. § 2510.3-2(d). (ER30-31.) Its primary reason is that CalSavers is not "completely voluntary" due to its automatic enrollment feature. "Completely voluntary" requires employee initiation.

The four necessary factors exempting an IRA from ERISA status are:

> **(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).)

a. CalSavers is not "completely voluntary."

Phyllis Borzi, Assistant Secretary of the Employee Benefits Security Administration, summarized the DOL's meaning of "completely voluntary" under the 1975 safe harbor on November 16, 2015, and on August 24, 2016. (80 Fed.Reg. 72006; 81 Fed.Reg. 59464.) Ms. Borzi spoke directly to state-mandated retirement savings programs including CalSavers. (*Ibid.*) She said the 1975 safe harbor never contemplated state savings laws, but "focused on employers acting in coordination with IRA and other vendors, *without state involvement*." (80 Fed.Reg. 72006, 72008, emphasis added.) Here is the picture she painted of the Congressional intent in 1975 and current understanding today:

> In essence, if the employer merely allows a vendor to provide employees with information about an IRA product and then facilitates payroll deduction for employees who voluntarily initiate action to sign up for the vendor's IRA, the employer will not have established, and the arrangement will not be, an ERISA pension plan.

(81 Fed.Reg. 59464, 59465.)

With CalSavers, the employer is not merely allowing a vendor to hand a brochure to their employee, nor facilitating a payroll deduction when and if the employee initiates enrollment with that private vendor. In fact, an "eligible employee" has no mechanism to self-initiate. The employer — by mandate — hands the brochure to their employees themselves, and — by mandate — automatically enrolls their employees at each interval the State will declare. They then automatically debit and escalate their employees' contributions in the same fashion. Adding opt-out features to such an arrangement does *not* satisfy the 1975 safe harbor because the DOL has declared that where there is a duty to opt-out, the program is not "completely voluntary." (80 Fed.Reg. 72006, 72008-72009; *id.* at n. 12; 81 Fed.Reg. 59464, 59465-59466, 59470-59473.) The DOL "intended 'completely voluntary' to mean considerably more than that employees are free to opt out." (80 Fed.Reg. at p. 72008.) So, each time an employer automatically enrolls employees, an ERISA plan is established, "trigger[ing] ERISA's protections for the employees whose money is deposited into an IRA." (*Id.* at p. 59465; *id.* at n. 14.)

DOL Advisory Opinions confirm this view, never retreating from the position that automatic enrollment, payroll debiting, escalation, and opt-out features are unacceptable. (Advisory Opn. 82-67A (Dec. 21, 1982); Advisory Opn. 84-25A (June 18, 1984), cited in 80 Fed.Reg. 72006, 72008, n. 11.) Consistently, the DOL Interpretive Bulletin 2015-02 mentioned "automatic enrollment rules" as part of ERISA's "well-established uniform regulatory structure." (80 Fed.Reg. 71936, 71937.) Federal case law, the Advisory Council on Employee Welfare and Pension Benefits Plans — noting that automatic enrollment inherently involves an ERISA plan sponsor and a fiduciary —, and DOL Field Assistance Bulletins concur. (80 Fed.Reg. 72006, 72008, n. 12.)

The State will argue that the Congressional disapproval of the 2016 rule requires erasing from memory Phyllis Borzi's detailed explanations of the 1975 rule. But Public Law 115-35 only disapproved "the rule" and only the "*rule* shall have no force or effect." Phyllis Borzi's detailed explanations are contained in the background, overview, and analysis behind the 2016 rule approving "Savings Arrangements Established by States for Non-Governmental Employees, (81 Fed.Reg. 59464) as well as the proposed rule. (80 Fed.Reg. 72006.) The DOL's explanation of its 1975 rule would not be changed. Such would insult the extensive work of the DOL, as well as defy the advisory opinions, bulletins, and case law cited therein.

b. Employer involvement is inevitably above ministerial.

Minimal, non-endorsing employer involvement — highlighted mostly in the third factor of this test, but part of all four — is being confused here with *Golden Gate*'s "modicum of discretion" test discussed above. *Golden Gate, supra,* 546 F.3d 639 considered local healthcare legislation with a mandated employer payment not using the employee's funds. With healthcare regulation being a traditional concern of state and local governments, the "modicum of discretion" test could be solely applied. CalSavers, on the other hand, is an IRA payroll deduction pension plan using the employee's own funds. It must satisfy the *entirety of the* 1975 safe harbor specifically applicable to IRA payroll deduction programs.

IRA payroll deduction programs must satisfy *all four* factors of the 1975 safe harbor in order for overall employer involvement to be minimal enough to be saved. (80 Fed.Reg. 72006, 72008 ["When a program meets the conditions of the safe harbor, employer involvement in the arrangement is minimal…"].) CalSavers fails because it does not satisfy all conditions, plural.

Factors one and two and four can be briefly discussed in this context. CalSavers allows employer contributions if ERISA will someday allow. (Cal. Gov. Code, § 100012(j).) CalSavers is not "completely voluntary" as discussed. Lastly, CalSavers does not compensate employers.

Factor three is employer endorsement of the program. Here, employers are mandated to endorse CalSavers if they do not choose another ERISA plan. (Cal. Gov.

Code, § 100032.) The promotions of CalSavers are quite clear that employers will be expected to endorse CalSavers, and many of them are already doing so by indicating they are happy to "offer" the plan. (ER391-395.)

Overall, employer involvement is high under CalSavers due primarily to the mandated and automatic nature of the program, and secondarily to the employer's forced endorsement. Inevitably, employees will seek guidance and opinions from their employers, who are obligated, and in some cases, willing, to provide it.

2. CalSavers does not abide by IRC § 408(a).

The 1975 safe harbor also applies only to IRAs "described in section 408(a) of the [Internal Revenue] Code." (29 C.F.R. § 2510.3-2(d).) Section 408(a) requires that the IRA be for the exclusive benefit of the beneficiary. It also requires the trustee to be a bank or a DOL-approved non-bank trustee. CalSavers struggles to meet these requirements as well.

CalSavers has made some progress on complying with the exclusive benefit rule, but its progress is not complete. It recently achieved a repeal of Government Code section 100006 which had allowed CalSavers to maintain a "gain and loss reserve account" and to use a stated interest rate for the pooled IRAs. However, the funds remain pooled and open to commingling with any public retirement program. (Cal. Gov. Code, §§ 100004(c) 100010(a)(8)(10).) Also, CalSavers has not shown itself to have a qualifying trustee.

II. ALL PLAINTIFFS HAVE STANDING.

The District Court's determination whether a party has standing is reviewed *de novo*. (*Gingery v. City of Glendale* (9th Cir. 2016) 831 F.3d 1222, 1226, *cert. denied sub nom. Mera v. City of Glendale* (2017) 137 S. Ct. 1377; *San Luis & Delta-Mendota Water Auth. v. United States* (9th Cir. 2012) 672 F.3d 676, 699; *Jewel v. Nat'l Sec. Agency* (9th Cir. 2011) 673 F.3d 902, 907 [explaining that because District Court sua sponte dismissed complaint, standing would be reviewed as if raised in a motion to dismiss].)

The District Court correctly found that HJTA has standing as a potential ERISA plan fiduciary. (ER29.) But the individual plaintiffs have standing, and HJTA has associational standing as well.

ERISA's private civil enforcement statute is located a 29 U.S.C. section 1132. The relevant subsection is 1132(a)(3)(B):

> *(a) Persons empowered to bring a civil action. A civil action may be brought—*
>
> …
>
> (3) *by a participant, beneficiary, or fiduciary* … (B) *to obtain other appropriate equitable relief* (i) to redress such violations *or (ii) to enforce any provisions of this title* or the terms of the plan;

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

Thus, any "participant, beneficiary, or fiduciary" may enforce ERISA preemption of any state statute. (*See Franchise Tax Bd. v. Constr. Laborers Vacation Trust* (1983) 463 U.S. 1, 26-27; *see also Denny's, Inc.*[5] *v. Cake* (4th Cir. 2004) 364 F.3d 521,

[5] While Denny's, Inc. failed at its declaratory and injunctive relief action for ERISA preemption, this was because Denny's was attempting to enjoin a state-court proceeding which may not be done under 28 U.S.C. § 2283. Denny's

525-526 [29 U.S.C. section 1132(a)(3)(B) "clearly contains ERISA's preemption provision, 29 U.S.C. § 1144."].)

A "participant" is one "who is *or may become eligible* to receive a benefit of any type from an employee benefit plan." (29 U.S.C. § 1002(7), emphasis added.) Since the Legislature has declared CalSavers "implemented" as of January 1, 2017, (Cal. Gov. Code, § 100046), and the program is ongoing, any employed or employable person in California "may become eligible."

"Participant" thus includes HJTA's members and Plaintiffs Jonathan Coupal and Debra Desrosiers. This is not a remote connection. A remote connection would be someone who could not fit the CalSavers standards of eligibility, such as someone who is well under the age of eighteen, permanently disabled, or deceased. In denying standing to the individual plaintiffs, the District Court cited this Court's decision in *Miller v. Rite Aid Corp.* (9th Cir. 2007) 504 F.3d 1102, asserting that a party must be a participant or beneficiary at the time the lawsuit is filed. (ER28.) But this belies the phrase "or may become eligible." (29 U.S.C. § 1002(7).) It cannot be surplusage.

In *Miller*, the party seeking ERISA standing had passed away before the life insurance policy at issue had gone into effect. (504 F.3d at p. 1107.) A deceased party could not have become eligible. Here, the individual parties are living, working employees, who at the time the lawsuit was filed were, and continue to be, ones who

essentially made a preemption "defense" to a state court case in which it was the defendant by filing a new federal case as a plaintiff. The Fourth Circuit made clear that Denny's should have raised the preemption argument as a defense in the state court case, and should have considered removal of that original case to the federal district court.

"may become eligible" for CalSavers. The individual plaintiffs can show "that eligibility requirements will be fulfilled in the future." (*Firestone Tire & Rubber Co. v. Bruch* (1989) 489 U.S. 101, 117-118.) Waiting until the employer is mandated to participate would be too late, and against the public interest in resolving the legality of programs such as CalSavers. (See Cal. Gov. Code, § 100032(b-e).) And determining a right time in between now and then is only amorphous. The individual Plaintiffs' standing should be acknowledged.

The District Court also denied associational standing to HJTA, finding that this case "is not germane to HJTA's purpose." (ER28.) Federal courts acknowledge associational standing with a three-part test:

> The Supreme Court has articulated a three-part test for determining whether an organization has associational standing to sue on behalf of its members: 'an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' *Hunt v. Wash. State Apple Advert. Comm'n*, (1977) 432 U.S. 333, 343. Although the first two prongs of the *Hunt* test are constitutional requirements, the third is merely prudential and may be eliminated by Congress.

(*Dunn v. Dunn* (M.D.Ala. 2016) 219 F. Supp. 3d 1163, 1167.)

HJTA's members each have standing in their own right to sue according to each of their own roles as employers or employees. The interests HJTA seeks to protect are germane to its purpose of taxpayer advocacy because private earnings of taxpaying employees could be squandered, there is no guarantee that the general fund loan will be repaid, and the District Court will have supplemental jurisdiction over the state law taxpayer waste claim. (Cal. Code, Civ. Proc., § 526a.) In other words, the state law section 526a claim aiming to stop taxpayer waste depends directly on the determination of ERISA preemption, which can only be done in federal court. Lastly, no member need individually participate in order to prove the case because preemption is a question of law.

CONCLUSION

The District Court erred finding CalSavers exempt from ERISA by confusing the 1975 safe harbor with the employer involvement test for healthcare legislation and mandated employer payments unrelated to the employment relationship. The 1975 safe harbor for IRA payroll deduction programs *is* the test here. As the District Court correctly found, CalSavers fails it. Moreover, Congressional intent could not be more clear. The District Court's order granting the State's motion to dismiss should be reversed, and CalSavers should be declared preempted by ERISA.

Date: June 12, 2020.

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Laura E. Dougherty
Laura E. Dougherty

Attorneys for Appellants

STATEMENT OF RELATED CASES

Plaintiffs are unaware of any related cases currently pending before this Court or in the United States Court for the Eastern District of California.

Date: June 12, 2020.

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Laura E. Dougherty
Laura E. Dougherty

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,924 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Date: June 12, 2020.

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/ Laura E. Dougherty
Laura E. Dougherty

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 12, 2020.

JONATHAN M. COUPAL
TIMOTHY A. BITTLE
LAURA E. DOUGHERTY

/s/Laura E. Dougherty
Laura E. Dougherty

Attorneys for Appellants