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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Howard Jarvis Taxpayers Association, Jonathan Coupal, and Debra Desrosiers, Plaintiffs, 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.	No. 2:18-cv-01584-MCE-KJN **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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INTRODUCTION

The defendants' motion rests on one main assumption: that when a state sets up an IRA payroll deduction program and mandates participation by private employers, no ERISA plan is established even if that program fails to satisfy the conditions for exemption of payroll deduction IRAs in 29 C.F.R. §§ 2510.3-2; 2509.99-1, including Internal Revenue Code § 408(a). This assumption is false.

The risk of this liability has been foreseen since its inception. The California State Legislature requested a $170,000,000.00 general fund loan to establish CalSavers, placing risk on the taxpayers of California. (Exhibit B.) Credit extended is not always repaid and credit extended for an illegal program adds significantly to that risk.

Even California's own Department of Finance identified this risk to the state treasury. "Finance is opposed to this bill because it could create pressure on the General Fund to pay for start-up and administrative costs for the Program should outside funding fail to materialize. The General Fund is unable to support new programs at this time. This bill also establishes a new board at a time when the Administration is focusing on reducing the size of government. Additionally, this bill could create a multibillion-dollar liability for the state if investment returns fail to reach cover [sic] the guaranteed rate of return and administrative overhead." (Exhibit H, p. 2.) As to the multibillion-dollar liability regarding investment returns, the Department of Finance was worrying about liability under the Employee Retirement Income and Security Act.

Standing in this case is based on injury to the taxpayers who are private employers and employees because ERISA made private pensions "exclusively a federal concern." (*Alessi v. Raybestos-Manhattan, Inc.*(1982) 451 U.S. 504, 523; *Goss v. Aetna, Inc.* (N.D. Georgia, 2019) 360 F.Supp.3d 1364, 1371.) Accordingly, the California Legislature's $170 million general fund loan request was made *on the condition* that the U.S. Department of Labor finalizes a regulation exempting CalSavers from ERISA. (Exhibit B.) The DOL finalized a regulation in 2016 doing so, but Congress repealed it. (Pub.L. No. 115-35 (May 17, 2017) 131 Stat. 848.) Thus, CalSavers is not exempt from

ERISA.

This Court has correctly concluded that the 1975 safe harbor for individual retirement accounts (29 C.F.R. §2510.3-2(d)) does not apply to CalSavers. Presently, this court appears to view CalSavers as an IRA payroll deduction program, but not one expressly exempted from ERISA. Nevertheless, this court has not found preemption because it sees neither a reference nor connection to ERISA nor interference with ERISA plans, and accepts CalSavers generally as a state government mandate on employers. But CalSavers is exactly the type of employee benefit plan that Congress regulates through ERISA and keeps in the federal domain. Because CalSavers creates an ERISA plan or plans, refers to ERISA, connects with ERISA, conflicts with ERISA, and is not under the 1975 safe harbor, it is preempted. Thus, the first amended complaint must not be dismissed.

I. CalSavers is a Non-Exempt ERISA Plan.

Plaintiffs briefed this issue on the first motion to dismiss. Plaintiffs continue their arguments, with clarification in support of the first amended complaint.

Existence of a plan is a question of fact to be determined by a reasonable person standard. (*Donovan v. Dillingham* (11th Cir. 1982) 688 F.2d 1367.) Any reasonable person reviewing CalSavers' documents such as the CalSavers investment policy statements (Exhibits C; G), for example, would conclude that CalSavers is an ERISA plan because investment policy statements are typical documents of an ERISA plan.

Under *Donovan*, to determine "whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits. Some essentials of a plan, fund, or program can be adopted, explicitly or implicitly, from sources outside the plan, fund, or program — e.g., an insurance company's procedure for processing claims, cf. 29 C.F.R. § 2520.-102-5 (qualified health maintenance organization) — but no single act in itself necessarily constitutes the establishment of the plan, fund, or program." (*Id.* at p.

1373.) With CalSavers, any reasonable person can ascertain the intended benefits (workplace retirement programming), intended beneficiaries (private employees and their beneficiaries), source of financing (private employee automatic wage deductions), and procedures for receiving benefits (withdrawals). (Cal. Gov. Code, §§ 100000(b); 100004; 100006; 100010(a)(12-13); 100000-100050.)

A standout among the *Donovan* factors here is that the "source of financing" includes private employees subsidizing one another. This violates the exclusive benefit rule of the Internal Revenue Code for IRAs, and thus adds further weight to the ERISA plan status.

California Government Code section 100006 authorizes a "Gain and Loss Reserve Account" and the use of a stated interest rate. (Exhibit A.) The statutory authorization to violate the exclusive benefit rule is another factor a reasonable person would assume creates a private employee benefit plan. Violating the exclusive benefit rule of section 408(a) of the Internal Revenue Code disqualifies CalSavers from the safe harbor in 29 C.F.R. § 2510.3-2. More importantly, it increases the risk imposed on private employees whose wages will be entrusted to the program.

Defendants contend that California Government Code section 100006 was repealed in 2016, citing 2016 Cal. Stats. Ch. 734 (S.B. 1234) § 3. That section was not repealed. (*Ibid*.; Exhibit A.) And the concern for liability expressed by the Department of Finance in 2012 specifically related to the ERISA liability that could result from the use of a stated interest rate. (Exhibit H, p. 2. ["Despite the bill's stated intent to shield the state from financial liability, the state ultimately could be responsible for benefit payments under federal law, putting the state at serious risk of billions of dollars in unfunded liabilities if investment performance falters under the Program. … Additionally, this bill could create a multibillion dollar liability for the state if investment returns fail to reach cover [sic] the guaranteed rate of return and administrative overhead. All private-sector, defined-benefit plans, including cash-balance plans, operate under federal ERISA requirements, which hold plan sponsors responsible for benefit payments, among other

fiduciary obligations."].) The Department of Finance is correct that "all private-sector, defined-benefit plans … operate under federal ERISA requirements." CalSavers is such a plan. A reasonable person will notice that CalSavers is a private-sector, defined-benefit plan, and expect ERISA standards and protections to apply. Thus, in addition to the application of the *Donovan v. Dillingham* factors made above, this statute-created risk adds to the conclusion that CalSavers is the very type of plan ERISA regulates.

The sole debate about whether CalSavers is an ERISA plan arises in the nature of who is creating it. Undisputedly, CalSavers is for "retirement income" or "deferral of income by employees." (29 U.S.C. § 1002(2)(A)(i-ii).) Per section 1002 (2)(A)(i-ii) and the *Donovan* factors, there is no doubt CalSavers would be held an ERISA plan absent that point of contention. This is particularly true now that this court has found 29 C.F.R. § 2510.3-2(d) (the 1975 safe harbor) inapplicable.

IRA programs are ERISA plans if they are not harbored by section 2510.3-2(d). Numerous DOL advisory letters were requested in the early 1980s to address when that fine line may be crossed, and there is no evidence of a gray area where an IRA program could otherwise be exempt. (ERISA Opinion Letters (1984) No. 84-34A [ERISA plan established by offering IRAs to employees]; (1983) No. 83-25A [ERISA plan would be established once employer retains benefit by not "promptly" transferring withheld funds and thus no longer qualifies for exception under section 2510.3-2(d)]; (1981) No. 81-26A; (1982) No. 82-53A; (1982) No. 83-1A; (1983) No. 83-15A; (1982) No. 82-47A; (1982) No. 82-67A; (1982) No. 83-2A; (1983) No. 83-9A; (1983) No. 83-10A.) What these letters all have in common is that once that line is crossed beyond the 1975 safe harbor, the IRA program at issue becomes an ERISA plan. (See also 29 C.F.R. § 2509.99-1(b) ["In this regard, 2510.3-2(d) sets forth a safe harbor under which IRAs will not be considered to be pension plans [under ERISA] *when the conditions of the regulation are satisfied.*" Emphasis added.].)

Thus, it is odd that CalSavers would be neither an IRA payroll deduction program under the 1975 safe harbor nor an ERISA plan. For this to be true, there should exist

another safe harbor. But Congress expressly repealed the safe harbor the DOL designed for CalSavers.

Absent a DOL safe harbor, the conclusion that CalSavers is not an ERISA plan rests solely on the argument that the State created CalSavers, and so it does not constitute a plan under 29 U.S.C. § 1002(2)'s "established or maintained by an employer" clause. On a complete reading of section 1002, this argument fails.

a. On Plain Language and Per the Express Purpose of CalSavers, the CalSavers Trust is the ERISA Employer under 29 U.S.C. § 1002(5) and § 1002(9).

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 point of contention here is 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. Section 1002(5) specifically defines "employer" for ERISA purposes which also incorporates a definition of "person" from section 1002(9).

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." (Exhibit A.) CalSavers

creates a trust. The trust is a person "acting…indirectly in the interest of an employer." On plain language alone, 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.

As an example, the Ninth Circuit found an abstracted entity to be an ERISA employer under section 1002(5) in *Kanne v. Connecticut General Life Insurance Co.* (9th Cir. 1988) 867 F.2d 489, 492-493[1]. In *Kanne*, an employee of a company called Harlow Carpets did not originally contest the existence of an ERISA plan, but later did. 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. The Ninth Circuit said "the problem with the Kannes' argument is their apparent assumption that *Harlow Carpets'* functions with respect to the plan determine ERISA coverage." (Emphasis added.) It then immediately cited section 1002(5) and concluded, "[u]nder this definition, ABC can be an ERISA employer for purposes of our analysis." (*Ibid*.)

Similarly here, the problem with the State's argument is that it assumes the functions of actual California employers like Harlow Carpets determine ERISA coverage of CalSavers. Rather, like ABC in *Kanne*, the CalSavers Trust determines ERISA coverage. The Ninth Circuit in *Kanne* did not need to go so far as to analyze whether the ABC Trust was also an ERISA employer because ABC itself was an employer association which is another type of ERISA employer under section 1002(5). But by plain

[1] 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.

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, the "person" acting indirectly in the interest of employers in California is the CalSavers Trust.

An employer must decide what to do (or not do) about workplace retirement savings. The CalSavers Trust is acting indirectly in the interest 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 page 6 of Defendant's Request for Judicial Notice Exhibit 2, for further example, the Assembly Committee on Public[2] 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." This indicates that the CalSavers Trust intended 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.

Plaintiffs' Exhibit D and the promotional videos themselves (lodged as a CD) 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. Plaintiffs' Exhibit E, the employer page of 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

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

save for retirement, with no fees, no fiduciary responsibility, and minimal maintenance." This is clearly acting 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. The Ninth and Eleventh Circuits look 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 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."

The State may not rely on the mandatory nature of CalSavers nor its exercise of traditional police powers to set it apart when analyzing whether the Trust is acting indirectly for the employers' benefit. A state mandate does not save from ERISA preemption. (*Standard Oil v. Agsalud* (9th Cir. 1980) 633 F.2d 760 [Hawaii Act mandating healthcare plans not exempt from ERISA by virtue of being mandatory on private employers, and also not exempted as a "disability insurance law" because it did not relate solely to disabled persons].) In fact, in response to *Agsalud*, Congress expressly exempted the Hawaii Act from ERISA. (29 U.S.C. § 1144(a)(5)(A).) Here, however, Congress has preemptively done the very opposite of that. On May 17, 2017, Congress repealed the 2016 DOL regulation designed to authorize CalSavers itself and similar state programs. (80 Fed.Reg. 72006; 81 Fed.Reg. 59464; Pub.L. No. 115-35, 131 Stat. 848.) Clearly, Congress has expressly disavowed CalSavers, has no imminent intention of changing its mind, and has more than once considered nationwide automatic savings laws. (Automatic IRA Act of 2011, S.1557, 112th Cong.; Automatic Retirement Plan Act of 2017, H.R. 4523, 115th Cong.) In fact, the 2017 Act was proposed by the

same Congress that repealed the 2016 DOL regulation.

From the Supreme Court's 1980 decision in *Agsalud* to its 2016 decision in *Gobeille v. Liberty Mutual Insurance Co.,* (2016) 136 S.Ct. 936, it is also clear that traditional state regulation powers and purposes do not save from preemption, so the State cannot pretend that a general purpose to improve health and welfare sets it apart from acting indirectly in the interests of private employers to make choices *about workplace retirement planning*. A good summary is provided here:

> The Vermont regime cannot be saved by invoking the State's traditional power to regulate in the area of public health. The Court in the past has "addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law," in particular state laws regulating a subject of traditional state power. *Travelers, supra*, at 654-655, 121 S. Ct. 1322. ERISA, however, "certainly contemplated the pre-emption of substantial areas of traditional state regulation." *Dillingham*, 519 U. S., at 330, 117 S. Ct. 832. ERISA pre-empts a state law that regulates a key facet of plan administration even if the state law exercises a traditional state power. See *Egelhoff*, 532 U. S., at 151-152. The fact that reporting is a principal and essential feature of ERISA demonstrates that Congress intended to pre-empt state reporting laws like Vermont's, *including those that operate with the purpose of furthering public health*. The analysis may be different when applied to a state law, such as a tax on hospitals, see *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U. S. 806 (1997), the enforcement of which necessitates incidental reporting by ERISA plans; but that is not the law before the Court. *Any presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does*.

(*Id.* at p. 946, emphasis added.)

Thus, CalSavers is established by an ERISA employer — the CalSavers Trust — acting indirectly in the interests of employers for the purpose of workplace retirement planning. On the plain language of 29 U.S.C. § 1002 subsections 2, 5, and 9, CalSavers is an ERISA plan with no safe harbor.

b. Each Private Employer is Creating a Separate ERISA Plan by Following Procedures for Enrollment and Maintenance.

Since the 1975 safe harbor does not exempt CalSavers, the arguably minimal or ministerial nature of the private employer's role does not exempt CalSavers nor each employer from ERISA liability. The cases finding no ERISA plan on this basis alone are ones involving one-time payments, not ongoing administrative programs. In *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, for example, a Maine statute required employers to make a one-time severance payment to employees in the event of a plant closing. This was 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 must comply with an ongoing administrative scheme with regular open-enrollment periods. Similarly in *Golden Gate Restaurant Association v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639, an ordinance imposed spending requirements, not plans and plan maintenance, on employers. The employer's obligation was complete on making the payment and there was no ongoing management or maintenance involved. (See also *Velarde v. PACE Membership Warehouse, Inc.* (9th Cir. 1997) 105 F.3d 1313 ["stay-on" and "severance" one-time payments at issue not ERISA plans on same basis of not being an ongoing administrative scheme].)

Since CalSavers is an IRA program, rather, the *applicable* test of minimal employer involvement is only located in the 1975 safe harbor as its third and fourth requirements:

> (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).)

Plaintiffs contend that endorsement is inevitable and forced upon employers. But the CalSavers program already fails this safe harbor, primarily due to not satisfying the second requirement that the program be completely voluntary. Factors three and four do not apply independently of the safe harbor, however, when an IRA program such as CalSavers is concerned. Because CalSavers is an ongoing IRA program, not a one-time payment mandate, the 1975 safe harbor *is* the test it must pass, which it does not.

Absent application of 29 C.F.R. §2510.3-2(d)(iii-iv), there is thus no authority to exempt CalSavers on the basis that private employers have little discretion and, in turn, no protection for private employers who signup voluntarily or involuntarily. By contrast, merely arranging for participation in a program creates a plan if the *Donovan* factors are met. (See *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co*. (9th Cir. 1987) 809 F.2d 617,625 [referring to the companion 1975 safe harbor for welfare benefit programs, "Even if an employer does no more than arrange for a 'group-type insurance program,' it can establish an ERISA plan, *unless* it is a mere advertiser who makes no contributions on behalf of its employees. 29 C.F.R. § 2510.3-1(j)."]. Emphasis added.) This means that merely arranging for the enrollment and operation in CalSavers, an employer is establishing an ERISA plan.

Since an "employee pension benefit plan" is any plan "established *or maintained* by an employer," (29 U.S.C. § 1002(2)(A), emphasis added), the maintenance alone by each private employer creates a separate ERISA plan even if enrollment and setup in themselves do not. The fact that each private employer will be maintaining each plan is

admitted on the CalSavers website for employers. (Exhibit E [instructing employers regarding "Account management" that "you'll move into maintenance mode."].)

Thus, without any exemption for the CalSavers program as a whole, and even assuming that the CalSavers Trust is not an ERISA employer, the only result is that hundreds of thousands of separate unrelated employers will be creating ERISA plans. (See Exhibit F. DOL Adv. Op. 2012-04A [ruling that participation by multiple unrelated employers in an arrangement established by a service provider to fund and provide retirement benefits to employees would be deemed a series of ERISA-covered plans established by each of the participating employers].) California employers are being mandated to create ERISA plans.

II. CalSavers is Expressly Preempted.

Plaintiffs briefed this issue on the first motion to dismiss. Plaintiffs continue their arguments, with clarification in support of the first amended complaint.

When Congress repealed the 2016 DOL regulation specifically referencing CalSavers, its obvious intent was to disapprove CalSavers and to restore its status to being expressly preempted.

a. CalSavers is not Entitled to a Presumption Against Preemption Because the State of California has Entered a Field Traditionally Occupied by the Federal Government — Private Retirement Savings — not a Field of Traditional State Concern.

Citing *Massachusetts v. Morash* (1989) 490 U.S. 107, 118, defendants argue that "CalSavers is merely an exercise of the State's traditional power over the payment of wages." (Defs. Motion at p. 10.) But *Morash* concerned vacation pay, a subject beyond ERISA's reach. (*Id*. at pp. 118-119.) Moreover, regulation of wages itself is a separate affair from private pension plans, which are "exclusively a federal concern." (*Alessi v. Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at p. 523; *Goss v. Aetna, Inc., supra,* 360 F.Supp.3d at p. 1371.)

The Ninth Circuit has noted that "state and local laws enjoy a presumption against

preemption when they 'clearly operate[ ] in a field that has been traditionally occupied by the States.'" (*Golden Gate Rest. Assn. v. City & County of San Francisco, supra,* 546 F.3d 639 at p. 647, citing *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund* (1997) 520 U.S. 806, 814.) But retirement savings is a matter of federal concern through ERISA, the Internal Revenue Code, and the Social Security Act. And as discussed above, any incidental societal benefits to mandating the program for health and welfare purposes do not save CalSavers from preemption. Its purpose for preemption analysis — purely private pension regulation — is stepping on federal territory. ERISA is "one of the broadest preemption clauses ever enacted by Congress." (*FMC Corp. v. Holliday* (1990) 498 U.S. 52, 58.) California's attempt to enter this field is novel at best.

The California Department of Finance acknowledged this in 2012 when CalSavers was first proposed. ("Exhibit H, p. 2 ["This bill would expand the state's role into *private sector retirement policy, which is historically the domain of the federal government*. Efforts to strengthen private sector retirement security could be pursued through Congress. Existing federal law also provides for a variety of individual retirement accounts by which employers and private citizens can save for retirement."]. Emphasis added.)

So powerful is the federal domain of ERISA that California sought to conform itself to DOL regulations, but Congress disapproved. This history is well-briefed. (See Exhibit B; 80 Fed.Reg. 72006; 81 Fed.Reg. 59464; Pub.L. No. 115-35, 131 Stat. 848.)

b. The Plan(s), the Government Code, and the Mandate "Refer" to ERISA.

The specific references to ERISA in CalSavers — the creation of an ERISA plan or plans as briefed above, the state statutes expressing desire to avoid ERISA, and the mandate — expressly preempt CalSavers. State statutes that "relate to" ERISA plans are preempted. (29 U.S.C. § 1144(a).) Relating to ERISA plans can mean a specific reference to ERISA or a connection with ERISA without a specific reference. (*Shaw v. Delta Airlines, Inc.* (1983) 463 U.S. 85, 96-97.) Specific references to ERISA

unquestionably relate the statutes to ERISA and preempt on that basis alone. (*District of Columbia v. Greater Washington Bd. of Trade* (1992) 506 U.S. 125, 130 [section of District of Columbia statute "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted"].)

Applied here, the creation of an ERISA plan or plans as briefed above creates self-reference. Second, California Government Code sections 100012, 100032(g) and 100043, expressly refer to the "Employee Retirement Income and Security Act." Although they do this for the intended purpose of avoiding ERISA, this is no less of a preempting reference. (*Prudential Ins. Co. of Am. v. National Park Med. Ctr, Inc.* (8th Cir. 1998) 154 F.3d 812, 824 [Arkansas Patient Protection Act's explicit "reference to" ERISA plans brought it within the scope of preemption even though the Act only referred to ERISA plans to exempt them from its reach, because the state law "'singles out ERISA employee welfare benefit plans for different treatment under state [law], [and therefore] is preempted,'" citing *Mackey v. Lanier Collection Agency & Serv., Inc.* (1988) 486 U.S. 825, 830.]) CalSavers necessarily singles out employers with ERISA plans and employers without ERISA plans, so as to apply its mandate to those without. Those with ERISA plans are being treated differently under state law than those without because they are not mandated to enroll. Lastly, the mandate is a specific reference to ERISA because its application is determined by reference to ERISA plans. As in *Greater Washington* where "[t]he health insurance coverage that [the state statute] requires employers to provide for eligible employees is measured by reference to 'the existing health insurance coverage' provided by the employer," 506 U.S. at p. 130, so too is the requirement that private California employers provide CalSavers retirement accounts to its employees measured by the existence or non-existence of existing ERISA plans. On any of these bases, CalSavers is expressly preempted by specific reference.

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: 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* (2001) 532 U.S. 141, 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, while assuming 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 ERISA objectives to protect private pensions.

Besides national uniformity of regulation in general, core ERISA objectives include reporting of data, disclosure, fiduciary obligations, vesting requirements (*Shaw v. Delta Airlines Inc.*, 463 U.S. at pp. 98-99) and payment of benefits (*Egelhoff v. Egelhoff,* 532 U.S. at pp. 147-148). (See also *Gobeille v. Liberty Mutual Insurance Co.* (2016) 136 S.Ct. 936 [reporting of data].) CalSavers creates an ERISA plan with statutes and regulations all distinct from ERISA and its objectives. But even assuming CalSavers is not an ERISA plan, the mandate interferes with all ERISA objectives by forcing either an ERISA plan or an avoidance of an ERISA plan supplanted by a much lesser plan. This "choice" violates the employer's autonomy and administrative stability under ERISA.

III. CalSavers is Preempted for Conflicting with Employer Autonomy in the 1975 Safe Harbor's Interpretive Regulation (29 C.F.R. § 2509.99-1) and for Forcibly Exposing Small Employers to ERISA Liability.

Plaintiffs briefed this issue on the first motion to dismiss. Plaintiffs continue their arguments, with clarification in support of the first amended complaint.

Under conflict preemption, "relating to" is unnecessary. Any inherent conflict with ERISA "suffices to resolve the case." (*Boggs v. Boggs* (1997) 520 U.S. 833, 841.)

a. The CalSavers Mandate Eliminates a Private Employer's ERISA Right to Choose One IRA Provider or to Set Criteria, and to not have to Choose an ERISA Plan.

The 1975 safe harbor at 29 C.F.R. §2510.3-2(d) is interpreted at 29 C.F.R. § 2509.99-1. Per subsection (d), employers may designate one (and exactly just one if they wish) IRA sponsor. Alternatively, they may designate criteria for IRA sponsors, such as "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." (*Ibid*.) Both of these private employer rights under ERISA are destroyed by the CalSavers statutes because the CalSavers statutes supplant them. A private employer without a pre-existing ERISA plan *must* accept CalSavers as their IRA sponsor. No longer does the private employer have autonomy to set criteria, or to select another provider as its "one" choice.

CalSavers is not an option employers can accept or reject without consequence. Unemployment Insurance Code section 1088.9 fines employers who do not choose a plan. If an employer does not sign up for CalSavers or pay the fines under section 1088.9, the employer must choose an ERISA plan. (Cal. Gov. Code, § 100032.)

Mandating CalSavers absent an ERISA plan forces an employer to make an ERISA choice. This is not a mere literal connection. "ERISA generally would preempt a state law that required employers to establish and maintain ERISA-covered employee benefit pension plans." (80 Fed.Reg. 72006, 72011.) The defendants' argument is that

where a state law doesn't literally require employers to establish ERISA plans, there is no preemption. But the forced decision here is still too invasive. If the employer doesn't want to choose CalSavers — as is the employer's right under ERISA at 29 C.F.R. §2509.99-1(d) — it is undisputable that the employer *is* mandated to choose an ERISA-covered plan. Either way, ERISA rights are violated.

b. Small Employers will be Volleyed between Mandated and Prohibited from CalSavers, Risking ERISA Liability.

CalSavers creates more conflict once an employer of five employees loses one and is then immediately prohibited from the program they had been mandated to establish and maintain. (Cal. Gov. Code, §100000(d); Defs.' Motion at p. 3:25-4:1.) At that point, 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.)

This is a Hobson's choice. (Cal. Gov. Code, § 100034(b).) These small employers 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.' [citing *NGS American, Inc. v. Jefferson* (6th Cir. 2000) 218 F.3d 519, 529-530] In addition to potentially coercing a plan fiduciary into violating plan provisions and ERISA, a state's enforcement of an assertedly preempted state law against an ERISA plan (unlike a private suit based on state law) is arguably itself a 'violation' of § 1144 – which provides that ERISA 'shall supersede any and all State laws. See, e.g. *HMI Mech. Sys., Inc. v. McGowan* (2d Cir. 2001) 266 F.3d 142, 149." (*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].)

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IV. The 1975 Safe Harbor Remains Unavailable as This Court Found, Because the Program is not "Completely Voluntary," Because CalSavers Violates the Exclusive Benefit Rule, and Because the State is not a DOL-Approved Bank or Nonbank Trustee.

Plaintiffs briefed this issue on the first motion to dismiss. Plaintiffs continue their arguments, with clarification in support of the first amended complaint.

This court found correctly that CalSavers fails the 1975 safe harbor.

a. CalSavers is not "Completely Voluntary."

Plaintiffs continue to maintain that CalSavers is not "completely voluntary" under 29 C.F.R. § 2510.3-2(d) for all the reasons argued in previous briefing. Defendants' opt-out form (RFJN Exh. 3) does not change the analysis. As that form states, "If you do not opt out your employer will send payroll contributions to your CalSavers account."

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.) Rather, when 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.)

Moreover, the Ninth Circuit has already treated the terms "voluntary" and "automatic" as mutually exclusive. (*Kanne v. Connecticut General Life Ins. Co., supra*, 867 F.2d at p. 492.)

b. CalSavers does not Comply with 26 U.S.C. § 408(A).

Plaintiffs also continue to maintain that the 1975 safe harbor cannot apply because the IRAs do not qualify under 26 U.S.C. § 408(a). For one, the IRAs violate the exclusive benefit rule due to the Gain & Loss Reserve Account and stated interest rate. (Cal. Gov. Code, § 100006.) For another, there is no proof that the trustee is a bank or DOL-approved non-bank trustee.

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V. Plaintiffs have Standing and the State Law Claim does not Fail.

Plaintiffs briefed these issues on the first motion to dismiss. Plaintiffs continue their arguments.

a. The State's Action is not Legal Because ERISA Preempts.

The State may not rely on its traditional police power to circumvent ERISA preemption. (*Gobeille v. Liberty Mutual Insurance Co., supra,* 136 S.Ct. at p. 946.) The financial plight of Californians with respect to retirement is of genuine concern, but it must be addressed *under* ERISA. The Supreme Court is firm on this point. "Any presumption against preemption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does." (*Ibid*.)

b. The Eleventh Amendment is not a Bar.

HJTA *et al*. have sued the proper parties in this action. The State Treasurer is the officer who implements CalSavers in his official capacity. "Enjoining a statewide official under [*ex Parte*] *Young* [(209 U.S. 123)] based on his obligation to enforce a law is appropriate when there is a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." (*Russell v. Lundergan-Grimes* (6th Cir. 2015) 784 F.3d 1037, 1048.) The program itself is authorized to sue or be sued under 29 U.S.C. section 1132(d) for violations of that section.

c. Plaintiffs' Claim for Injunctive Relief is Viable.

California Code of Civil Procedure section 526a does not "relate to" ERISA except by way of consequence that taxpayer funds are spent on the plan and is therefore not preempted. If section 526a is preempted, however, appropriate injunctive relief would still be had under ERISA.

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CONCLUSION

The first amended complaint is well-pled. CalSavers is preempted by ERISA and must be enjoined. Defendants' motion to dismiss should be denied.

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By: **/s/ Laura E. Dougherty**

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