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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Howard Jarvis Taxpayers Association *et al.*,

Plaintiffs,

v.

California Secure Choice Retirement Savings Program *et al.*

Defendants.

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

STATEMENT OF INTEREST OF THE UNITED STATES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

The United States submits this Statement of Interest[1] for the purpose of advancing a correct and uniform interpretation of the extent of ERISA preemption and in order to further Congress's intent of promoting the voluntary establishment of employer-sponsored retirement plans with nationally uniform standards of administration. *See* 29 U.S.C. § 1144(a). The United States has a heightened interest in finding the Secure Choice Act preempted because the Act is among the first of a number of similar state auto-individual retirement account (IRA) laws to be challenged. *See* National Conference of State Legislatures, State-Facilitated Retirement Savings Programs for Private Sector Workers (Sept. 26, 2018), *available at* http://www.ncsl.org/research/fiscal-policy/state-facilitated-retirement-savings-programs-for-private-sector-workers.aspx.

INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA) is a "comprehensive and reticulated statute" reflecting Congress's careful policy choices. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 259, 261 (1980)). Among those choices is Congress's intentional decision to give employers the freedom to choose whether to establish a retirement plan. "Nothing in ERISA," the Supreme Court has observed, "requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). "Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506,

[1] 28 U.S.C. Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. A submission by the United States pursuant to this provision does not constitute intervention under Rule 24 of the Federal Rules of Civil Procedure.

516-17 (2010). The Court "[has] therefore recognized that ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the *encouragement of the creation* of such plans." *Id.* (emphasis added).

The California Secure Choice Retirement Savings Trust Act ("Secure Choice Act" or "Act") takes away the freedom of choice that lies at the core of ERISA by forcing employers either to establish their own ERISA plan or to maintain an equivalent plan under the Act. Employers face only these two stark options. In taking away this choice, the Secure Choice Act disregards Congress's careful determination that employers should not be required to maintain employee pension benefit plans. Because the Secure Choice Act disregards and runs afoul of ERISA's statutory scheme by effectively requiring employers to maintain such plans, it is preempted by ERISA's broad, express preemption provision that disallows any state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a).

BACKGROUND

The Secure Choice Act, Cal Gov't Code § 100000 *et seq.*, requires California employers with five or more employees to have retirement savings programs for their employees through automatic enrollment in IRAs managed by the state's CalSavers Board. *See* § 100032. It implements this regime in stages—California employers with more than 100 employees must have such IRA plans in place by June 2020; employers with more than 50 employees must have such IRA plans in place by 2021; and all eligible employers must have such IRA plans in place by 2022. *See* Cal. Code Regs. tit 10 § 10002(a). Employers are exempt if they offer an "employer-sponsored retirement plan" or an "automatic enrollment payroll deduction IRA" that qualifies for "favorable income tax treatment under the federal Internal Revenue Code." *See* Cal. Gov't Code § 100032(g)(1). Thus, private, non-church employers who sponsor these types of ERISA-covered retirement plans are exempt from CalSavers. *See generally* ERISA tit. II, Pub. L. 93-406 (amending the Internal Revenue Code with respect to retirement plans covered under ERISA). However, employers who provide ERISA-covered retirement plans that do not fit within the exemption (such as employers who offer payroll deduction IRA programs without automatic enrollment) are still required to register for CalSavers. *See* Cal. Code Regs. tit 10 § 10000(l),(o),(x).

Under the CalSavers Act and its implementing regulations, as recently amended, nonexempt employers must provide contact information for their eligible employees to CalSavers, which then distributes enrollment materials directly to employees. Cal. Gov't Code § 100014(f); Cal. Code Regs. tit. 10 § 10003(c). Because the plain text of the Act provides that certain classes of employees are ineligible for CalSavers (such as employees for whom contributions are made to a multiemployer plan, *see* Cal. Gov't Code § 100000(c)(2)(B), or employees engaged in interstate commerce, § 100000(c)(2)(A)), employers must continually determine which of their employees are "eligible employees" for whom reporting to CalSavers is required. Cal Gov't Code § 10000(c). Employers must also determine on an ongoing basis whether they are an "eligible employer" by determining whether any retirement plans they offer qualify as a "tax-qualified retirement plan," *see* Cal. Code Regs. tit. 10 § 10000(l), (x); § 10001, or whether their average number of employees has fallen below the statutory amount, *see* § 10002(a), as calculated by the average number of employees reported to the State for the quarter ending December 31 and the previous three quarters of available data. Eligible employers must then withhold contributions from the eligible employees' wages at a specified contribution rate, and remit them to an IRA set up for each employee by CalSavers, unless CalSavers instructs the employer otherwise because the employee opted out of the program. Cal. Code Regs. tit. 10 §§ 10003-10004; see Cal. Gov't Code § 10032. Employers are required to update the contributions withheld for each employee as the applicable contribution rate changes. *See* Cal. Code Regs. tit. 10 § 10003(d). CalSavers maintains a single pooled fund of IRA assets, which are invested according to enumerated guidelines. Cal Gov't Code at §§ 100002, 100004.

Although the statute provides for optional employer contributions if doing so "would not cause the program to be treated" as an ERISA-covered plan, § 100012(j), such contributions are prohibited by regulation. *See* Cal. Code Regs. tit. 10 § 10005(c)(1). The Secure Choice Act specifically provides that the CalSavers 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." *Id.* § 100043(a).

ARGUMENT

THE SECURE CHOICE ACT IS PREEMPTED BY ERISA SECTION 514(a).

ERISA section 514(a) provides that ERISA supersedes any state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has identified two separate threads of ERISA preemption—"reference to" preemption and "connection with" preemption. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97 (1983); *accord, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). A state law inappropriately makes "reference to" an ERISA-covered plan if (1) the law "specifically refers" to ERISA covered plans, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992); (2) if it acts "immediately and exclusively" upon ERISA plans; or (3) if the existence of ERISA plans is "essential to the law's operation." *Cal Div. of Labor Stds. Enforcement v. Dillingham Const., N.A.*, 519 U.S. 316, 325 (1996). A state law has an impermissible "connection with" ERISA plans if it "governs a central matter of plan administration" or "interferes with nationally uniform plan administration." *Gobeille v. Liberty Mut. Ins Co.*, 136 S. Ct. 936, 943 (2016) (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)). Under either thread, the pre-emption provision "displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Mackey v. Lanier*, 486 U.S. 825, 829 (1988) (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

I. The Act Makes Improper "Reference to" ERISA Plans Because the Law Presents Employers with the False Choice of Establishing an ERISA Plan or Maintaining California's Equivalent.

Under the "reference to" inquiry, the Supreme Court has held preempted a law that "impos[ed] requirements by reference to [ERISA] covered programs," *Dist. of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 131 (1992); a law that specifically exempted

ERISA plans from an otherwise generally applicable garnishment provision, *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 828, n. 2, 829–830 (1988); and a common-law cause of action where the existence of an ERISA plan was a "critical factor" in establishing liability, *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990); *see also Cal. Div. of Labor Stds. Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 324–25 (1997). Indeed, the Court has taken it "virtually . . . for granted that state laws which are designed to affect employee benefit plans are pre-empted under § 514(a)." *Mackey*, 486 U.S. at 829 (1988) (internal quotations omitted). "Even if the law is not specifically designed to affect such plans, or the effect is only indirect," a state law will nonetheless be preempted if it has such an effect. *See Ingersoll-Rand*, 498 U.S. at 139.

This preemption regime, of course, is not boundless. Where a state law is indifferent as to the ERISA coverage of plans within its scope, such as where the law affects a broad class of arrangements that may incidentally contain ERISA plans, such a law does not make "reference to" ERISA plans. *See e.g. Dillingham*, 519 U.S. at 325-28; *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Furthermore, where a law does not act upon ERISA-covered *plans* at all, but rather acts upon plan participants, *see e.g. Mackey*, 486 U.S. at 830-38, or upon one-time payments that do not constitute plans, *see e.g.* , *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987), such laws similarly do not make an improper "reference to" ERISA.

Because CalSavers falls squarely in the category of cases holding state laws preempted because of their improper reference to ERISA plans. Indeed, ERISA plans are essential to the operation of the Secure Choice Act's regulatory framework—the Act forces California employers who do not offer the State's preferred types of ERISA plans (certain tax-favored employer-sponsored retirement programs and automatic enrollment IRAs) to adopt equivalent automatic-enrollment IRAs through CalSavers. *See* Cal. Gov't Code § 100032(g). Such heads-I-win-tails-you-lose state regulations cannot survive under the Court's "reference to" jurisprudence.

The case law is instructive here. In *Mackey*, the Court struck down a Georgia law that specifically exempted ERISA plans from a generally applicable garnishment procedure. 486 U.S. at 828 n. 2, 829–830. The Georgia law specifically referred to ERISA by requiring that "[f]unds or benefits of a pension, retirement, or employee benefit plan or program subject to [ERISA]" be exempt from garnishment. *See id.* at 828 n.2. Because the law "single[d] out" ERISA-covered plans for different treatment under state garnishment through this express reference to ERISA plans, the law was preempted. *See id.*

Similarly, in *Greater Washington*, the Supreme Court held that ERISA preempted a District of Columbia law requiring employers to provide the same health benefits to workers' compensation recipients that they provided to their active employees through ERISA plans. *See* 506 U.S. at 125. Because the active employees' health insurance plans were ERISA-covered plans, the Court found that the statute's mandate that health insurance be provided at the "same benefit level" as the existing insurance "specifically refer[red]" to ERISA plans. *See id.* at 130-31. That statute, too, was preempted.

In contrast, the Court in *Dillingham* found that a state law that referenced an entire class of plans that incidentally *included* ERISA plans was not preempted. There, California had enacted a law providing that public works contractors could pay an apprenticeship wage to apprentices in apprenticeship programs that met national standards. *See Dillingham*, 519 U.S. at 319. Noting that the regulated "apprenticeship programs need not necessarily be ERISA plans," *id.* at 325, the Court rejected the argument that the law improperly made reference to ERISA—the law remained valid because it referred to a class of plans that included some ERISA plans; it did not make specific reference to ERISA plans. *Id.*

Likewise, in *Fort Halifax*, a Maine law that required employers to pay one-time severance payments to employees laid off by plant closures was not preempted. 482 U.S. at 1. The payments did not suffice to constitute a "plan" for ERISA purposes because they simply involved the writing of a single check to all affected employees—they did not require "an ongoing administrative program to meet the employer's obligation" under the statute, which was necessary for the regime to constitute a "plan." *See Fort Halifax*, 482 U.S. at 11.

Crucially, the *Fort Halifax* Court expressly rejected the reasoning of the Maine Supreme Court in its decision below, which had found that the Maine statute was not preempted because the severance mandate was a state-created benefit plan, not one created by employers. *See Dir. of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1059 (Me. 1986). The United States Supreme Court recognized that the Maine court's approach "would permit States to circumvent ERISA's pre-emption provision, by allowing them to require directly what they are forbidden to regulate." *Fort Halifax*, 482 U.S. at 16. "[T]he purpose of ERISA pre-emption makes clear why the mere fact that a plan is required by a State is insufficient to fend off pre-emption." *Id.* at 16-17. Indeed, the Supreme Court recognized that "[t]he requirements imposed by a State's establishment of a benefit plan would pose a formidable barrier to the development of a uniform set of administrative practices." *Id.*

Under the Secure Choice Act, California singles-out employers who decline to sponsor the state's preferred ERISA plans, forcing them to enroll their workers in plans that function just like the plans they have chosen not to offer. This is invalid under the case law discussed above. Just as the statutes in *Mackey* and *Greater Washington* invalidly made specific reference to ERISA plans, so, too, does the Secure Choice Act: It requires employers who do not offer a qualifying "employer-sponsored retirement plan" or "automatic enrollment payroll deduction IRA" to register for CalSavers. *See* Cal. Gov't Code § 100032(g)(1). As in *Mackey*, CalSavers includes a provision that specifically exempts ERISA plans from coverage. *See Mackey*, 486 U.S. at 828 n. 2, 829–830. The statute's mandate to create alternative equivalent plans are "measured by reference to the existing . . . coverage provided by the employer." *Greater Washington*, 506 U.S. at 130.

Moreover, the employer-sponsored plans that exempt employers from the Secure Choice Act's requirements are *all* ERISA-covered plans. *See* 29 U.S.C. § 1002(2)(A). Unlike in *Dillingham*, the Secure Choice Act is not a statute that references some larger class of plans that happens to include ERISA plans. *See Dillingham* 519 U.S. at 325. Nor is *Fort Halifax* a barrier to preemption. As in that case, the fact that state law, rather than employers, has created CalSavers is irrelevant to its preemptive scope, *see Fort Halifax* 482 U.S. at 16-17, and unlike the Maine statute in *Fort Halifax*, the Secure Choice Act's reference to ERISA operates with respect to *plans*, not participants or one-time benefits. *See Fort Halifax*, 482 U.S. at 11; *see also Mackey*, 486 U.S. at 830-38.

Further, the Secure Choice Act, unlike the *Fort Halifax* statute, requires "an ongoing administrative program to meet the employer's obligation" under the statute. *Fort Halifax*, 482 U.S. at 11. The Secure Choice Act establishes an ongoing program and requires that employers continually update their payroll deductions to reflect changes to their workforce of eligible employees, their employer eligibility, and the fluctuating contribution rate for each employee. *See* Background, *supra* at 3; *cf. Simas v. Quaker Fabric Corp*., 6 F.3d 849, 852-53 (1st Cir. 1993) (a Massachusetts statute that required employers to make one-time severance payments at varying times and amounts for different terminated employees based on complex eligibility criteria required an "ongoing administrative program," and was preempted). The required CalSavers plans are, in every relevant sense, equivalent to the ERISA plans that non-exempt employers have decided not to offer. Just as a typical ERISA retirement savings account would operate, CalSavers sets-up IRAs for retirement savings for employees, and the contributions to those IRAs are collectively invested by a fiduciary. Cal. Gov't Code §§ 100002, 100004. Whether the employees invest the 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.

This fact distinguishes this case from *Golden Gate*, in which the Ninth Circuit held that a San Francisco ordinance that set minimum health care spending requirements on employers in the City was not preempted. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639 (9th Cir. 2008). The Ordinance at issue in *Golden Gate* imposed fixed per-employee health care spending requirements on San Francisco employers, which could be satisfied by either funding ERISA plans maintained by the employers in the required amount, or by paying the same amount instead to the City's Health Access Program (HAP), which provided health care benefits for uninsured city residents. The Ninth Circuit found that this did not constitute an improper reference to ERISA, because covered employers could discharge their obligation under the ordinance by making payments to the HAP without ongoing administrative maintenance or management. *See Golden Gate*, 546 F.3d at 652. The HAP was distinguishable from the employers' ERISA health care plans—it was a "government entitlement program available . . . regardless of employment status," funded primarily by taxpayer dollars. 546 F.3d at 653. In contrast, CalSavers creates a nearly identical replacement for the ERISA plans employers have elected not to provide.

A state law may not reference ERISA plans in order to trigger ERISA-equivalent coverage. Because the Secure Choice Act does exactly that, this Court should determine that the law is preempted on that basis.

II. Because the Secure Choice Act Requires Employers to Maintain CalSavers Plans, Those Plans are Themselves ERISA Plans to Which the Secure Choice Act Improperly Refers.

The Secure Choice Act is alternatively preempted because an employer's ongoing maintenance of CalSavers Plans makes them ERISA-covered plans. *See Golden Gate*, 546 F.3d at 648 (if a city ordinance "creates an ERISA plan," then "the ordinance almost certainly makes an impermissible 'reference to' an ERISA plan."). ERISA defines a "pension benefit plan" as "any plan, fund, or program . . . established *or maintained* by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program— (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A) (emphasis added). Thus, in order to find that employers subject to the Act create ERISA-covered plans, this Court must first determine whether the CalSavers arrangement is a "plan, fund, or program" of the type described in 29 U.S.C. § 1002(2)(A), and second, whether the level of employer involvement in "establish[ing] or maintain[ing]" the arrangement is sufficient to create ERISA-covered plans. These are separate and distinct inquiries. *See Donovan v. Dillingham*, 688 F.2d 1367, 1367 n.11 (11th Cir. 1982) (en banc) ("Department of Labor regulations recognize that an employer may be involved in a plan, fund, or program without establishing it or maintaining it."). In this case, both criteria are satisfied.

A. CalSavers is a "Plan, Fund or Program" under 29 U.S.C. § 1002(2)(A).

The requirements to establish a plan are minimal. *See Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Acc. Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987) ("An employer, however, can establish an ERISA plan rather easily."). Indeed, an ERISA-covered plan can exist even if funded solely with employee contributions. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). "In determining 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." *Id*. The Ninth Circuit has repeatedly relied on *Donovan*.[2] *See, e.g., Modzelewski v. Resolution Tr. Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994).

It is plain that the payroll-deduction arrangements mandated by the Secure Choice Act meet the test set forth in *Donovan*. The "intended benefits" are the retirement income from tax-

[2] This Court did not apply the *Donovan* test in its March 29, 2019 Order on the Motion to Dismiss, noting that the Ninth Circuit in *Golden Gate* had declined to apply the test when considering government mandates on employers. Dkt. No. 24 at 15. The Ninth Circuit appears to have mistakenly concluded that the *Donovan* analysis applies both to whether a "plan, fund or program" has been established *and* whether that plan, fund, or program is "established or maintained" by employers. *See Golden Gate*, 546 F.3d at 651-52. The test actually applies only to the former inquiry. *See Donovan*, 688 F.2d at 1367 n.11. It is unsurprising, then, that the *Golden Gate* court expressed doubt with regard to the application of the *Donovan* test where the court had found that employers had neither established nor maintained the plan—under the ordinance (and unlike CalSavers) the court found that employers had no ongoing obligation to the city once they made required payments, much like a payroll tax. *See* 546 F.3d at 652. In any event, that court did not actually reach the question of whether *Donovan* applied, because it found that the *Donovan* criteria were not satisfied. *See Golden Gate*, 546 F.3d at 652.

deferred contributions provided by the IRAs required by the Act, the "beneficiaries" are the employees whose wages are withheld, the "source of financing" is the automatic payroll deductions, and the "procedures for receiving benefits" are those provided through the IRA product. See *Donovan*, 688 F.2d at 1373. If the identical functions of the CalSavers Board were instead performed by a third party administrator and investment manager voluntarily hired by an employer plan sponsor, this arrangement clearly would fall within the scope of ERISA. *Compare Silvera v. Mut. Life Ins. Co. of New York*, 884 F.2d 423, 427 (9th Cir. 1989) (rejecting the notion that a government employer delegating tasks to a private insurer, who "stepped into the employer's shoes," changes the fact that the plan was established as a governmental plan under ERISA). A CalSavers payroll-deduction arrangement is therefore a "plan, fund or program."

B. Employers Participating in CalSavers, at the Very Least, "Maintain" ERISA-covered Plans under 29 U.S.C. § 1002(2)(A).

Determining that the CalSavers program constitutes a "plan, fund, or program" to provide retirement benefits does not end the analysis. *Donovan* emphasizes that a plan "only falls within the ambit of ERISA if [it] covers ERISA participants because of their employee status in an employment relationship, and an employer or employee organization is the person that establishes or maintains [it]." 688 F.2d at 1371. The arrangements created by the Secure Choice Act require employers to "maintain" CalSavers plans.

The Secure Choice Act specifically requires employers to maintain CalSavers plans by setting up the payroll-deduction arrangements, ensuring the enrollment of their employees, deducting money from employees' pay, and sending the payroll deductions to the CalSavers program administering the IRAs. *See* Cal. Gov't Code, § 100032; Cal. Code Regs. tit. 10 § 10003(c). By requiring employers to deduct contributions from eligible employees' wages on an ongoing basis, and to forward the contributions for deposit into IRAs established for each enrolled employee, the Secure Choice Act requires the employers to maintain an employer-based program providing "retirement income to employees" or resulting "in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A). Therefore, the Act requires the covered employers to maintain "ongoing administrative programs" to pay employee benefits. *Fort Halifax* 482 U.S. at 11.

Employers subject to the Act must make ongoing determinations regarding their eligibility, the eligibility of employees, and the associated contribution rate. Specifically, employers must monitor and make determinations on an ongoing basis regarding: whether any benefit provided is or becomes a "tax-qualified retirement plan" under California regulations such that the employer becomes exempt from coverage, Cal. Code Regs. tit. 10 § 10000(l), (x); whether any employee has elected to change his or her contribution rate, or whether the CalSavers Board has changed the default contribution rate, *see id.* § 10005; whether any particular employee is or becomes exempt by virtue of the fact that he or she is "engaged in interstate commerce," Cal. Gov't Code § 100000(c)(2)(A); whether the employee is or becomes exempt because contributions are required on that employee's behalf to a multiemployer plan pursuant to a collective bargaining agreement, § 100000(c)(2)(B); whether an employee is or becomes exempt due to coverage under the Railway Labor Act, § 100000(c)(2)(A); and whether the employer's average total employees for the quarter ending December 31 and the previous three quarters of available data has fallen below the Act's current coverage minimum, Cal. Gov't Code § 100000(d)(1). Such determinations must also be made for all new hires, and then on an ongoing basis for all existing employees, including even short-term employees. These determinations may not be straightforward, particularly given that they are subject to government "investigation and audit" and any subsequent penalties. Cal. Unemp. Ins. Code § 1088.9(d).

The First Circuit recognized in *Simas* that, when a state law requires such ongoing eligibility determinations in combination with an ongoing administrative scheme, then the employer's required activities will be sufficient to establish or maintain an ERISA-covered plan. *Simas*, 6 F.3d at 852-54. The Eighth Circuit has similarly recognized that an employer's need to make eligibility determinations can be sufficient to establish or maintain an ERISA-covered plan. *Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 679-80 (8th Cir. 2004) (finding plan existed when it was necessary for the "company to engage in a case-by-case review of employees to determine eligibility for benefits.")

Defendants have argued in their Motion to Dismiss that recent modifications to the Act effective June 27, 2019, made by S.B. 83, 2019 Cal. Legis. Serv. Ch. 24, and associated emergency regulations effective July 25, 2019, mean that the role of employers is "purely ministerial." Dkt. No. 38 at 6. Under the amended Act, employers do not provide materials to their employees directly; rather, employers must provide contact information for their employees to CalSavers, which then sends materials to employees. Cal. Gov't Code § 100014(f); Cal. Code Regs. tit. 10 § 10003(c). Yet even under these modifications, employers must still make ongoing determinations as to which employees are "eligible employees" under the Act as a threshold matter. For example, an employee of a multistate employer may cease to become an "eligible employee" after being transferred from a California office to an Oregon office under the Act's interstate commerce exemption at Cal. Gov't Code § 100000(c)(2)(A). Or, an employee may cease to be an "eligible employee" after entering a bargaining unit for whom contributions are made to a multiemployer plan under Cal. Gov't Code § 100000(c)(2)(B). Under the Act's reporting structure, these initial eligibility determinations would necessarily be made by the employer, not CalSavers.

The fact that employers do not voluntarily create these ERISA plans does not alter the conclusion that they are still "employers" as defined by ERISA who "maintain" the plan, notwithstanding any attempt by state law to redefine the role of employers. The Supreme Court has held that when an employer acts in an ERISA capacity, state laws regulating that activity may not diminish the entity's status as an ERISA actor. *See Unum v. Ward*, 526 U.S. 358, 379 (1999) (California law that would have rendered invalid a contractual provision governing an employer's status as an agent of its insurer was preempted by ERISA because it regulated plan administration). ERISA still operates and has consequences even if the employer's conduct is dictated by a third party. *See Fort Halifax*, 482 U.S. at 12, 16-17. The Ninth Circuit has followed this reasoning in finding that state laws mandating that employers provide certain benefits to their employees are preempted when the employer would need to establish an ERISA-covered plan to comply with the law. *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498 (1993).

In sum, each private employer that participates in the CalSavers program maintains an employee pension benefit plan covered by ERISA, regardless of the role of the state mandate in creating the withholding arrangements.[3]

III. The Act's Arrangements Do Not Satisfy the Department of Labor's 1975 IRA Safe Harbor.

Defendants have argued that even if the CalSavers IRAs are ERISA plans, they fall within the 1975 IRA Safe Harbor Regulations at 29 C.F.R. § 2510.3-2(d). This safe harbor is part of a regulation that "clarifies the limits of the defined terms 'employee pension benefit plan' and 'pension plan' for purposes of title I of the Act . . . by identifying specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes." 29 C.F.R. § 2510.3-2(a). The safe harbor regulation provides that ERISA does not cover a payroll-deduction IRA arrangement otherwise covered by ERISA so long as four conditions are met: (1) the employer makes no contributions; (2) employee participation is "completely voluntary"; (3) the employer does not endorse the program and acts as a mere facilitator of a relationship between the IRA vendor and employees; and (4) the employer receives no consideration except for its own expenses. "[A]ny failure under [the conditions in the regulation] establishes that the Plan is an employee pension benefit plan for purposes of ERISA," assuming the plan was otherwise covered. *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1230 (9th

[3] Although the Court need not decide the question, certain employers may be deemed to have "established" ERISA plans in addition to "maintaining" them. In particular, although the Act mandates participation by employers that do not offer another retirement plan, it also contemplates voluntary participation by any California employer, such as, for example, if the employer registers before the law becomes mandatory for employers of their size. *See* Cal. Gov't Code §100032. For these employers who voluntarily set up CalSavers, this may suffice to "establish" an ERISA plan. *See, e.g.*, *Donovan*, 688 F.2d at 1373 (a plan has been "established" by an employer when a "decision [to provide benefits] has become a reality"). Indeed, if anything, this provides further reason to find that all employers "maintain" ERISA plans under the Act, since it would be counterintuitive to find the Act preempted for those employers who *voluntarily* sign up for CalSavers, but not for those who are forced to do so.

Cir. 2000). Because CalSavers' automatic-enrollment IRAs are not "completely voluntary," they are not exempt from ERISA within the 1975 IRA Safe Harbor.

The Court correctly decided in its decision on the First Motion to Dismiss that the CalSavers arrangement is not "completely voluntary." Dkt. No. 24 at 12-13. As mentioned by the Court, it was for this reason that the 2016 Safe Harbor that had excepted savings arrangements such as CalSavers (and which was later disapproved by Congress and rescinded pursuant to the Congressional Review Act, 5 U.S.C. § 801 *et seq.*), had been necessary. *See* Dkt. No. 24 at 13.

Cases discussing the "completely voluntary" requirement in other ERISA safe harbors, while not involving opt-out provisions, have focused on whether the employees' participation was voluntary or automatic, which at least implies that an affirmative choice by the employee is needed to make participation "completely voluntary."[4] *See, e.g., Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 492 (9th Cir. 1998) (analyzing group welfare plan safe harbor, court focused on "whether Kanne's participation was voluntary or automatic"); *Carter v. Guardian Life Ins. Co.*, Civil No. 11-3-ART, 2011 WL 1884625 (E.D. Ky. 2011) ("Courts have held that employees' participation is not 'completely voluntary' if their enrollment in the plan is 'automatic'"). In addition, cases in other contexts have also held that opt-out arrangements, like the one in CalSavers, are not "completely voluntary." *See e.g., Doe v. Wood Co. Bd. of Educ.*, 888 F. Supp. 2d 771, 775-77 (S.D. W. Va. 2012); *Schear v. Food Scope Am., Inc.*, 297 F.R.D. 114, 125 (S.D.N.Y. 2014). To protect participant choice and further ERISA's protections of

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[4] Defendants contend that there is no distinction between "voluntary" and "completely voluntary," and that the terms "appear redundant." See Defs.' Supplemental Statement, Dkt. No. 22, at 5 n.8. This reasoning conflicts with general principles of statutory interpretation. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (holding that it is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (internal quotation marks omitted). By adopting an opt-out regime, the IRA arrangements required under the Act fail to meet the 1975 Safe Harbor.

participants, the safe harbor requires a "completely voluntary" rather than a merely "voluntary" choice, and this heightened protection bars opt-out regimes from the 1975 Safe Harbor.[5]

IV. The Secure Choice Act is Preempted Because it Has an Impermissible "Connection With" ERISA-Covered Plans.

The Secure Choice is also independently preempted under "connection with" preemption. Under "connection with" preemption, a state law is preempted if it "mandate[s] employee benefit structures." *Travelers*, 514 U.S. at 658. Additionally, a state law has an impermissible "connection with" ERISA plans if the state law either "governs . . . a central matter of plan administration" or "interferes with nationally uniform plan administration." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. at 943 (citing *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)). The *Gobeille* Court emphasized that "ERISA preempts a state law that regulates a key facet of plan administration even if the state law exercises a traditional state power." 136 S. Ct. at 946. Thus, in *Gobeille*, a Vermont law requiring that information about benefit payments and plan demographic data be reported to a centralized healthcare database was preempted by ERISA because reporting and disclosure are core functions of ERISA plan administration.

This Court previously ruled that "CalSavers does not govern a central matter of an ERISA plan's administration, nor does it interfere with nationally uniform plan administration." Dkt. No. 24 at 8. The Court reasoned that the program only applies to employers without existing retirement plans, does not require employers to make any promises to employees, and imposes only ministerial duties on employees. *Id.* at 7. The United States respectfully urges the Court to reconsider its analysis of "connection with" preemption in light of *Gobeille*.

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[5] The inverse proposition does not hold, of course—*i.e.* opt-out arrangements are not inherently nonconsensual or involuntary. *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B)(v) (members of Rule 23(b)(3) class are included in settlement unless they "request exclusion"); *Circuit City Stores v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (failure to object to arbitration agreement is considered consent). Instead, the IRA safe harbor regulation requires a "completely voluntary" choice, a heightened standard that requires more than mere consent or mere voluntariness. Automatic enrollment is inconsistent with that heightened standard.

The Secure Choice Act governs a central matter of plan administration and mandates employee benefit structures by requiring the maintenance of ERISA plans in the manner specified in the Act. As discussed earlier, California's Secure Choice Act requires employers who do not have ERISA plans to maintain ERISA-covered plans. The Secure Choice Act also controls the benefits, design, and administration of the mandated plan. *See* Cal. Gov't Code § 100000-100050. The Act interferes with nationally uniform plan administration by potentially subjecting multi-state employers to numerous disparate retirement plan laws. In that regard, a decision by this Court to allow the Secure Choice Act to survive would allow for the creation of a patchwork of different state laws regulating the provision of retirement benefits to employees. This danger is exacerbated because the Act applies to employers to the extent they do business in California regardless of where the company is headquartered or specific employees are located. Cal. Gov't Code § 100000(d). A multi-state employer would not only have to keep track of payroll deductions, rates, and eligibility for CalSavers, but also for myriad other states' automatic-enrollment IRA programs. This is exactly the kind of disuniformity that ERISA § 514(a) was designed to avoid. *See Gobeille*, 136 U.S. at 949 (Breyer, J., concurring) ("failure to find pre-emption here would subject [ERISA] plans to 50 or more potentially conflicting information reporting requirements. Doing so is likely to create serious administrative problems.").

V. The Secure Choice Act is Preempted Under Traditional Conflict Preemption Principles.

Finally, CalSavers is still preempted under traditional preemption principles, as articulated by the Supreme Court. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (holding that ERISA's civil enforcement remedies preempted conflicting state law in part because of "the deliberate care" and "balancing of policies" undertaken by Congress in drafting the statute); *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (holding that ERISA preempted state law under conflict preemption principles without needing to analyze whether the state law related to a plan under ERISA section 514(a)). Where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the law may be preempted under those principles. *Gade v. Nat'l Solid Waste Mgmt. Assoc.*, 505 U.S. 88, 98 (1992). Conflict preemption analysis is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l For. Trade Council*, 530 U.S. 363, 373 (2000).

As the case law interpreting the express preemption doctrine makes clear, "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Aetna Health, Inc., v. Davila*, 542 U.S. 200, 208 (2008). Congress, through ERISA, carefully refrained from mandating "what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). ERISA's "comprehensive and reticulated" regime does not "require employers to establish benefit plans in the first place." *Mertens*, 508 U.S. at 251; *Conkright*, 559 U.S. at 516-17. ERISA's provisions do not mandate plans, but include specific provisions to encourage the creation of plans, and then to apply its requirements to those plans. *See, e.g., Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014) (discussing application of ERISA to employee stock ownership plans). The Court "[has] therefore recognized that ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the *encouragement* of the creation of such plans." *Conkright*, 559 U.S. at 515-16. (emphasis added).

Because CalSavers, unlike ERISA, *forces* (rather than encourages) employers to have an ERISA-covered pension plan, or else provide an equivalent through CalSavers, *see supra* Section I, it conflicts with ERISA even if CalSavers does not create ERISA-covered plans itself. However, because CalSavers *does* create ERISA-covered plans by requiring employers to maintain a "plan, program, or fund," *see supra* Section II, it conflicts with numerous substantive requirements of ERISA as well—CalSavers has its own administrative regime, fiduciary obligations, reporting procedures, and enforcement mechanisms, entirely apart from those set forth in or required by ERISA. *See* Cal. Gov't Code §§100000 *et seq*. These provisions clearly conflict with ERISA and are therefore preempted.

CONCLUSION

Because the CalSavers Act is preempted by ERISA, this Court should deny Defendant's motion to dismiss Plaintiff's First Amended Complaint.

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