No. 20-15591

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOWARD JARVIS TAXPAYERS ASSOCIATION, et al.,
Plaintiffs-Appellants

v.

THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of California
Case No. 2:18-cv-01584-MCE-KJN

BRIEF OF THE SECRETARY OF LABOR, AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

GARRETT N. TRAUB
Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(202) 693-5594

KARINA WEGMAN
Attorney

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STATEMENT OF THE ISSUES

The California legislature enacted the California Secure Choice Act ("Secure Choice Act" or "Act") to provide a retirement savings vehicle for certain California employees who do not have access to other retirement plans. The Act establishes a trust with individual retirement accounts (IRAs) for employees and a governing board that invests the trust's assets (collectively "CalSavers"). The law requires certain employers who do not otherwise offer a retirement plan or automatic enrollment IRA to "have a payroll deposit retirement savings arrangement" for employees to participate in CalSavers. The arrangement must have automatic enrollment, though employees may opt-out. An employer subject to the Act argued that the law is preempted by section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a). The district court found that the Act is not preempted. The question presented is:

> Whether the Secure Choice Act, which requires certain employers to facilitate employee enrollment in CalSavers if the employer does not offer another qualifying retirement plan, is preempted by ERISA section 514(a), 29 U.S.C. § 1144(a), because it makes reference to and has a connection with ERISA-covered plans.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor has primary regulatory and enforcement authority to enforce Title I of ERISA. 29 U.S.C. §§ 1132, 1135. The Secretary has an interest in whether state laws are preempted, properly interpreting the extent of preemption to delineate the roles of federal and state authority over the establishment or maintenance of employment-based retirement plans, and maintaining uniform national standards for plan administration. That interest is heightened here because the Act is among the first of several similar state laws. See, e.g., Georgetown University McCourt School of Public Policy, Center for Retirement Initiatives, State-Facilitated Retirement Savings Programs: A Snapshot of Program Design Features (February 29, 2020), available at https://cri.georgetown.edu/wp-content/uploads/2018/12/CRI-State-Brief-States_SnapShotPlanDesign-Feb-20-2020.pdf.

The Secretary files this brief as amicus curiae under the Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

I. Facts

The Secure Choice Act, Cal Gov't Code § 100000 et seq., requires employers with five or more employees to have retirement savings programs for their employees through automatic enrollment in IRAs managed by the CalSavers Board. See § 100032. 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 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 are still required to register for CalSavers. See Cal. Code Regs. tit. 10 § 10000(m),(p),(z).

The Act permits employer contributions if doing so "would not cause the program to be treated" as an ERISA-covered plan, § 100012(j). The regulation, however, prohibits employer contributions altogether. See Cal. Code Regs. tit. 10 § 10005(c)(1). The Act also specifically provides that the CalSavers Board shall not implement the program "if it is determined that the program is an employee benefit plan under [ERISA]." Cal Gov't Code § 100043(a).

II. Procedural History

Howard Jarvis Taxpayers Association ("HJTA") and certain of its officers filed a complaint on May 31, 2018 against the California Secure Choice

Retirement Savings Program ("CalSavers" or "the Program") and its officials, alleging that ERISA preempts the Act. Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Retirement Sav. Program, No. 2:18-cv-01584-MCE-KJN, 2019 WL 1430113 (E.D. Cal. Mar. 29, 2019). On July 25, 2018, Defendant CalSavers filed a motion to dismiss, arguing chiefly that HJTA lacked standing, the Program was governed by the Department of Labor (DOL)'s IRA safe harbor regulations, and the Act did not create ERISA plans.

On March 28, 2019, the district court dismissed the complaint, but granted leave to file an amended complaint. Howard Jarvis, 2019 WL 1430113, at *8. The court held that HJTA had standing, id. at *5-6; CalSavers could not take advantage of DOL's IRA safe harbor regulation, id. at *7; and that the law was not preempted by ERISA. Id. at *7-8.

Plaintiffs filed an amended complaint on April 11, 2019, and Defendant CalSavers again filed a motion to dismiss on May 28, 2019. On September 13, 2019, the Department of Justice, in conjunction with the DOL, filed a Statement of Interest opposing CalSavers' motion to dismiss and argued that the Act is preempted. The district court granted Defendant's motion to dismiss the amended complaint on March 10, 2020. Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Retirement Sav. Program, No. 2:18-cv-01584-MCE-KJN, 2020 WL

1157924 (E.D. Cal. Mar. 10, 2020). HJTA filed a notice of appeal on April 1, 2020.

SUMMARY OF THE ARGUMENT

1. The California Secure Choice Act is preempted under ERISA's "reference to" doctrine because the existence of an ERISA-covered plan is essential to its operation. To comply with the Act, employers either must have an ERISA-covered retirement plan, or must use the CalSavers withholding arrangement. If they use the withholding arrangements mandated by the Act, they establish or maintain plans, funds, or programs of benefits for their employees which therefore are themselves ERISA-covered plans. The fact that the withholding arrangements are compelled by state law does not alter the ERISA preemption analysis.

2. The Act is also preempted under the "connection with" doctrine because it both governs a central matter of plan administration and interferes with nationally uniform plan administration. The Act interferes with nationally uniform plan administration of retirement benefits by subjecting multi-state employers to a patchwork of state laws that directly regulate how employers must structure their program or plan in providing retirement benefits.

3. The district court correctly held that the arrangements required by the Act do not satisfy the DOL's regulation, 29 C.F.R. § 2510.3-2(d), which provides that

certain individual retirement accounts do not constitute ERISA plans. Therefore, that regulation cannot save the Act from preemption.

ARGUMENT

ERISA supersedes any state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Supreme Court has identified two threads of ERISA preemption—"reference to" and "connection with" preemption. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983). A state law inappropriately makes "reference to" a plan if the law "specifically refers" to ERISA-covered plans, District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 130 (1992); if it acts "immediately and exclusively" upon ERISA plans; or 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).

Under the second preemption thread, a state law has an impermissible "connection with" ERISA plans if it "governs a central matter of plan administration," thereby "interfer[ing] with nationally uniform plan administration." Gobeille v. Liberty Mut. Ins Co., 136 S. Ct. 936, 943 (2016). Under either thread, the preemption 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). The Secure Choice Act is preempted under both preemption doctrines.

I. The Act Makes Improper "Reference To" ERISA Plans Because The Act's Mandated Arrangements Are Plans Established Or Maintained By Employers

The Secure Choice Act is essentially a state mandate for employers to provide a retirement plan for their employees. This mandate can only be satisfied with an ERISA-covered plan, so ERISA preempts the Act under "reference to" preemption. First, an employer under Cal. Gov't Code § 100032(g)(1) must either establish a plan that would, by definition, be ERISA-covered or *establish* a state-mandated plan. Second, an employer who chooses to satisfy the mandate by participating in the CalSavers withholding arrangement *maintains* a plan. Because the state-mandated plan is "established or maintained" by an employer, it is covered by ERISA. Accordingly, the Act has an impermissible "reference to" ERISA plans.

To the extent that appellees argue the withholding arrangement is instead established or maintained by a state agency, courts have found that government-sponsored employee benefit arrangements dominated by private employees are not exempt from ERISA. Finally, the district court's reliance on <u>Golden Gate Rest. Ass'n v. City & Cty. of San Francisco</u>, 546 F.3d 639 (9th Cir. 2008) is misplaced.

A. "Reference To" Preemption

A state law inappropriately makes "reference to" an ERISA-covered plan if the law "specifically refers" to ERISA covered plans, <u>Greater Washington</u>, 506

U.S. at 130, if it acts "immediately and exclusively" upon ERISA plans, or if the existence of ERISA plans is "essential to the law's operation." Dillingham Const., 519 U.S. at 325. 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). Thus, based on the statute, in order to find that employers subject to the Act create ERISA-covered plans, this Court must first determine whether the CalSavers arrangements are the sort of "plan, fund, or program" described in 29 U.S.C. § 1002(2)(A), and second, whether employer involvement in *either* "establish[ing] or maintain[ing]" the arrangement is sufficient to create ERISA-covered plans. See Donovan v. Dillingham, 688 F.2d 1367, 1373 n.11 (11th Cir. 1982) (en banc). In this case, both criteria are satisfied.

B. Determining The Existence Of An ERISA-Covered Plan

The Act's withholding arrangements are "plans, funds, or programs" for purposes of ERISA section 3(2)(A). 29 U.S.C. §1002(2)(A). The elements that constitute a "plan, fund, or program" are minimal. See Credit Managers Ass'n of S. Cal. v. Kennesaw Life & Acc. Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987).

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 construing ERISA section 3(2)(A), the Eleventh Circuit has held that "[i]n 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." Donovan v. Dillingham, 688 F.2d at 1373. This Court repeatedly relied on Donovan v. Dillingham to ascertain the existence of a plan, fund, or program. See, e.g., Modzelewski v. Resolution Tr. Corp., 14 F.3d 1374, 1376 (9th Cir. 1994).

The arrangements mandated by the Act meet the test set forth in Donovan v. Dillingham to determine whether a plan, fund, or program exists. The "intended benefits" are the retirement income from tax-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 v. Dillingham, 688 F.2d at 1373; see also Okun v. Montefiore Med. Ctr., 793 F.3d 277, 279 (2d Cir. 2015) (noting that "Congress intended the definition of 'employee welfare benefit plan' to be broad and independent of the specific form of the plan"). As an analogy, if the administrative and investment management functions of the CalSavers Board were instead performed by service providers voluntarily hired by an employer plan sponsor, this arrangement would inarguably fall within the scope of ERISA. Cf. 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."

C. Employers "Establish" CalSavers Withholding Arrangements Because A State Mandate Requires An Employer-Sponsored Retirement Plan

Having determined the Act's mandated withholding arrangements are plans, funds, or programs of benefits, it is necessary to determine next whether they are established or maintained by employers. Here, employers who comply with the Act's retirement benefit mandate through CalSavers "establish" a plan sufficient for ERISA coverage. "Establishment of a plan . . . is a one-time, historical event," Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017), that results in "a reasonable person [being able to] ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d at 1373. The arrangements would be ERISA-covered plans if the employers had voluntarily set up identical IRA arrangements for their employees and hired CalSavers to manage those investments. The Supreme Court has held that a plan otherwise covered by ERISA does not escape preemption purely because state law mandated its existence. Thus, the identical state-mandated plan is treated as equivalent to plans established by employers and subject to ERISA.

In Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), a Maine law that required employers to pay one-time severance payments to employees laid off by plant closures was held not to be preempted. The payments were not sufficient to constitute a "plan" for ERISA purposes, because the state 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 id. at 11. Crucially, though, the U.S. Supreme Court expressly rejected the reasoning of the Maine Supreme Court in its decision below that the Maine statute was not preempted because the severance-pay mandate was a state-created benefit plan, not one established by employers. See Dir. of Bureau of Labor Standards v. Fort Halifax Packing Co., 510 A.2d 1054, 1059 (Me. 1986). The U.S. Supreme Court rejected the notion that an otherwise ERISA-covered plan avoids ERISA coverage merely because of the existence of a state mandate, and the Court recognized that the Maine Supreme 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. This Court 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, 1505 (9th Cir. 1993).

Here, the alternative arrangement mandated by the Secure Choice Act would surely fall within the scope of ERISA if an employer established a plan by voluntarily hiring the CalSavers Board to provide administrative and investment management services for employees.[1] 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 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 mandates employers to provide an employment-based pension plan,

[1] Although not necessary to decide whether the Secure Choice Act is preempted, CalSavers' arguments would allow for the evasion of ERISA's protections by altering the application of ERISA's liability to the employers and to the state itself. The Secure Choice Act provides that the CalSavers Board shall design and implement investment guidelines, and have authority to pay expenses out of investment returns earned by the individual accounts. Cal. Gov't Code §§ 100002(e), 100010(a)(14). By exercising discretionary authority over the assets in the employees' accounts in this manner, the CalSavers Board is arguably an ERISA fiduciary under ERISA section 3(21)(A), subject to ERISA's obligations regarding mismanagement of the employee contributions, which may be ERISA plan assets. 29 U.S.C. § 1002(21)(A).

which, aside from the state's involvement, would be indistinguishable from other ERISA-covered plans. The required CalSavers plans are, in every relevant sense, equivalent to the ERISA plans that non-exempt employers have decided not to offer. Employers subject to the Act's withholding mandate thus "establish" ERISA-covered plans by complying with the Act's requirements and mandate to provide a CalSavers plan, an ERISA-plan equivalent, for its employees.[2]

California thus singles out employers who decline to sponsor ERISA plans, forcing them to establish and enroll their workers in plans that function just like the plans they have chosen not to offer. Indeed, the plain language of the Act demonstrates that the state does not itself establish a plan, but rather imposes a duty on employers to establish a plan. Cal. Gov't Code § 100032(b)-(d) ("employers . . . *shall have* a payroll deposit retirement savings arrangement") (emphasis added). The statute's mandate to create alternative equivalent plans is "measured by reference to the existing . . . coverage provided by the employer."

[2] The Act may also require employers to participate in CalSavers even if the employer offers an ERISA-covered plan, thereby requiring such an employer to change its otherwise ERISA-covered plan. Cal. Gov't Code § 100032(g)(1) provides an exemption for employers with an "employer-sponsored retirement plan . . . or automatic enrollment payroll deduction IRA," but regulations clarify that the exemption does not apply to an employer's payroll deduction IRA if it "does not provide for automatic enrollment." Cal. Code Regs. tit. 10 § 10000(z). Accordingly, employers who offer a non-automatic IRA retirement plan may be ERISA-covered if one of the other conditions of 29 C.F.R. § 2510.3-2(a) is not satisfied, see *infra* section III. Employers who sponsor these ERISA plans are, therefore, not exempt from CalSavers' requirements.

Greater Washington, 506 U.S. at 130. The state mandate leaves the employer no choice but to provide a retirement plan, so each employer who complies with the mandate "establishes" a plan, fund, or program for purposes of ERISA section 3(2)(A). A conclusion that a state law that leaves employers no choice but to establish ERISA-covered retirement plans or equivalents is not preempted would be contrary to Congress's purposes. ERISA's "comprehensive and reticulated" regime does not "require employers to establish benefit plans in the first place." Mertens v. Hewitt Assocs., 508 U.S. 248, 251 (1993); Conkright v. Frommert, 559 U.S. 506, 516-17 (2010). "[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." Fort Halifax, 482 U.S. 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.; accord 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"). The California Secure Choice Act's mandate to establish employee benefit plans equivalent to those established under ERISA cannot escape ERISA preemption.

D. Employers "Maintain" CalSavers Withholding Arrangements

ERISA-covered plans must be "established *or* maintained" by an employer. 29 U.S.C. § 1002(2)(A) (emphasis added). Section I(C) explained how covered employers "establish" plans by complying with the Act's mandate. Independently, the Act's mandated withholding arrangements are ERISA-covered plans because the covered employers "maintain" them in a manner sufficient for ERISA coverage. Two circuit decisions considered the plain meaning of "maintain" in the context of another ERISA definition. See Medina v. Catholic Health Initiatives, 877 F.3d 1213, 1227 (10th Cir. 2017); Sanzone v. Mercy Health, 954 F.3d 1031, 1041 (8th Cir. 2020). In both, the circuit courts define "maintain" as "[t]o care for (property) for purposes of operational productivity." Sanzone, 954 F.3d at 1041 (citing Medina). "Maintain" does not rise to the level of "administer." See Sanzone, 954 F.3d at 1042 (noting that "administer . . . looks to tasks, while [maintain] considers continuity and longevity"). Nor does the term "require[] an organization to have authority over the adoption, modification, termination, benefit commitments, or terms of a plan." Id. at 1043; accord Medina, 877 F.3d at 1225. Under this definition, the Act requires employers to "care" for the ongoing administrative operations of the CalSavers plan, and thus "maintain" an ERISA-covered plan.

The Act undisputedly establishes an ongoing administrative program. The statute and its regulations define the employer's administrative responsibilities within that program. Currently, regulations require 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 Simas v. Quaker Fabric Corp., 6 F.3d 849, 852-53 (1st Cir. 1993) (a Massachusetts statute that required employers to make severance payments at varying times and amounts for terminated employees based on eligibility criteria required an "ongoing administrative program," and was preempted) (relying on Bogue v. Ampex Corp., 976 F.2d 1319 (9th Cir. 1992)).

As in Simas, courts recognize 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. 6 F.3d at 852-54; see also Petersen v. E.F. Johnson Co., 366 F.3d 676, 679-80 (8th Cir. 2004); Greathouse v. Glidden Co., 40 S.W.3d 560, 566 (Tex. Ct. App. 2001). "In other words, where a plan requires an employer to make eligibility and benefits decisions on an individual case basis—such that there is effectively 'no way to administer the program without an administrative scheme'—the plan will satisfy the ongoing administrative scheme requirement." Edwards v. Lockheed Martin Corp., 954 F. Supp. 2d 1141, 1148 (E.D. Wash.

2013), aff'd, 617 F. App'x 648 (9th Cir. 2015) (quoting Bogue, 976 F.2d at 1323); accord Collins v. Ralston Purina Co., 147 F.3d 592, 597 (7th Cir. 1998) ("[p]rolonged individualized decision-making concerning benefits describes a plan subject to ERISA"); Ditchey v. Mechanics Bank, No. 15-CV-04103-JSC, 2016 WL 730290, at *4 (N.D. Cal. Feb. 24, 2016); Saad v. Boeing Co., No. CV 08-2984-JFW (SHX), 2009 WL 10671429, at *5 (C.D. Cal. Feb. 4, 2009); Stanley v. CNH Am. LLC, No. CV 07-1290-PHX-ECV, 2007 WL 9724816, at *2 (D. Ariz. Nov. 1, 2007).

While the test turns on specific facts and circumstances, the employers here "care" for the ongoing operation of the CalSavers plans by, among other tasks, identifying new eligible employees and keeping records for withholding. The 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) (requiring employers to record and maintain information about each employee's contribution rate). 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).

Employers subject to the Act must make ongoing determinations regarding their own 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(m), (z); 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 or owners. 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).

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.[3]

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[3] Furthermore, CalSavers has created extensive guides on how employers "facilitate" this program. E.g., "Employer Program Details" available at https://employer.calsavers.com/home/employers/program-details.html, (last visited June 17, 2020). See also "Facilitating CalSavers", August 2019 available at https://cdn.unite529.com/jcdn/files/CAER/pdfs/en_US/account_management_reference.pdf, (last visited June 10, 2020). Employers continue to request assistance to "facilitate" the program. See Ascensus Presentation, January 27, 2020, at 6 available at, https://www.treasurer.ca.gov/calsavers/meeting/2020/20200127/staff/3.3.pdf, last visited June 10, 2020). Employers also must verify and submit to the state their exemption status, see "Register or certify your exemption," available at, https://employer.calsavers.com/californiaertpl/enroll/createEmp/viewCollectEmpPreRegDetails.cs (last visited June 10, 2020).

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. Cf. In re Walter Energy, Inc., 911 F.3d 1121, 1144 (11th Cir. 2018) (rejecting distinction between state mandated employer "maintenance" of a plan versus an employer's voluntary maintenance of a plan under the Coal Act). In other words, the existence of the state mandate under the Secure Choice Act does not mean that employers cannot "maintain" the withholding arrangements for ERISA coverage purposes. Indeed, 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.

Congress contemplated the types of benefit plans that states could require employers to have and chose to only exclude state laws mandating plans providing three types of benefits from ERISA preemption. ERISA section 4(b)(3), 29 U.S.C. § 1103(b)(3), excludes state-required workers' compensation, unemployment compensation, or disability insurance plans from ERISA coverage, and thus, those laws are not preempted by ERISA. Because of this, states are permitted to require separate non-ERISA plans covering *only* those kinds of benefits. Similarly, Congress amended ERISA section 514(b), 29 U.S.C. § 1144(b), to specifically save the Hawaii Prepaid Health Care Act from preemption after it was found to be preempted in Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977), aff'd, 633 F.2d 760 (9th Cir. 1980), aff'd, 454 U.S. 801 (1981). Similar Congressional action would be required to save California's Secure Choice Act. In sum, each private employer that participates in the CalSavers program establishes or maintains an employee pension benefit plan covered by ERISA, regardless of the role of the state mandate in creating the withholding arrangements.

E. Exempting The CalSavers Arrangements From ERISA Coverage Is Contrary To ERISA's Structure

It is beyond dispute that the CalSavers arrangement is an ongoing administrative scheme to provide employee retirement benefits. If the arrangement is neither established nor maintained by the private employers, then a logical conclusion is that it is established or maintained by the state.[4] However, courts

[4] CalSavers asserts that "[u]nlike an employer-sponsored plan, CalSavers is established, operated and maintained by the state." FAQs, available at https://www.calsavers.com/home/frequently-asked-questions.html?language=en# ("How is CalSavers different from an employer sponsored plan like a 401(k)?", (last visited June 10, 2020).

have uniformly held that government-sponsored plans dominated by private employees do not meet the conditions under ERISA section 3(32) for exemption from ERISA coverage under section 4(b)(1) as a "governmental plan." A conclusion that the CalSavers arrangements are neither established nor maintained by private employers, nor are subject to ERISA's conditions regarding governmental plans would defy ERISA's structure for regulating the provision of employee retirement benefits by ignoring the Congressional delineation between how employers and governmental entities provide employee benefits.

The governmental plan is one of a limited number of enumerated exemptions from ERISA coverage under ERISA section 4(b). 29 U.S.C. § 1003(b). Congress plainly stated that the exemption from coverage only applies when a state established or maintained a plan for "*its*" employees, not for employees *in general.* The same provision exempts from coverage Indian tribal government plans that meet the statutory definition but does not offer an exemption if substantially all the employees of the tribe perform "commercial activities." 29 U.S.C. § 1002(32). See generally Alley v. Resolution Tr. Corp., 984 F.2d 1201, 1206 (D.C. Cir. 1993) (discussing exemption).

Some plans qualify for the government-plan exemption even if they cover private employers' employees, but courts limit their participation to a "de minimis" level in order to preserve the statutory distinction between private and governmental plans. See, e.g., Navlet v. Port of Seattle, 194 P.3d 221, 229 (Wash. 2008) (relying on DOL Advisory Opinions to find that de minimis number of private employees does not defeat governmental plan status). However, if private employees predominate despite a government establishing and maintaining the plan, the logical conclusion is that the plan would not be exempt from ERISA. E.g., Hall v. Maine Mun. Emps. Health Tr., 93 F. Supp. 2d 73, 81 & n.15 (D. Me. 2000) (citing examples). See also DOL Adv. Op. 2012-01A (Apr. 27, 2012) (opining that arrangement with more than 50% private employees would not meet the conditions for a governmental plan).

CalSavers rejects arguments that the employers establish or maintain the CalSavers "plan," implying the state established and maintains the CalSavers program, but just for private employers. Such an argument turns the statutory definition and related exemptions on their head, erasing distinctions set by ERISA because it would permit the state to establish and maintain ERISA-exempt plans that cover only governmental employees *or* only private employees. For example, if a state establishes and maintains a pension plan for employees, 1% of whom are governmental employees, it is no longer a governmental plan and would be subject to ERISA. CalSavers essentially argues that the CalSavers arrangements, which differ from such a private-employer dominated governmental plan merely by degree, should be entirely exempt from ERISA coverage. The governmental plan definition and exemption would be mere surplusage if any plan established and maintained by a state government is categorically not "related to" employee benefit plans under section 514.

F. Golden Gate Is Distinguishable

The district court relied heavily on Golden Gate Rest. Ass'n v. City & Cty. of San Francisco, 546 F.3d 639 (9th Cir. 2008). Its reliance was misplaced because the fact pattern in Golden Gate differs in a number of critical respects from CalSavers. As a threshold matter, the Health Access Program (HAP) at issue in Golden Gate was not a purely employment-based arrangement. 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 HAP, which provided health care benefits for uninsured city residents.

This Court found that this arrangement did not constitute an improper reference to ERISA, because covered employers could discharge their obligation under the ordinance by making payments to the HAP, like paying taxes. See Golden Gate, 546 F.3d at 652. The HAP was a "government entitlement program available . . . regardless of employment status," funded primarily by taxpayer dollars. Id. at 653. In short, the HAP is a government entitlement program, not an employment-based "plan" as defined by ERISA. Id. at 653 ("[t]he HAP, administered by the City, is not an ERISA plan. Rather, the HAP is a government entitlement program available to low- and moderate-income residents of San Francisco, *regardless of employment status*.") (emphasis added). In Golden Gate, the employer's role and burden are akin to the regular burdens incidental to paying local taxes. In contrast, CalSavers creates a nearly identical employment-based replacement plan for the ERISA plans employers have elected not to provide.

CalSavers and the district court also cite Golden Gate for the proposition that Donovan v. Dillingham is not applicable to the question of whether an ERISA plan can be created by a state law mandate. Howard Jarvis, 2020 WL 1157924 at *10. This Court did not reach that issue, and thus Golden Gate does not bar the application of Donovan v. Dillingham in the context of CalSavers. 546 F.3d at 652 ("we need not reach the question whether Donovan applies"). HAP was structured to work in much the same way as a tax credit. In contrast, for CalSavers arrangements, the money goes straight from payroll into a retirement savings vehicle. Because it worked as a tax credit, HAP, as a whole, did not rely on funding tied to the employment relationship, so Donovan v. Dillingham has no application.

Moreover, in dicta, Golden Gate quoted a Seventh Circuit decision that suggested a conflict between applying Donovan v. Dillingham to state mandates and the holding in Fort Halifax. Golden Gate, 546 F.3d at 652 (quoting Sandstrom v. Cultor Food Science, Inc., 214 F.3d 795, 797 (7th Cir. 2000)). Sandstrom is not relevant because that case did not involve a government mandate. Instead, the court held that an employee was not eligible for severance pay and found it unnecessary to decide Dillingham's compatibility with Fort Halifax in determining whether the payment of severance amounted to an ERISA plan. Sandstrom, 214 F.3d at 797. Moreover, Fort Halifax, 482 U.S. at 12 n.6, cited favorably both Dillingham and this Court's decision in Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1358 (9th Cir. 1986), amended, 791 F.2d 799 (9th Cir. 1986), abrogated on other issues by Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986). The Supreme Court cited both cases to support its delineation between state mandates that establish plans and those that do not. Fort Halifax, 482 U.S. at 12 n.6. In Martori, for example, this Court distinguished between state mandates that force employers to provide one-time payments versus the creation of "new ERISA plans." 781 F.2d at 1358. The CalSavers program would mandate the creation of new ERISA plans, suggesting that it is appropriate to also follow Donovan v. Dillingham in this instance.

*   *   *

A state law makes improper reference to ERISA plans if ERISA plans are essential to the law's operation. ERISA plans are essential to the operation of the

Secure Choice Act, either through an ERISA plan, or through the CalSavers withholding arrangements, which are treated as ERISA plans because they are plans, funds, or programs of benefits: (1) established by employers; or (2) maintained by employers. The Secure Choice Act is thus preempted.

II. The Secure Choice Act Is Preempted Because It Has An Impermissible "Connection With" ERISA-Covered Plans

The Secure Choice Act is independently preempted under the "connection with" preemption doctrine. Under "connection with" preemption, a state law is preempted if it "mandate[s] employee benefit structures." N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995). 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. Gobeille 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.

The district court held that the Act is not preempted under "connection with" preemption because "there are no additional burdens or requirements imposed by

CalSavers on existing ERISA or employer-sponsored retirement plans which interfere with ERISA's regulatory domain or govern any central matter of plan administration." Howard Jarvis, 2020 WL 1157924 at *12-13. But this reasoning ignores the fact that the Act functions as a mandate on the structure for providing employee benefits, which the Supreme Court has found triggers "connection with" preemption. Specifically, in Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983), the Court considered a New York state law that mandated that employers provide certain disability benefits to their employees. One method of compliance, as here, was to provide the benefits through a pre-existing ERISA plan. But if the employer's ERISA plan did not provide adequate benefits, then the state could mandate the employer maintain a separately administered plan. This aspect also parallels the situation in CalSavers, but differs in a crucial respect—New York's disability law was specifically saved from preemption by section 4(b) of ERISA, which carves out plans maintained to comply with state disability laws from ERISA coverage. This carve-out was crucial, as the Court suggested that without it, the disability law would be preempted on the basis that a mandate to provide employee benefits through a plan otherwise falls within the scope of section 514(a) of ERISA. Shaw, 463 U.S. at 106. Unlike the state law in Shaw, Congress provided no equivalent carve-out for state mandates structuring plans that provide retirement benefits, and thus the Secure Choice Act is preempted.

A decision by this Court that the Secure Choice Act is not preempted would permit the creation of a patchwork of different state laws regulating retirement plan administration. 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 employees' payroll deductions, rates, and eligibility for CalSavers, but also for other states' similar programs.

III. The Act's Withholding Arrangements Do Not Satisfy The Department Of Labor's Safe Harbor Regulation

The district court correctly rejected appellee's argument that CalSavers can avoid preemption because the withholding arrangements avoid ERISA coverage under the DOL's safe harbor regulation at 29 C.F.R. § 2510.3-2(d). Instead, the district court found that because employees are automatically enrolled in the program, the arrangements are not "completely voluntary" as required by the safe harbor. Howard Jarvis, 2020 WL 1157924 at *4 n.5. As background, this safe harbor "identif[ies] specific plans, funds and programs which do not constitute employee pension benefit plans." 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 certain conditions are met, including: (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 Cir. 2000). Because CalSavers' automatic-enrollment IRAs are not "completely voluntary," they do not satisfy the safe harbor's requirements. Thus, they are ERISA-covered plans.

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." See, e.g., Kanne v. Conn. Gen. Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1998) (analyzing "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 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 further ERISA's protections of participant choice, the safe harbor requires a "completely voluntary" rather than a merely "voluntary" choice, and this heightened protection bars opt-out regimes, like CalSavers, from the Department's safe harbor regulation.

CONCLUSION

For the reasons stated above, the California Secure Choice Act is preempted by ERISA.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for
Plan Benefits Security

THOMAS TSO
Counsel for Appellate and
Special Litigation

/s/ Garrett N. Traub
Attorney
U.S. Department of Labor
Room N-4611
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5594

KARINA WEGMAN
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7)(B) and (C), Fed. R. App. P., I certify that this amicus brief uses a mono-spaced typeface of 14 characters per inch and contains 6,921 words.

Dated: June 19, 2020

/s/ Garrett N. Traub
Garrett N. Traub
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2020, true and correct copies of the foregoing - THE SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND REQUESTING REVERSAL - were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served electronically via email to the Participants in the case who are registered CM/ECF users of the appellate CM/ECF system.

Dated: June 19, 2020

/s/ Garrett N. Traub
Garrett N. Traub
Attorney