No. 21-558

In The
Supreme Court of the United States

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

Petitioners,

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,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

California politicians, in recent years, seem to have forgotten that the U.S. Constitution has a Supremacy Clause. They have not been bashful about overriding federal law. On July 1, 2019, former California State Senator Kevin DeLeón held a press conference at the California State Treasurer's Office on the launch of CalSavers, California's automatic retirement program challenged here under the Employee Retirement Income Security Act of 1974. (See CalSavers Launch Press Conference July 1, 2019, https://www.youtube.com/watch?v=Dya17bjmMhI&t=497s.) DeLeón described many trips to Washington, DC, lobbying "to *change* ERISA," acknowledging that it "should have been done in Washington, DC." (*Id*. at 7:40-8:20.) This press conference was two years after Congress repealed the regulation authorizing CalSavers.

California politicians failed to change ERISA as desired. That inability to *change* ERISA to the Senator's liking was an acknowledgment that such change was necessary to accommodate CalSavers. DeLeón then said that "because we are California . . . we will move forward with or without Washington." (*Ibid*.)

Thus, certiorari is needed to review CalSavers under ERISA. The issue of state-run automatic IRA mandates is likely to come up in other jurisdictions. The foundational case on which the Ninth Circuit relied is split against two other Circuits. And, for everyone's consistent financial security, CalSavers should be reviewed sooner than later.

There are many issues at stake in this case, including the financial security of California's private employees in their vested retirement interests, the complex administrative burdens of undoing the program (now including traditional IRAs), the tax dollars spent each day the program runs, the ERISA autonomy of all private employers to select any or no IRA sponsors, and all the similar implications in the programs of other states and governments. Finally, now that the automatic IRA proposal in the Build Back Better Act has been dropped, our nation is headed for more than fifty variations in state retirement programs and countless local government programs.

ARGUMENT

I. CONGRESS INTENDED TO PROTECT PRIVATE EMPLOYEES UNDER FEDERAL LAW. CALIFORNIA EVADES THIS PROTECTION.

The State's Brief in Opposition reveals a key reason why certiorari should be granted. ERISA protects private employee retirement savings under federal law. But CalSavers will limit private employees to state law recourse over their misappropriated retirement funds. (Br. in Opp at p. 20 ["California provides numerous protections against employers who convert employee wages to their own use."].)

These potential conversions are not of *wages*. They are of vested retirement funds directed into IRAs,

accounts considered sacred for their benefits such as tax incentives[1] and protection from creditors in bankruptcy. California's arrogance in placing the fate of these funds under state law is the opposite of what Congress had in mind when it passed ERISA in 1974 and when it repealed the safe harbor for CalSavers in 2017.

The State's likening of automatic retirement payroll deductions to routine withholdings is equally unsatisfying for private employees. (Br. in Opp. at p. 12 [CalSavers "payroll deductions [are] similar to the deductions employers routinely make under income tax, unemployment insurance, and garnishment statutes."].) Garnishment statutes are enforced because the money legally belongs to another person. Unemployment insurance and income tax withholdings are vested in the government, which will pursue the employer for any insufficient payment. (See IRS Publication 15 (Circular E) Employer's Tax Guide, https://www.irs.gov/pub/irs-pdf/p15.pdf.) In fact, an employee whose employer fails to remit tax withholdings can reconstruct his or her W-2 using IRS Form 4852, and take credit for his or her taxes withheld, even if the IRS must pursue the employer to recover funds. (See Topic No. 154, Form W-2 and Form 1099-R (What to Do If Incorrect or Not Received),

[1] Now that CalSavers includes traditional IRAs as well as Roth IRAs, an employee whose employer fails to remit contributions will suffer when it comes time to file their federal tax return. They may, for example, be placed in a higher tax bracket or miss out on certain benefits based on an incorrect adjusted gross income.

https://www.irs.gov/taxtopics/tc154.) In essence, the employee's interests remain undisturbed as to garnishments and tax withholdings.

Retirement contribution deductions are different. Unlike taxes, they become an immediately vested interest of the employee, meant to grow for their individual future welfare. Unlike with taxes, employees must take legal action if the employer fails to remit. Congress intended for those employees to have access to federal courts.

Because of this nature of the payroll deduction, it is impossible for CalSavers to act "without using employers as [ERISA] intermediaries." (Br. in Opp. at p. 2.) Workers may communicate directly with CalSavers, but the employer is directed by California to enroll employees, make automatic paycheck deductions and remit those funds to an IRA program. That the IRA program is run *by* the State makes no difference for ERISA preemption. This action is identical to what is clearly governed by ERISA and the 1975 Safe Harbor for IRA Payroll Deduction Programs, which CalSavers fails. (Pet. at pp. 35-39.)

II. A CONCURRENT PETITION IN ANOTHER ERISA CASE ASKS TO OVERTURN *GOLDEN GATE*, THE FOUNDATION OF THE NINTH CIRCUIT'S AFFIRMATION OF CALSAVERS.

The State of California suggests "no overlap" between CalSavers' preemption analysis and *ERISA*

Industry Committee (ERIC) v. City of Seattle (9th Cir. 2021) Case No. 20-35472, review for which a petition has been simultaneously filed. (Case No. 21-1019; Br. in Opp. at p. 23, n. 19.) However, in affirming CalSavers, the Ninth Circuit and Eastern District Courts relied heavily on the key case challenged therein, *Golden Gate Restaurant Association v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639.

The Ninth Circuit said: "*Golden Gate* stands for the proposition that an employer's non-discretionary administrative obligations under a government-mandated benefit program do not, without more, 'run the risk of mismanagement of funds or other abuse' by employers, which is ERISA's focus." (App. 24.) This is the "modicum of discretion" test. (App. 25, citing *Golden Gate*, *supra*, 546 F.3d at p. 650.)

The Ninth Circuit used this *Golden Gate* test to find that CalSavers is not "established or maintained" by an employer. (App. 25 ["Applying these principles, we conclude that in every relevant sense, it is the State that has established CalSavers and the State that maintains it – and not eligible employers."].)

But if Petitioners herein and in *ERIC v. City of Seattle* are correct that *Golden Gate* was incorrectly decided, then there is no basis to conclude that the employers in this case perform no establishment or maintenance of ERISA plans. Or that CalSavers is not a statutory ERISA plan mandating key employer actions.

ERIC asks for *Golden Gate* to be overturned because it is irreconcilable with two other Circuits. (*Retail Industry Leaders Association v. Fielder* (4th Cir. 2007) 475 F.3d 180, 196-197; *Merit Construction Alliance v. City of Quincy* (1st Cir. 2014) 759 F.3d 122, 131.) This Circuit split is 2-1 against *Golden Gate*. It is thus wise and efficient to review CalSavers now because its Ninth Circuit foundation may be eliminated or further deteriorated.

Fielder and *Merit Construction*, like *Golden Gate*, concern what have become known as "play-or-pay" laws. In "play-or-pay," a state or local government mandates employer participation in its benefit programs, typically healthcare or, as in *Merit*, an apprenticeship program. They do so with an option to pay the government instead of "playing." CalSavers is a "play-or-pay" program because it mandates employers to choose an ERISA plan, implement CalSavers (also an ERISA plan), or pay penalties to the State of California.

It would certainly be ideal here to have precedent concerning a "play-or-pay" *pension* system, but it is healthcare and apprenticeship cases such as *Fielder* and *Merit* which represent the jurisprudence available. And these two cases undermine the Ninth Circuit's "scant case law on when an employer's required participation in a government-mandated, government-run benefits program nonetheless leads to the employer 'establishing or maintaining' an ERISA plan" because "the closest precedent we have is *Golden Gate*." (App. 22-23.) That's why this is "an important question,"

App. 4, one that "initially seems close," even to the Ninth Circuit. (App. 12.)

Looking to *Fielder* and *Merit Construction* as part of the "scant" available case law, it is clear that not all Circuits condone government-mandated benefits programs,s even if they have some sort of alternative "option" to avoid ERISA. *Fielder*, for example, did not condone a Maryland "play-or-pay" healthcare law placing spending and reporting requirements on employers, despite healthcare being a territory of traditional state law and despite the "pay" option which arguably gave employers a non-ERISA alternative.

Regarding this Court's potential review of CalSavers as an ERISA plan itself, *Fielder* notably employs this Court's statement that, while a one-time obligation will not constitute a plan, a program that "requires the employer to maintain some ongoing administrative support generally constitutes a 'plan.'" (*Fielder, supra*, 475 F.3d at p. 190, citing *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 12.) CalSavers undoubtedly "requires" ongoing administrative support of California employers. And while *Fielder* was mindful of the potential for "uncritical literalism" in ERISA preemption, *id.* at p. 191, it nonetheless preempted Maryland's "play-or-pay" statute. It did so despite the non-ERISA "pay" option and because, as does CalSavers, the Maryland law interfered with national uniformity for employers. (*Ibid.*)

Even viewing *Golden Gate* as merely tenuous, CalSavers merits specific attention for two reasons: It

needs both greater foundational analysis and analysis of an employee's vested retirement interest in an automatic paycheck deduction.

This Court typically reviews health plan and insurance cases when considering ERISA. But CalSavers needs accurate foundational analysis as a pension plan case. Specifically here, there is inconsistency in the Ninth Circuit's position that "*any* failure" under the 1975 Safe Harbor for IRA Payroll Deduction Programs renders the program an ERISA plan, and its decision here that an exception is possible. (*Cline v. Industrial Maintenance Engineering & Contracting Co.* (9th Cir. 2000) 200 F.3d 1223, 1230; cf. *Stuart v. UNUM Life Insurance Co. of America* (9th Cir. 2000) 217 F.3d 1145, 1153, n. 4.) Whether CalSavers is excused remains unresolved under this existing case law, because the State *mandates* employer action, including the automatic deductions. Those questions have yet to be considered.

CalSavers needs analysis of the employee's vested interest in his or her retirement savings once an automatic payroll deduction occurs. Again, there has been no adequate answer. The Ninth Circuit uses *Golden Gate* to conclude that the automatic payroll deductions are like "[m]any federal, state, and local laws, such as income tax withholding, social security, and minimum wage laws, [which] impose similar administrative obligations on employers; yet none of these obligations constitutes an ERISA plan." (App. 27.) But as discussed, they are not like these because the money deducted belongs to the employee, who has an immediately vested retirement interest.

A starting point for this and the foundational analysis is available in *Modzelewski v. Resolution Trust Corp.* (9th Cir. 1994) 14 F.3d 1374, 1376-1378. Per *Modzelewski*, an ERISA pension plan's establishment is determined "broadly." (*Id.* at p. 1376.) *Modzelewski* also discusses the vested interest of employees in their wages directed at retirement. (*Id.* at p. 1378.)

III. THE STATE ACTION DOES NOT CHANGE THE FACT THAT AN ERISA PLAN HAS BEEN CREATED. THE STATE ACTION ALSO VIOLATES THE EMPLOYER'S ERISA RIGHT TO REJECT CALSAVERS.

Preemption analysis of CalSavers is not as simple as looking to 29 U.S.C. § 1002 and turning a blind eye to the State's mandates of employer action. If CalSavers were "established and maintained" exclusively by the State of California under 29 U.S.C. § 1002, the State wouldn't need employers. It would work with employees directly. For example, Washington State's Retirement Marketplace is a voluntary platform where individuals may sign up for IRAs directly through the state's website. Employers are informed and encouraged, but not mandated, to create retirement plans of many types.

Given that CalSavers is available to individuals regardless of employment (App. p. 9, Cal. Code Regs. tit. 10, § 10006(a)), it can offer no reason to mandate employer registration and payroll deductions. Yet registration and payroll deductions are indicia of establishment and maintenance. Although CalSavers could

work with employees directly, it saves itself public outreach and administrative costs by placing those responsibilities on employers. But it does so at the expense of violating ERISA and weakening ERISA protections for employees and employers alike.

To avoid application of 29 U.S.C. § 1002(5), which alternatively makes the State the ERISA employer for purposes of the "established or maintained" clause, the State of California disingenuously disclaims that it acts in the interest of employers. Presently, it claims that it acts only in the interest of employees, not employers or a group of them. (Br. in Opp. at p. 10.) However, Executive Director Katie Selenski stated publicly in promotional videos: "The program will help employers because it'll help level the playing field for their recruitment and retention goals by allowing them to offer their employees a retirement savings plan just like their competitors." (FAC, p. 8, Exh. D (full transcription of CD lodged with court from then State Treasurer's website, https://www.treasurer.ca.gov/scib/video.asp; see also Pl. Opp. to Second Motion to Dismiss, filed 7/18/19, pp. 14-15.)

Offering a retirement savings plan "just like their competitors" means offering a copy of an ERISA plan. In its July 1, 2019, press release, the State likewise reported: "Employer feedback from the pilot has been leveraged to refine the program, ahead of broad rollout." (See State Treasurer Fiona Ma, Board, and Leaders Announce Official Launch of CalSavers, July 1, 2019, https://www.treasurer.ca.gov/news/releases/2019/20190701/66.asp.) And the State reported on the

first employer to enroll, who reflected back the very employer benefit articulated by Katie Selenski: "CalSavers is just what our company needed to help attract and retain good workers," said Harris. (*Ibid.*)[2]

It is further and fundamentally in the employer's interest not to pay penalties. But the State is forcing employers to act as its agents. Using penalties as a stick, the State tells employers what they will do, invoking 29 U.S.C. § 1002(5)'s agency clause on the most basic level. Under threat of statutory penalties, the State forces employers to advertise and implement a program they did not freely choose.

On this topic of employer choice, the State did not discuss Petitioners' presentation of a fundamental and direct conflict with ERISA: Employers have a federal right to *reject* CalSavers just as they may reject any other IRA sponsor. (29 C.F.R. § 2509.99-1(d); Pet. at p. 27; App. 94-95.) Subsection (d) of the 1999 Interpretive Bulletin allows employers to "select one IRA sponsor as the designated recipient for payroll deduction contributions, or it may establish criteria by which to select IRA sponsors. . . ." This means that private employers nationwide have a right to choose an IRA

[2] Referencing statements in the Respondents' press releases asserting that CalSavers will "help" employers are presented herein not for any truth in those representations, but solely for the purpose of revealing the state's disingenuous contention that it is motivated solely by the interests of the employees. In truth, without CalSavers, the state could simply issue public service announcements encouraging everyone to establish their own IRAs – something that would not violate ERISA.

sponsor from the whole market. CalSavers, if viable, is just *one* IRA sponsor.

In requiring employers to choose CalSavers as their IRA sponsor, the State overrides the employer's ERISA autonomy. It forces a Hobson's choice between something that, under ERISA, they shouldn't have to choose, or else face punishment. The State argues that employers are not forced to participate in CalSavers because they can "choose" any other ERISA plan. But under federal law, employers cannot be forced to choose any ERISA plan. Federal law merely encourages ERISA plans. Employers are free to not offer any retirement plan. (See *Fielder, supra*, 475 F.3d at p. 190 [ERISA "does not mandate that employers provide specific employee benefits but leaves them free . . . ," citing *Curtiss-Wright Corp. v. Schoonejongen* (1995) 514 U.S. 73, 78 and *Shaw v. Delta Air Lines, Inc*. (1983) 463 U.S. 85, 91.].)

As of January 2022, CalSavers began imposing penalties on non-participating employers. (See https://www.treasurer.ca.gov/calsavers/penalties.pdf.) But it is wrong that California employers should suffer state law penalties for failure to "choose" CalSavers as their IRA sponsor when they have federal autonomy to choose any – or even zero – IRA sponsors from the full open market. In this way, CalSavers is getting the same result prohibited by the 4th Circuit in *Fielder*, i.e., employers conceding to the State the authority to re-write federal law or pay penalties. Nationwide, all other employers without ERISA plans may then have to track and manage participation in 50-plus similar

programs as citizens move and work between states, bringing the previous state's own program with them.

CONCLUSION

CalSavers is plainly a workplace retirement savings program, sorely in need of ERISA preemption analysis as a pension plan. *Golden Gate*, a health plan case ripe for being overturned or further deteriorated due to conflict with two Circuits, cannot support CalSavers. In fact, following Congress' specific repeal of the regulation authorizing CalSavers, nothing substantiates its mandates on employers to enroll employees and automatically deduct their paychecks. Congress intended federal law to protect these employees' vested retirement interests and to allow their employers to select IRA sponsors from the market. certiorari should be granted.

DATED: February 4, 2022.

Respectfully submitted,

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