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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**HOWARD JARVIS TAXPAYERS
ASSOCIATION, JONATHAN COUPAL,
and DEBRA DESROSIERS,**

Plaintiffs,

v.

**THE CALIFORNIA SECURE CHOICE
RETIREMENT SAVINGS PROGRAM and
JOHN CHIANG,**

Defendants.

2:18-cv-01584-MCE-KJN

**DEFENDANTS' RESPONSE TO
STATEMENT OF INTEREST OF THE
UNITED STATES**

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8
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10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Introduction	1
Argument	1
I. CalSavers Does Not Establish an ERISA Plan.	1
II. The Secure Choice Act Does Not Impermissibly Reference ERISA Plans.	6
III. CalSavers Is Not Preempted Under Traditional Conflict Preemption Principles or Under the Impermissible “Connection With” Analysis.....	6
IV. None of the United States’ Cited Authorities Suggest That CalSavers Is Not “Completely Voluntary” Within the Meaning of the Safe Harbor.	8
Conclusion	9

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers
923 F.3d 1162 (9th Cir. 2019)..... 1

Bd. of Trs. of Glazing Health & Welfare Trust v. Chambers
903 F.3d 829 (9th Cir. 2018)..... 1

Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.
519 U.S. 316 (1997)..... 6

Cal. Hotels & Lodging Ass'n v. City of Oakland
393 F. Supp. 3d 817 (N.D. Cal. 2019) 2-3

Carter v. Guardian Life Ins. Co. of Am.
Civ. No. 11-3-ART, 2011 WL 1884625 (E.D. Ky. 2011) 9

Charles Schwab & Co. v. Debickero
593 F.3d 916 (9th Cir. 2010)..... 7

Cline v. Indus. Maintenance Eng'g v. Contracting Co.
200 F.3d 1223 (9th Cir, 2000)..... 9

Combined Mgmt., Inc. v. Superintendent of Bureau of Ins.
22 F.3d 1 (1994)..... 4

Delaye v. Agripac, Inc.
39 F.3d 235 (9th Cir. 1994)..... 3, 4

Donovan v. Dillingham
688 F.2d 1367 (11th Cir. 1982)..... 1, 2

Egelhoff v. Egelhoff
532 U.S. 141 (2001)..... 2

Fort Halifax Packing Co. v. Coyne
482 U.S. 1 (1987)..... 1, 2, 8

Gobeille v. Liberty Mut. Ins, Co.
136 S. Ct. 936 (2016)..... 1, 8

Golden Gate Rest. Ass'n v. City & Cty. of San Francisco
546 F.3d 639 (9th Cir. 2008)..... *passim*

James v. Fleet/Norstar Fin'l Group, Inc.
992 F.2d 463 (2d Cir. 1993)..... 3

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>Kanne v. Conn. Gen. Life Ins. Co.</i>	
4	867 F.2d 489 (9th Cir. 1988).....	9
5	<i>Lockheed Corp. v. Spink</i>	
6	517 U.S. 882 (1996).....	4
7	<i>Modzelewski v. Resolution Tr. Corp., United States v.</i>	
8	14 F.3d 1374 (9th Cir. 1994).....	2
9	<i>N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</i>	
10	514 U.S. 645 (1995).....	6, 8
11	<i>O’Connor v. Commonwealth Gas Co.</i>	
12	251 F.3d 262 (1st Cir. 2001).....	3
13	<i>Operating Eng’rs Health & Welfare Tr. Fund v. JWJ Contracting Co.</i>	
14	135 F.3d 671 (9th Cir. 1998).....	1
15	<i>Petersen v. E.F. Johnson Co.</i>	
16	366 F.3d 676 (8th Cir. 2004).....	4
17	<i>Rottler v. Mich. Automotive Compressor, Inc.</i>	
18	673 F. Supp. 2d 560 (E.D. Mich. 2009).....	4
19	<i>S. Cal. IBEW-NECA Tr. Funds v. Standard Indus. Elec. Co.</i>	
20	247 F.3d 920 (9th Cir. 2001).....	6
21	<i>Scott v. Gulf Oil Co</i>	
22	754 F.2d 1499 (9th Cir. 1985).....	2
23	<i>Shaw v. Delta Air Lines, Inc.</i>	
24	463 U.S. 85 (1983).....	1
25	<i>Simas v. Quaker Fabric Corp.</i>	
26	6 F.3d 849 (1993).....	3, 4
27	<i>Siskind v. Sperry Ret. Program, Unisys</i>	
28	47 F.3d 498 (2d Cir. 1995).....	4
	<i>Velarde v. PACE Membership Warehouse, Inc.</i>	
	105 F.3d 1313 (9th Cir. 1997).....	3, 4

1
2
3
4
5
6
7
8
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14
15
16
17
18
19
20
21
22
23
24
25
26
27
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TABLE OF AUTHORITIES
(continued)

Page

STATUTES

26 U.S.C. § 4087
29 U.S.C. § 1144(a)2
29 U.S.C. §§ 10021-1031, 1101-11142
Cal. Gov’t Code § 100000((d)(3)).....7
Cal. Gov’t Code § 100032(g).....7

OTHER AUTHORITIES

DOL Interpretive Bulletin 99-1 Relating to Payroll Deduction Programs for IRAs,
64 Fed. Reg. 33,000 (June 18 1999)7
H.R. Rep. No. 220, 105th Cong., 1st Sess. 755 (1997).....7
<https://www.irs.gov/retirement-plans/common-errors-on-form-w2-codes-for-retirement-plans>.....5

1 **INTRODUCTION**

2 The United States challenges both the reasoning and conclusion of this Court’s previous
 3 order dismissing Plaintiffs’ initial complaint. In particular, it argues the Court should reject a
 4 controlling Ninth Circuit decision, *Golden Gate Restaurant Ass’n v. City & County of San*
 5 *Francisco*, 546 F.3d 639 (9th Cir. 2008), and instead apply a holding from another Circuit,
 6 *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). As this Court previously held, however,
 7 the Ninth Circuit has expressly determined that *Donovan* does not apply to laws like the Secure
 8 Choice Act. This Court also previously held that, under *Golden Gate*, as well as the Supreme
 9 Court’s decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Secure Choice Act
 10 does not impose the kinds of discretionary duties on employers that would trigger ERISA
 11 preemption. The United States provides no reason to revisit the Court’s previous decision. The
 12 Court should now dismiss this case without leave to amend.

13 **ARGUMENT**

14 **I. CALSAVERS DOES NOT ESTABLISH AN ERISA PLAN.**

15 This Court’s March 29, 2019 order, Dkt. 24 (“March 29 Order”) determined that CalSavers
 16 does not create an ERISA plan and is not preempted because it does not “govern[] . . . a central;
 17 matter of plan administration ‘or interfere with nationally uniform plan administration.’” *Id.*
 18 at 13 (citations omitted). The Court did so based in large part on the Ninth Circuit’s decision in
 19 *Golden Gate Restaurant Ass’n v. City & County of San Francisco*, 546 F.3d 639, and
 20 the Supreme Court’s reasoning in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1. March 29
 21 Order at 13-15.¹ The United States’ contrary position rests on its contention that *Golden Gate*

22 ¹ The March 29 Order also cites *Board of Trustees of Glazing Health & Welfare Trust v.*
 23 *Chambers*, 903 F.3d 829 (9th Cir. 2018). March 29 Order at 2-3, 13-14. After this Court issued
 24 the March 29 Order, the Ninth Circuit granted rehearing en banc in *Chambers*, ordering that it
 25 “shall not be cited as precedent by or to any court of the Ninth Circuit.” *Bd. of Trs. of Glazing*
 26 *Health & Welfare Tr. v. Chambers*, 923 F.3d 1162 (9th Cir. 2019). The grant of rehearing in
 27 *Chambers* does not undermine in any way the March 29 Order. The propositions for which this
 28 Court cited *Chambers*, 903 F.3d 829, are unexceptional and were previously articulated in other
 sources. *See Operating Eng’rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d
 671, 676 (9th Cir. 1998) (describing Congressional purpose in enacting ERISA, quoting *Shaw v.*
Delta Air Lines, Inc., 463 U.S. 85, 90 (1983)); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936,
 943 (2016) (describing “in connection with” preemption as applying to a state law that
 “governs ... a central matter of plan administration’ or ‘interferes with nationally uniform plan

1 was wrongly decided, and that this Court instead should apply the Eleventh Circuit’s decision in
2 *Donovan v. Dillingham*, 688 F.2d 1367. See U.S. Statement at 10 & n.2 (arguing that “[t]he
3 Ninth Circuit [in *Golden Gate*] appears to have mistakenly concluded . . .”). This Court,
4 however, has already rejected this same argument.² It recognized that the Ninth Circuit has
5 specifically declined to apply the *Donovan* criteria to statutory administrative burdens like the
6 ones imposed by the Secure Choice Act: “The Court holds the same hesitation here.” March 29
7 Order at 15.³

8 The United States cites *United States v. Modzelewski v. Resolution Trust Corp.*, 14 F.3d
9 1374, 1376 (9th Cir. 1994), as its sole support for the proposition that “[t]he Ninth Circuit has
10 repeatedly relied on *Donovan*.” U.S. Statement at 10. This badly mischaracterizes Ninth Circuit
11 law. *Modzelewski* not only did not rely on *Donovan*, its sole mention of *Donovan* is in a citation
12 to *Scott v. Gulf Oil Co*, 754 F.2d 1499, 1504 (9th Cir. 1985). *Modzelewski*, 14 F.3d at 1376. In
13 *Golden Gate*, however, the Ninth Circuit specifically rejected reliance on both *Scott* and
14 *Donovan*:

15 In *Scott*, we relied on the criteria set forth in *Donovan* to hold that an agreement
16 to provide severance pay to terminated employees at a rate of two weeks’ salary for
17 each year of employment was sufficient to establish an ERISA plan. 754 F.2d at
18 1503–04. The outcome of *Scott* is almost certainly no longer good law in light of the
19 Supreme Court’s subsequent decisions in *Fort Halifax* and [*Massachusetts v.*
20 *Morash*], 490 U.S. 107 (1989)].

21 *Golden Gate*, 546 F.3d at 651.⁴ The Court should decline the United States’ invitation to second-
22 guess *Golden Gate*, which is a controlling Ninth Circuit decision.

23 administration’,” quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)); 29 U.S.C. §§ 10021-
24 1031, 1101-1114 (employee benefit plans must conform to reporting, disclosure, and fiduciary
25 requirements); 29 U.S.C. § 1144(a) (ERISA “supersede[s] any and all State laws insofar as they
26 may now or hereafter relate to any employee benefit plan”).

27 ² The United States appeared as amicus curiae in both *Golden Gate* and *Fort Halifax*
28 *Packing Co. v. Coyne*, 482 U.S. 1, and its positions in favor of preemption were rejected in both
cases. See *Golden Gate*, 512 F.3d at 648, 653; *Fort Halifax*, 482 U.S. at 2.

³ The Ninth Circuit in *Golden Gate* also concluded that the criteria in *Donovan* were not
satisfied because the employers’ “obligation ceases as soon as they make the required payments.”
546 F.3d at 652. Here, too, an employer’s obligation ceases once it has forwarded the payroll
deductions to the CalSavers program.

⁴ In a recent decision, *California Hotels & Lodging Ass’n v. City of Oakland*, 393 F.Supp.
3d 817 (N.D. Cal. 2019), the Northern District followed *Golden Gate* in holding that an ordinance

1 The United States' related argument that CalSavers requires employers to create or
2 maintain an ERISA plan because the Act requires employers to "maintain ongoing administrative
3 programs to pay employee benefits," U.S. Statement at 12 (internal quotation marks and citation
4 omitted), likewise fails. As this Court has already held in this case (*see* March 29 Order at 14),
5 the touchstone for determining when administrative activities give rise to an ERISA plan is
6 whether the administration of a scheme requires an employer to exercise significant discretion.
7 *See, e.g., Golden Gate*, 546 F.3d at 650 ("[A]n employer's administrative duties must involve the
8 application of more than a modicum of discretion in order for those administrative duties to
9 amount to an ERISA plan"); *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313,
10 1317 (9th Cir. 1997) (holding that program that required employer to determine whether
11 employee had satisfactorily performed duties and was not terminated for cause was not an ERISA
12 plan because its administration involved only a "minimum quantum of discretion"); *Delaye v.*
13 *Agripac, Inc.*, 39 F.3d 235, 237-38 (9th Cir. 1994) (holding that an employee severance contract
14 that had different provisions depending on whether the employee was or was not terminated
15 without cause was not an ERISA plan); *James v. Fleet/Norstar Fin'l Group, Inc.*, 992 F.2d 463,
16 466, 468 (2d Cir. 1993) (holding that scheme requiring individual determinations regarding
17 eligibility, termination dates and payment amount did not create an ERISA plan). *Accord*
18 *O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262, 267 (1st Cir. 2001) ("Particularly germane
19 to assessing an employer's obligations is the amount of discretion wielded in implementing
20 them"). The duties imposed on employers by CalSavers require *no* discretion.⁵

21 _____
22 that effectively required employer to choose either paying employees at least \$20 per hour or
23 paying them \$15 per hour and providing health benefits under an ERISA plan valued at \$5 per
24 hour was not preempted by ERISA. The court explained: "Employers can pay \$20.00 an hour
and fully comply with the Ordinance. If, instead, it makes more sense under the Wage/Benefit
Provision to pay into an ERISA plan, preemption is not triggered because such influence is
permissible." *Id.* at 828 (citing *Golden Gate*, 546 F.3d at 656); *see id.* at 829.

25 ⁵ Ignoring relevant Ninth Circuit authority, including *Velarde* and *Delaye*, the United
26 States instead relies on an earlier First Circuit decision, *Simas v. Quaker Fabric Corp.*, 6 F.3d 849
27 (1993). U.S. Statement at 12; *see id.* at 8. *Simas* held that a severance plan that required the
28 employer to determine for a two-year period following a corporate takeover whether an employee
was terminated for cause or was otherwise ineligible for unemployment compensation was an
ERISA plan, explaining that the "for cause" determination, in particular, is likely to provoke
controversy and call for judgments based on information well beyond the employee's date of

1 This focus on discretion, which the Court recognized in its March 29 Order at page 14, is
2 consistent with the more general ERISA principle that, even where an employee benefit plan
3 exists, an employer only acts as a fiduciary when it is “fulfilling certain defined functions,
4 including the exercise of discretionary authority or control over plan management or
5 administration.” *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (quoting *Siskind v. Sperry*
6 *Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995)).

7 CalSavers does not require that employers make the kinds of subjective judgments courts
8 have held give rise to an ERISA plan. Employers are simply required to forward employee
9 information to CalSavers and make percentage deductions from payroll as instructed by
10 CalSavers. This is a straightforward arithmetical calculation based on the employee’s pay and
11 selected contribution level. See *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d at
12 1317. If the employer establishes its own retirement plan or if the number of its employees drop
13 below five, rendering it exempt from CalSavers, it stops forwarding payroll deductions to the
14 CalSavers program. None of this activity requires the exercise of any discretion. Nor is it
15 qualitatively different from other payroll deductions an employer makes for state and federal
16 taxes, unemployment insurance, and the like.

17 In fact, CalSavers requires less from employers than the ordinance upheld by the Ninth
18 Circuit in *Golden Gate*, which required employers to pay quarterly to support city-provided
19 benefits that they did not otherwise provide, through an ERISA plan or otherwise. The United
20 States attempts to distinguish *Golden Gate*, stating that “employers could discharge their
21 hiring and termination.” *Id.* at 853. *Simas* is plainly distinguishable on its facts; CalSavers
22 imposes no similar duty. Moreover, *Simas* has not been cited in any Ninth Circuit case or by any
23 district court in the Ninth Circuit; and the First Circuit itself has since held that the holding in
24 *Simas* “does not apply to [state laws] which mandate the establishment of exempt, non-ERISA
covered plans.” *Combined Mgmt., Inc. v. Superintendent of Bureau of Ins.*, 22 F.3d 1, 6 n.4
(1994).

25 Similarly, the United States cites *Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 679-80 (8th
26 Cir. 2004), which held that a severance plan that required an employer to determine whether a
27 termination was with or without cause and in some cases whether a change in control had
28 occurred was an employee benefit plan under ERISA. That decision is distinguishable on its
facts, does not reflect the law of the Ninth Circuit, and appears to represent a minority view. See
Rottler v. Mich. Automotive Compressor, Inc., 673 F. Supp. 2d 560, 565 (E.D. Mich. 2009)
(relying on *Velarde* and *Delaye*, while citing *Peterson* as contrary authority).

1 obligations by making payments [to the City program] without any ongoing maintenance or
2 management.” U.S. Statement at 9. This is incorrect. Under the *Golden Gate* ordinance,
3 employers had to remit payments on a quarterly basis for each employee, and had to keep track of
4 whether they continued to be “covered employers,” which of their employees were “covered
5 employees” working at least ten hours per week, and the number of hours per quarter each
6 employee worked. 546 F.3d at 643-44. The United States does not and cannot explain how the
7 requirements of the *Golden Gate* ordinance result in any less “maintenance or management” than
8 the payroll deductions under CalSavers.⁶

9 The United States further suggests that the employers’ obligation to determine eligibility
10 somehow subjects the program to ERISA, but, as noted above, the *Golden Gate* ordinance
11 imposed the same obligation. *Golden Gate*, 546 F.3d at 643-44. Moreover, employers are
12 already required by federal law to determine if their employees participate in a retirement plan,
13 including a multi-employer plan, in order to complete Box 13 of an employee’s Form W-2. This
14 is required in order to notify the recipient/employee that “depending on their filing status and
15 modified adjusted gross income, they may not be entitled to a full deduction for their traditional
16 IRA contributions.” See [https://www.irs.gov/retirement-plans/common-errors-on-form-w2-](https://www.irs.gov/retirement-plans/common-errors-on-form-w2-codes-for-retirement-plans)
17 [codes-for-retirement-plans](https://www.irs.gov/retirement-plans/common-errors-on-form-w2-codes-for-retirement-plans). Thus, employers whose employees participate in retirement plans
18 need to identify those employees, and administer payments due to those plans, whether CalSavers
19 exists or not. The same holds true for the other administrative tasks that the United States
20 identifies, including what happens when an employee is transferred from a California office to an
21 Oregon office. See U.S. Statement at 13. An employer must take certain administrative steps
22 when such a transfer occurs *regardless of whether the employer is subject to CalSavers*, because
23 after the transfer has occurred the employment relationship with the employee would be governed

24 _____
25 ⁶ The United States suggests that employers who register before the law becomes
26 mandatory for employers of their size have somehow “established” ERISA plans. U.S. Statement
27 at 14 n.3. The CalSavers program is a mandatory program. The fact that an employer may
28 register prior to the last day before that employer will be in violation of the law does not mean
that the employer has established an ERISA plan or that it is engaged in “administrative duties
that involve the application of more than a modicum of discretion.” *Golden Gate*, 546 F.3d at
650.

1 by Oregon law, including Oregon’s state income tax and employment laws. Expecting the
2 employer also to notify the CalSavers program and stop withholding the employee’s CalSavers
3 contribution is simply part of a multi-state employer’s normal course of managing its workforce.⁷

4 As this Court correctly held, the ministerial duties CalSavers requires “fall outside the
5 scope of conduct that Congress intended to regulate in enacting ERISA.” March 29 Order at 14
6 (citing *Golden Gate*, 546 F.3d at 650).

7 **II. THE SECURE CHOICE ACT DOES NOT IMPERMISSIBLY REFERENCE ERISA PLANS.**

8 The determination that CalSavers does not create an ERISA plan also disposes of the
9 United States’ “reference to” preemption argument. *See* U.S. Statement at 9-14. “To determine
10 whether a law has forbidden ‘reference to’ ERISA plans, we ask whether (1) the law ‘acts
11 immediately and exclusively upon ERISA plans,’ or (2) ‘the existence of ERISA plans is essential
12 to the law’s operation.’” *Golden Gate*, 546 F.3d at 657 (quoting *Cal. Div. of Labor Standards*
13 *Enf’t v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)).⁸ Like the ordinance in *Golden*
14 *Gate*, the Secure Choice Act “does not act on ERISA plans at all, let alone immediately and
15 exclusively.” *Golden Gate*, 546 F.3d at 657. Nor is the existence of an ERISA plan essential to
16 CalSavers’ operation. Again quoting from *Golden Gate*, “employers need not have any ERISA
17 plan at all; and if they do have such a plan, they need not make any changes to it.” *Id.* at 659.

18 **III. CALSAVERS IS NOT PREEMPTED UNDER TRADITIONAL CONFLICT PREEMPTION**
19 **PRINCIPLES OR UNDER THE IMPERMISSIBLE “CONNECTION WITH” ANALYSIS.**

20 The United States next argues that CalSavers is preempted under traditional conflict
21 preemption principles because it “forces” employers who do not choose to sponsor an ERISA
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23 _____
24 ⁷ The only employer plaintiff in this case is Howard Jarvis Taxpayers Association, which
does not claim to be a multi-state employer. *See* First Amended Complaint ¶ 6, Dkt. 25.

25 ⁸ While the United States acknowledges this is the correct standard, U.S. Statement at 4,
26 its arguments misleadingly rely on older cases decided prior to *New York State Conference of*
Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995), which do not
27 apply this standard. *See* U.S. Statement, *passim*. As the Ninth Circuit has explained, “the breadth
of federal preemption which governed our decisions prior to [*New York State Conference of Blue*
Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645] is no longer applicable.” *S. Cal.*
28 *IBEW-NECA Tr. Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 929 (9th Cir. 2001).

1 plan to “provide an equivalent through CalSavers.” U.S. Statement at 18. The argument is
2 meritless for several reasons.

3 First, CalSavers does not require employers to choose between an ERISA plan or
4 CalSavers. Employers are exempt from CalSavers if they offer an employer-sponsored retirement
5 savings arrangement; this may include any defined contribution or defined benefit plans governed
6 by ERISA, but also may include other, non-ERISA plans, such as 403(b) savings plans that do
7 not allow employer contributions, or automatic enrollment IRAs that qualify for favorable income
8 tax treatment under the Internal Revenue Code. Cal. Gov’t Code §§ 100000((d)(3), 100032(g). It
9 is not an either/or proposition.

10 Second, the United States’ argument incorrectly assumes that CalSavers establishes an
11 ERISA plan or an “equivalent,” which it does not for the reasons discussed above. As the United
12 States appears to acknowledge, U.S. Statement at 2, CalSavers establishes IRAs, which are a
13 distinct form of retirement savings vehicle described in 26 U.S.C. § 408 that are “specifically
14 excluded from ERISA’s coverage.” *Charles Schwab & Co. v. Debickero*, 593 F.3d 916, 919 (9th
15 Cir. 2010). Employers may even *voluntarily* establish payroll deduction IRA programs without
16 thereby establishing (or maintaining) ERISA-governed plans. *See* DOL Interpretive Bulletin 99-1
17 Relating to Payroll Deduction Programs for IRAs, 64 Fed. Reg. 33,000 (June 18 1999)
18 (“Congress expressed its view that ‘employers that choose not to sponsor a retirement plan should
19 be encouraged to set up a payroll deduction system to help employees save for retirement by
20 making payroll deduction contributions to their IRAs” (quoting H.R. Rep. No. 220, 105th Cong.,
21 1st Sess. 755 (1997)). The IRAs created in the CalSavers program are not the “equivalent” of
22 ERISA-governed plans.

23 Finally, the United States provides no support for its argument that CalSavers somehow
24 conflicts with ERISA because the CalSavers program “has its own administrative regime,
25 fiduciary obligations, reporting procedures and enforcement mechanisms.” U.S. Statement at 18.
26 Employers who sponsor ERISA plans are exempt from CalSavers, and therefore have no
27 conflicting administrative, reporting or other obligations. Indeed, CalSavers presents an even
28

1 clearer case than that presented in *Golden Gate*, where some employers with ERISA plans also
2 were required to make payments to the City under the ordinance. 546 F.3d at 645-646.

3 The United States’ “in connection with” argument also incorrectly assumes that CalSavers
4 “requires employees who do not have ERISA plans to maintain ERISA-covered plans.” U.S.
5 Statement at 17. It urges the Court to “reconsider its analysis of ‘in connection with’ preemption
6 in light of *Gobeille* [*v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936, 943 (2016)].” U.S.
7 Statement at 16. This Court did in fact consider and rely on *Gobeille* in its March 29 Order (at
8 page 13.) But the United States misunderstands that decision. In *Gobeille*, the Supreme Court
9 invalidated the Vermont statute *only as it applied to ERISA plans*. 136 S. Ct. at 947. It held that
10 preemption of the state law as it applied to *ERISA plans* “is necessary to prevent the States from
11 imposing novel, inconsistent and burdensome reporting requirements on [those] plans.” *Id.* at
12 945.⁹ CalSavers is a state-sponsored and administered plan that does not apply to ERISA plans.
13 ERISA is not concerned with uniformity of state laws like the Secure Choice Act that do not
14 apply to ERISA plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11.

15 **IV. NONE OF THE UNITED STATES’ CITED AUTHORITIES SUGGEST THAT CALSAVERS IS**
16 **NOT “COMPLETELY VOLUNTARY” WITHIN THE MEANING OF THE SAFE HARBOR.**

17 Because the CalSavers program is not established or maintained by an employer, it is not an
18 ERISA plan and the Court need not reach the issue whether the Safe Harbor applies. In other
19 words, as this Court previously held, “[r]egardless of whether CalSavers is covered by the 1975
20 safe harbor, it is still not preempted by ERISA.” March 29 Order at 13. Defendants note,
21 however, that the United States has cited no case, and defendants are aware of none, that holds
22 that an automatic enrollment IRA *with an opt-out provision* like CalSavers fails to satisfy the
23 “completely voluntary” prong of the safe harbor. No one disputes that an automatic enrollment
24 program that *lacks* a procedure for opting out fails this requirement. However, none of the
25 ERISA cases relied on by the United States address whether automatic enrollment where the

26 _____
27 ⁹ The United States appeared as amicus in *Gobeille* supporting the State of Vermont and
28 arguing against preemption, including advancing the argument that it was “not obvious or particularly plausible” that the Vermont statute “imposed a substantial burden.” *See* 136 S. Ct. at 940, 956 (Ginsberg, J., dissenting).

1 employees may easily opt out does or does not satisfy the Safe Harbor. *See Kanne v. Conn. Gen.*
2 *Life Ins. Co.*, 867 F.2d 489, 492-93 (9th Cir. 1988) (holding that it was ambiguous as to whether
3 participation was voluntary and whether employer contributed to the plan, but it was clear that the
4 sponsoring employer group endorsed the plan); *Carter v. Guardian Life Ins. Co. of Am.*, Civ. No.
5 11-3-ART, 2011 WL 1884625, at *1 (E.D. Ky. 2011) (noting that there was no dispute that
6 participation was automatic, with no indication that employees could choose not to participate,
7 but also holding that the employer endorsed the plan and paid the premiums); *Cline v. Indus.*
8 *Maintenance Eng'g v. Contracting Co.*, 200 F.3d 1223, 1230 (9th Cir, 2000) (noting that the
9 parties agreed that employer contributions were made to the plan, while there was disagreement
10 over whether other requirements of the safe harbor were met).

11 **CONCLUSION**

12 The Court should grant the motion to dismiss without leave to amend.

13 Dated: October 15, 2019

Respectfully Submitted,

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