XAVIER BECERRA, State Bar No. 118517
Attorney General of California
PAUL STEIN, State Bar No. 184956
Supervising Deputy Attorney General
SHARON L. O'GRADY, State Bar No. 102356
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3834
Fax: (415) 703-1234
E-mail: Sharon.OGrady@doj.ca.gov

*Attorneys for Defendants CalSavers Retirement Savings Program, Formerly The California Secure Choice Retirement Savings Program, and Fiona Ma, in Her Official Capacity As Chair of the California Secure Choice Retirement Savings Investment Board*

R. Bradford Huss, No. 71303
Angel L. Garrett, No. 255682
TRUCKER ✦ HUSS, APC
One Embarcadero Center, 12th Floor
San Francisco, CA 94111
Telephone: (415) 788-3111
Facsimile: (415) 421-2017
E-mail: bhuss@truckerhuss.com
agarrett@truckerhuss.com

Joseph C. Faucher, No. 137353
TRUCKER ✦ HUSS, APC
15821 Ventura Blvd., Suite 510
Los Angeles, CA 91436
Telephone: (213) 537-1016
Facsimile: (213) 537-1020
E-mail: jfaucher@truckerhuss.com

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**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

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

## ARGUMENT

### I. CALSAVERS DOES NOT ESTABLISH AN ERISA PLAN.

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

[1] The March 29 Order also cites *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, 903 F.3d 829 (9th Cir. 2018). March 29 Order at 2-3, 13-14. After this Court issued the March 29 Order, the Ninth Circuit granted rehearing en banc in *Chambers*, ordering that it "shall not be cited as precedent by or to any court of the Ninth Circuit." *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 923 F.3d 1162 (9th Cir. 2019). The grant of rehearing in *Chambers* does not undermine in any way the March 29 Order. The propositions for which this 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

was wrongly decided, and that this Court instead should apply the Eleventh Circuit's decision in *Donovan v. Dillingham*, 688 F.2d 1367. *See* U.S. Statement at 10 & n.2 (arguing that "[t]he Ninth Circuit [in *Golden Gate*] appears to have mistakenly concluded . . . ."). This Court, however, has already rejected this same argument.[2] It recognized that the Ninth Circuit has specifically declined to apply the *Donovan* criteria to statutory administrative burdens like the ones imposed by the Secure Choice Act: "The Court holds the same hesitation here." March 29 Order at 15.[3]

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

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

*Golden Gate*, 546 F.3d at 651.[4] The Court should decline the United States' invitation to second-guess *Golden Gate*, which is a controlling Ninth Circuit decision.

---

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

[2] The United States appeared as amicus curiae in both *Golden Gate* and *Fort Halifax 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

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

---

that effectively required employer to choose either paying employees at least $20 per hour or paying them $15 per hour and providing health benefits under an ERISA plan valued at $5 per 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.

[5] Ignoring relevant Ninth Circuit authority, including *Velarde* and *Delaye*, the United States instead relies on an earlier First Circuit decision, *Simas v. Quaker Fabric Corp.*, 6 F.3d 849 (1993). U.S. Statement at 12; *see id*. at 8. *Simas* held that a severance plan that required the 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

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

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

In fact, CalSavers requires less from employers than the ordinance upheld by the Ninth Circuit in *Golden Gate*, which required employers to pay quarterly to support city-provided benefits that they did not otherwise provide, through an ERISA plan or otherwise. The United States attempts to distinguish *Golden Gate*, stating that "employers could discharge their

---

hiring and termination." *Id*. at 853. *Simas* is plainly distinguishable on its facts; CalSavers imposes no similar duty. Moreover, *Simas* has not been cited in any Ninth Circuit case or by any district court in the Ninth Circuit; and the First Circuit itself has since held that the holding in *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).

Similarly, the United States cites *Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 679-80 (8th Cir. 2004), which held that a severance plan that required an employer to determine whether a termination was with or without cause and in some cases whether a change in control had 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).

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

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

[6] The United States suggests that employers who register before the law becomes mandatory for employers of their size have somehow "established" ERISA plans. U.S. Statement at 14 n.3. The CalSavers program is a mandatory program. The fact that an employer may 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.

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

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

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

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

## III. CALSAVERS IS NOT PREEMPTED UNDER TRADITIONAL CONFLICT PREEMPTION PRINCIPLES OR UNDER THE IMPERMISSIBLE "CONNECTION WITH" ANALYSIS.

The United States next argues that CalSavers is preempted under traditional conflict preemption principles because it "forces" employers who do not choose to sponsor an ERISA

[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.

[8] While the United States acknowledges this is the correct standard, U.S. Statement at 4, 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 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. IBEW-NECA Tr. Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 929 (9th Cir. 2001).

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

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

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

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

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

The United States' "in connection with" argument also incorrectly assumes that CalSavers "requires employees who do not have ERISA plans to maintain ERISA-covered plans." U.S. Statement at 17. It urges the Court to "reconsider its analysis of 'in connection with' preemption in light of *Gobeille* [*v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936, 943 (2016)]." U.S. Statement at 16. This Court did in fact consider and rely on *Gobeille* in its March 29 Order (at page 13.) But the United States misunderstands that decision. In *Gobeille*, the Supreme Court invalidated the Vermont statute *only as it applied to ERISA plans*. 136 S. Ct. at 947. It held that preemption of the state law as it applied to *ERISA plans* "is necessary to prevent the States from imposing novel, inconsistent and burdensome reporting requirements on [those] plans." *Id*. at 945.[9] CalSavers is a state-sponsored and administered plan that does not apply to ERISA plans. ERISA is not concerned with uniformity of state laws like the Secure Choice Act that do not apply to ERISA plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S.at 11.

## IV. NONE OF THE UNITED STATES' CITED AUTHORITIES SUGGEST THAT CALSAVERS IS NOT "COMPLETELY VOLUNTARY" WITHIN THE MEANING OF THE SAFE HARBOR.

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

[9] The United States appeared as amicus in *Gobeille* supporting the State of Vermont and 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).

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

## CONCLUSION

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

Dated: October 15, 2019

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
PAUL STEIN
Supervising Deputy Attorney General

*/s/ Sharon L. O'Grady*
SHARON L. O'GRADY
Deputy Attorney General

TRUCKER ♦ HUSS, APC

R. Bradford Huss
Joseph C. Faucher
Angel L. Garrett
Attorneys for Defendants
CalSavers Retirement Savings Program, Formerly The California Secure Choice Retirement Savings Program, and Fiona Ma in Her Official Capacity As Chair of the California Secure Choice Retirement Savings Investment Board