20-15591

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM; JOHN CHIANG, California State Treasurer,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of California

No. 2:18-cv-01584-MCE-KJN
The Honorable Morrison C. England, Jr., Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The CalSavers Retirement Savings Program ("CalSavers"), formerly California Secure Choice Retirement Savings Program, is designed to provide an effective way for California workers to save for retirement through payroll deductions. Plaintiffs seek to invalidate this important, innovative program, which will make it possible for millions of Californians to save for retirement for the first time, and has already become a model for other states. The district court dismissed plaintiffs' complaint without leave to amend, and its decision should be affirmed.

Plaintiffs Howard Jarvis Taxpayers Association ("HJTA") and two of its employees claim that the program is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). They are wrong. CalSavers places no requirements or restrictions whatever on any ERISA plan. Further, the CalSavers program imposes no discretionary duties on employers that would trigger ERISA's requirements. Employers act simply as a conduit or forwarding agent; they are only required to make payroll deductions for participating employees and transmit their contributions to CalSavers. These are ministerial tasks just like those employers already perform for federal and state income tax withholding, as well as Social Security and Medicare tax withholding.

Plaintiffs' principal arguments are *first*, that the duties imposed on employers are too burdensome and require difficult, discretionary decisions about program eligibility, management of employees' accounts, and other matters; and *second*, that ERISA somehow gives employers complete "autonomy" to "choose" whether their employees should be permitted to participate in the CalSavers payroll deduction program. These arguments are based largely on misstatements about what CalSavers actually requires employers to do, and are totally divorced from the text and legislative history of ERISA. The district court correctly held that employers have "no discretion in the administration of CalSavers and do not make any promises to employees." Further, contrary to HJTA's sweeping theories, ERISA does not completely preempt the "field of private employee retirement savings," ousting any and all state regulation; to the contrary, ERISA only preempts state laws bearing upon employer-sponsored employee benefit *plans*, not every arrangement by which employee benefits are provided. And IRAs of the sort established by the CalSavers program are exempt from ERISA's requirements.

After sitting on the sidelines of this litigation for more than a year, the U.S. Department of Labor ("DOL") weighed in on the side of plaintiffs and filed a statement of interest in the district court. DOL has also filed an amicus curiae brief in this Court arguing in favor of reversal. DOL's preemption arguments fare no better than plaintiffs', as the district court correctly held.

As explained in more detail below, this case falls squarely within the standards the Supreme Court and this Court have applied in past cases determining that a state law does not trigger ERISA preemption, most relevantly, this Court's decision in *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008). The Court should affirm the district court's judgment.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. section 1291 because it is an appeal from a final decision and judgment of the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the district court correctly hold that the CalSavers Retirement Savings Trust Act, Cal. Gov't Code sections 100000-100050 (the "CalSavers Act" or the "Act"), does not establish an ERISA pension benefit plan, given that the only duties employers have under the Act—making payroll deductions for participating employees and transmitting their contributions to CalSavers—are ministerial and non-discretionary?

Did the district court correctly hold that the Act does not contain an impermissible "reference" to ERISA, given that the Act does not act immediately or exclusively—or indeed at all—on ERISA plans, and the existence of an ERISA plan is not essential to the Act's operation?

Did the district court correctly hold that the CalSavers program does not have an impermissible "connection" with an ERISA plan, given that the Act does not disturb ERISA's uniform regulatory scheme or have any effect on ERISA plans or administrative practices?

Do Plaintiffs lack statutory standing under ERISA because the Act does not create an ERISA plan?

STATEMENT REGARDING ADDENDUM

In accordance with Circuit Rule 28-2.7, the Addendum to this brief includes relevant sections of the CalSavers Act, its implementing regulations, relevant sections of ERISA, and the Department of Labor regulations, 29 C.F.R. section 2509.99-1 and 29 C.F.R. section 2510.3-2(a)-(d).

STATEMENT OF THE CASE

I. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 AND INDIVIDUAL RETIREMENT ACCOUNTS

ERISA governs employee benefit plans that are "established or maintained" by an employer, an employee organization, or both. 29 U.S.C. § 1003(a). "Employee benefit plan" or "plan" means an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." ERISA § 3(3), 29 U.S.C. § 1002(3). "Employee pension benefit plan," in turn, means any

> plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, 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.

ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A) (emphasis added).

While ERISA comprehensively regulates employee pension benefit plans *established or maintained by an employer*, individual retirement accounts ("IRAs") are a distinct form of retirement savings vehicle described in 26 U.S.C. § 408, and they are generally not subject to ERISA. 29 U.S.C. § 1051(6). They are intended to encourage employees whose employers do not offer a pension plan to save for retirement. *See In re Yee*, 147 B.R. 624, 626 (Bankr. D. Mass. 1992). An individual may set up his or her own IRA with a financial institution. 26 U.S.C. § 408 (a) & (b). It is well-established that an employer also may offer an IRA program for its employees, and may allow the employees to contribute to the IRA via payroll deduction, without triggering ERISA's requirements. *See* U.S. Dep't of Labor, Interpretive Bulletin Relating to Payroll Deduction IRAs, 29 C.F.R. § 2509.99–1 (June 18, 1999) (hereafter, "Interpretive Bulletin 99-1").

II. THE IMPENDING RETIREMENT CRISIS AND THE ADOPTION OF CALSAVERS

California, like much of the nation, faces an impending retirement crisis. Close to half of California workers are currently projected to retire with incomes below 200% of the federal poverty level, and at least 62% of retirees rely on Social Security for more than half of their retirement income. *See* CalSavers Fast Facts on Retirement Insecurity, available at https://www.treasurer.ca.gov/calsavers/facts.asp [as of October 12, 2020].[1]

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[1] 200% of the federal poverty threshold is a well-accepted measure of the "income cutoff below which retirees will face significant economic hardship and have difficulty meeting basic expenses" in high-cost areas like California. Sylvia A. Allegretto, et al., Ch. 2, *California Workers' Retirement Prospects*, in N. Rhee (ed.) *Meeting California's Retirement Security Challenges* 33 (2011) (hereafter "Allegretto").

According to the University of California, Berkeley, Center for Labor Research and Education, even "middle class families in California are at significant risk of not having enough retirement income to be self-sufficient," and nearly 50 percent California workers will retire at or near poverty." Allegretto at 22.

A significant contributor is that an estimated 7.5 million Californians do not work for employers that offer a retirement program. *See* https://www.treasurer.ca.gov/calsavers/facts.asp. Sixty-two percent of California private sector workers do not participate in a retirement program through their workplace, and that increases to 84% of those working for employers with 25 or fewer workers. Rep. of Assemb. Comm. on Pub. Emp., Ret. & Soc. Sec. on Sen. Bill 1234 (June 27, 2012).

The CalSavers Act was enacted to address these concerns. CalSavers creates a savings program for employees whose employers do not offer a tax-qualified retirement savings program. *Id*. §§ 100004, 100032, 100046. To fill this gap, the Act established individual IRAs to be funded entirely through voluntary employee payroll deduction contributions. *Id*. § 100000(h). The contributions are to be received by the CalSavers Retirement Savings Trust (the "Trust"). *Id*. §§ 100000(i), 100004(a). The regulations adopted to implement the CalSavers Act specify that employer contributions to CalSavers retirement accounts are not allowed. Cal. Code Regs. tit. 10, § 10005(c)(1).

The Act defines an "eligible employer" generally as a non-governmental employer that has five or more employees, but does not include an employer who provides a tax-qualified retirement savings program. Cal. Gov't Code §§ 100000(d)(1), (d)(3), 100032(g)(1). Employers not meeting these criteria are "exempt employers." Cal. Code Regs. tit. 10, § 10000(o). Whether an employer has the requisite number of employees for a calendar year is determined by the average number of employees as reported to the California State Employment Development Department for the quarter ended December 31 and the previous three quarters. *Id.* § 1001(a).

The program is being phased-in according to the size of an employer's workforce. *Id.* § 100032. The program opened for enrollment to all eligible employers beginning July 1, 2019. As of September 30, 2020, eligible employers with 100 or more employees were required to register with the program. Cal. Code Regs. tit 10, § 10002(a)(1). Employers the size of Plaintiff Howard Jarvis Taxpayers Association ("HJTA") need not register for the program until June 30, 2022.[2] Cal. Code Regs. tit. 10, § 10002(a)(3). As of October 12, 2020, 4,324 employers had registered for CalSavers and nearly 90,000 California workers had enrolled. Appellees' Request for Judicial Notice, Exh. 1.

The CalSavers' Board has promulgated regulations that strictly limit an employer's involvement in the program to (1) registering with the program, (2) providing the program administrator with the name, Social Security number, birth date, address, telephone number and e-mail address for each employee who is at least 18 years old, and (3) remitting participating employees' contributions each payroll period. Cal. Code Regs. tit. 10, §§ 10002, 10003(a)-(c); *see* Cal. Gov't Code § 100043(c). The program administrator provides the employer with the applicable contribution rate for each participating employee via the CalSavers website. Cal. Code Regs. tit. 10, § 10003(c).

After an employer registers with CalSavers, it sends the program administrator a list of its eligible employees (those 18 years or older). The program administrator then sends the employees an information packet,

[2] The Complaint alleges that HJTA has between five and eight employees. ER355. If that number drops below five HJTA will be exempt.

which includes a disclosure form describing how employees may opt out of making any contributions under the program. Cal. Gov't Code § 100014(a), (b)(3); Cal. Code Regs. tit. 10, § 10004(a). The opt-out notation on that form is statutorily required to be "simple and concise and drafted in a manner that the Board deems necessary to appropriately evidence the employee's understanding that he or she is choosing not to automatically deduct earnings to save for retirement." *Id.* § 100014(e). The CalSavers Savers employee information packet and opt-out form are attached as Exhibit 3 to Appellees' Request for Judicial Notice.

Employees have 30 days from receiving the employee information packet to opt out prior to being enrolled in the Program. *Id.* 10004(b). They also may opt out of the program at any time after enrollment. *Id.* § 10004(d). Opting out is easy and can be accomplished electronically, by telephone, or by submitting an opt-out form by either overnight or regular mail. *Id.* § 10004(d). While the default initial contribution is 5% of earnings, participating employees may elect a different contribution rate. *Id.* § 10005(a), (b). Contributions will be made to a Roth IRA. *Id.*

§ 10005(a)(3).[3] Like any Roth IRA, it is completely portable, and the employee has complete access to, and can withdraw, the contributions in his or her account at any time.

The CalSavers Act expressly states that participating employers are not considered to be fiduciaries with respect to CalSavers or the CalSavers Trust and have no authority, control, or responsibility for the design, investment, administration, or operation of the program. Cal. Gov't Code § 100034(b). The administrator, recordkeeper, trustee, custodian, investment managers, and advisors to the program were selected by the CalSavers Retirement Savings Board. Indeed, the employee disclosure form states that CalSavers is not sponsored by the employer, and that the employer is not responsible for the plan or liable as a plan sponsor. *Id*. §§ 100014(c)(2), 100034(b). Employers may not "[r]equire, endorse, encourage, prohibit, restrict, or discourage employee participation in the Program," and may not provide any "advice or direction concerning investment choices or any other decision about the Program." Cal. Code Regs. tit. 10, § 10003(d).

[3] Employees may opt for a traditional IRA instead. Cal. Code Regs. tit. 10, § 10005(c)(4).

III. Procedural History

Plaintiffs are Howard Jarvis Taxpayers Association ("HJTA") (both in its capacity as an employer and on behalf of its members) and two of its employees. ER 821-22. Defendants are the CalSavers Retirement Savings Program ("CalSavers" or the "program"), and Fiona Ma, in her capacity as the Chairwoman of the CalSavers Retirement Savings Board (the "Board"). The initial Complaint, filed on May 31, 2018, alleged two claims, the first for a declaratory judgment that CalSavers is preempted under ERISA, and the second a state-law claim seeking to enjoin CalSavers as a "waste" of taxpayer money. ER 825-829.

Defendants filed a motion to dismiss on the grounds: (a) that plaintiffs lacked Article III standing or statutory standing under ERISA, because CalSavers had not yet been implemented and it was speculative whether plaintiffs would have standing even as of June 30, 2022, the earliest date on which HJTA could be required participate in the program; (b) Plaintiffs' declaratory relief claim failed on the merits because CalSavers was not an ERISA plan and was not preempted by ERISA; and (c) the court should not exercise supplemental jurisdiction over Plaintiffs' state law claim because, among other reasons, it was barred by the Eleventh Amendment. ER 798-817. The district court granted the motion. ER005, ER016.

The court held that the employee plaintiffs lacked standing and that HJTA lacked associational standing, but that it had standing as an "eligible employer" under the statute assuming CalSavers creates an ERISA plan, an issue intertwined with the merits of the suit.[4] The Court then held that CalSavers does not create an ERISA employee benefit plan and is not preempted by ERISA. It further concluded that amendment of the Complaint would be "futile" but, in light of the importance of the case, granted plaintiffs "one final opportunity to amend" their complaint. ER034.

In April 2019, Plaintiffs filed a substantially similar Amended Complaint, and Defendants again moved to dismiss. ER353, ER312. On August 5, 2019, after the matter was fully briefed, and more than a year after the case commenced, the United States filed a notice of "potential participation" indicating it might wish to file a brief. ER144. On September 13, 2019, it filed a Statement of Interest siding with the plaintiffs. ER116. Both plaintiffs and defendants filed responses to the United States' Statement of Interest. ER057, ER059. Then, in a decision issued March 10, 2020, the district court granted the motion to dismiss without leave to amend. ER004.

[4] Hereafter, unless otherwise indicated, "HJTA" will refer to plaintiffs collectively.

It first held that the CalSavers Act does not create an employee benefit plan under ERISA. In so holding, the court rejected plaintiffs' argument that the CalSavers Board and Trust were "employers" under ERISA because they were "acting . . . indirectly in the interests of an employer." ER012. The district court further held that the actual employers neither establish nor maintain CalSavers, because they "have no discretion in the administration of CalSavers and do not make any promises to employees: employers simply remit payroll deducted payments to the Program and otherwise have no discretion regarding the funds." ER013 (citing *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639 (9th Cir. 2008) (hereafter "*Golden Gate*"); *Ariz. State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715, 722 (9th Cir. 1997)); *see also* ER011 (holding that the "role of actual employers in CalSavers is limited to providing a roster of eligible employees, providing contact information of eligible employees, making payroll deductions, and remitting such deductions").

The court further held that the Act also does not have an impermissible "reference" to an ERISA plan because CalSavers "does not interfere with existing ERISA or retirement plans provided by actual employers." ER015. Finally, it held the Act does not have an impermissible "connection" with ERISA, because CalSavers "does not impose additional reporting requirements on existing ERISA plans" or otherwise interfere with the national scheme of regulation applicable to ERISA plans; "reporting is only required where no ERISA or any other employer-sponsored retirement plan exists." ER015 (citing *S. Cal. IBEW-NECA Trust Funds v. Std. Indus. Elec. Co.*, 247 F.3d 920, 925 (9th Cir. 2001)).

The court further considered whether CalSavers falls within an ERISA "safe harbor" established by DOL in 1975, which exempts from ERISA's requirements certain payroll deduction IRA programs. (Hereafter "1975 Safe Harbor".) The court "decline[d] to hold that CalSavers is entitled to the exemptions set forth in the . . . 1975 Safe Harbor," but held that the issue was not dispositive because CalSavers does not create an employee benefit plan subject to ERISA in the first place. ER011 note 5; *see* ER011-14.

Finally, the court declined to exercise jurisdiction over HJTA's remaining state law claim. ER016.

This appeal followed.

SUMMARY OF THE ARGUMENT

None of the preemption theories advanced by HJTA or DOL in its amicus curiae brief has merit. First, the Secure Choice Act does not impermissibly "reference" ERISA or an ERISA plan. CalSavers, the program created by the Act, is not an employee pension benefit plan as defined by ERISA and "reference to" preemption therefore fails. Fundamentally, CalSavers does not fall within Title I of ERISA because it is neither established nor maintained by an employer. As the district court correctly held, the dispositive consideration under controlling Ninth Circuit law is that the actual employers exercise no discretion over the program; their functions are purely ministerial. Further, neither the State nor the CalSavers Trust are employers under the Act, because they are not acting on behalf of employers covered by the Act, either directly or indirectly. Indeed, HJTA argues that CalSavers is contrary to the interests of employers.

HJTA and DOL try in various ways to avoid these basic problems, all of which fail to persuade. They try to distinguish *Golden Gate*, the key Ninth Circuit case cited by the district court, but fail to show that the ordinance upheld there was materially different in any relevant respect from CalSavers. They effectively argue that the Court should ignore *Golden Gate* and instead follow an Eleventh Circuit decision, even though this Court in *Golden Gate* specifically held that the Eleventh Circuit's decision is inapplicable in ERISA preemption challenges, such as this one, to state laws that impose administrative requirements on employers. Finally, to avoid the impact of *Golden Gate*, HJTA and DOL make a number of false assertions about CalSavers' requirements in an attempt to make it look like employers have substantial, discretionary duties under the program, when in fact they have none.

HJTA and DOL's further contention that the Act has an impermissible "connection" to ERISA also fails as a matter of law. The district court correctly held that the Act neither interferes with ERISA's uniform regulatory scheme nor has any effect on the administration of any ERISA plan.

HJTA's remaining arguments that the Act somehow conflicts with ERISA's purposes are also unavailing. In particular, its repeated assertion that ERISA was designed to give employers complete autonomy to decide whether to allow its employees to participate in a retirement savings payroll deduction program is untethered to the text of ERISA or the case law interpreting the statute and Congress's actual purposes.

Even if this Court were to hold that employers establish or maintain the retirement accounts created by the CalSavers program—and it should not—it should further hold that CalSavers satisfies the 1975 Safe Harbor, and is thus exempt from ERISA. The automatic enrollment/opt-out procedure used by CalSavers is "completely voluntary" as a legal and a practical matter, and the other requirements of the safe harbor are indisputably met.

Finally, the district court's dismissal should be affirmed for lack of statutory standing to bring suit under ERISA; none of the Plaintiffs is a "participant," "beneficiary" or "fiduciary" within the meaning of ERISA's standing provision.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo a decision granting a motion to dismiss for failure to state a claim. *Davis v. HSBC Bank Nev. N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). ERISA preemption is a question of law that the Court reviews de novo." *Golden Gate*, 546 F.3d at 643.

II. CALSAVERS IS PRESUMPTIVELY NOT PREEMPTED BY ERISA.

Where a state law regulates in a field traditionally occupied by the state, there is a presumption against preemption. Specifically, the Supreme Court "has established a presumption that Congress did *not* intend ERISA to preempt areas of traditional state regulation that is quite remote from the areas with which ERISA is concerned – reporting, disclosure, fiduciary responsibility and the like." *Golden Gate*, 546 F.3d at 647-48 (quoting *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212 (9th Cir. 2000)). Areas traditionally left to state regulation include "the state's exercise of police powers and its regulation of health, safety, banking, securities, and insurance matters." *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contacting Co.*, 135 F.3d 671, 677 (9th Cir. 1998). In addition, "[t]he States have traditionally regulated the payment of wages." *Massachusetts v. Morash*, 490 U.S. 107, 118 (1989).

Here, CalSavers is plainly directed at an important state interest—the welfare of its citizens, millions of whom are currently projected to retire with incomes below 200% of the federal poverty level. *See* https://www.treasurer.ca.gov/calsavers/facts.asp. When citizens lack the resources to take care of their own needs in retirement, that places an inevitable burden on State and local government, to address issues of hunger, homelessness, and the adverse health effects that result when citizens forgo medical treatment, vaccinations or medications because they cannot afford them. *See generally Wash. v. U.S. Dept. of Homeland Sec.*, 408 F. Supp. 3d 1191, 1205-08 (E.D. Wash. 2019).

III. THE ACT DOES NOT MAKE AN IMPROPER "REFERENCE" TO ERISA BECAUSE IT DOES NOT CREATE AN ERISA PLAN.

As the district court correctly noted, a state law is preempted by ERISA if it "relates to" an employee benefit plan. ER014 (citing 29 U.S.C. § 1144(a)). "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)). Both HJTA and DOL argue that "reference to" preemption exists here because the CalSavers Act creates an ERISA plan for individual employees. HJTA Br. 30-42; DOL Amicus Br. 7-25. HJTA further argues that "reference to" preemption applies whether or not the Act creates an ERISA plan. HJTA Br. 26-29. Neither argument has merit.

A. The Act does not create an ERISA plan or plans because it imposes purely ministerial, non-discretionary duties on employers.

ERISA does not preempt all laws touching on employee benefits. Rather, it preempts state laws that bear upon employee benefit *plans* (as opposed to employee benefits), and does so only to the extent that such plans are *established or maintained* by an employer, employee organization, or both. ERISA Title I, § 3(2), 29 U.S.C. § 1003(a).[5] Further, the fact that a state law may impose administrative duties on employers is not enough, by itself, to trigger ERISA's requirements. Under well-settled Ninth Circuit

[5] Because there is no claim here that an employee organization (such as a union) is involved, for sake of simplicity most subsequent references in this brief to "employee organization, or both" are omitted.

law, "an 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." *Golden Gate*, 546 F.3d at 650; *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 imposed different terms depending on whether the employee was or was not terminated without cause was not an ERISA plan). *Accord James v. Fleet/Norstar Fin'l Group, Inc*., 992 F.2d 463, 466, 468 (2d Cir. 1993) (holding that scheme requiring employer to make individual determinations regarding eligibility, termination dates, and payment amount did not create an ERISA plan); *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").

As the district court correctly held, "actual employers have no discretion in the administration of CalSavers . . . ." ER013. Thus, HJTA's contention that the Act requires thousands of employers to create a separate

ERISA plan for each and every participating employee fails as a matter of law. HJTA Br. 37-42.

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 basic employee information to CalSavers and make percentage deductions from payroll as determined by the employee and instructed by CalSavers, and to forward the contributions to CalSavers. Cal. Code Regs. tit. 10, 10002, 10003(a)-(c). *See* Cal. Gov't Code § 100043(c). 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 tax-qualified retirement plan, rendering it exempt from CalSavers, it needs simply to notify CalSavers, in which event the employer is disenrolled from the program and CalSavers will stop sending it instructions for transmitting employee contributions. Cal. Code Regs. tit. 10, § 10001(b), (c); *see* Cal. Gov't Code § 100032(g). The same result obtains if, at the end of a calendar year, the employer no longer has the minimum number of five employees. Cal. Code Regs. tit. 10, § 10001(b),(c).

None of this activity requires the exercise of any discretion.[6] Nor is it qualitatively different from other payroll deductions that employers already make for state and federal taxes, unemployment insurance, and the like.

1. This Court's decision in *Golden Gate* controls.

As the district court held, this Court's decision in *Golden Gate*, 546 F.3d 639, is squarely on point and controls the outcome here. At issue in *Golden Gate* was a San Francisco ordinance that required covered employers to make minimum health care expenditures "to or on behalf of" certain employees each quarter, or to meet the spending requirement by making payments directly to a fund established by the city to pay for healthcare for uninsured workers. 546 F.3d at 644-645. The plaintiff argued that the so-called "City-payment option" satisfied the criteria for establishing an ERISA plan, as set forth in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (hereafter "*Donovan*"); namely, that "the administrative burden

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[6] The fact that employers exercise no discretion also disposes of HJTA's argument that CalSavers potentially exposes individual employers to liability for breach of fiduciary duty. *See* HJTA Br. 42, 46, 49. Under ERISA, *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)). Here, employers are expressly barred from exercising any of these functions.

on the covered employers, combined with the reasonable ascertainability of benefits to employees, creates an ERISA plan." *Golden Gate*, 546 F.3d at 651. This Court rejected the argument, holding that (1) the *Donovan* criteria do not apply "to an employer's administrative obligations imposed by a state or local law," and (2) the ordinance did not create an ERISA plan because employers were not required to "apply more than a modicum of discretion," which would be required to "make the plan an ongoing administrative scheme." *Id*. at 650-51. Employers were only required to keep track of the number of hours their employees worked and make healthcare payments based on those hours; "the employer's administrative obligations involve mechanical record-keeping, and the employer's payments to the city are typically fixed, due at known times, and do not depend on contingencies outside the employee's control." *Id*. at 651 (internal quotations and citation omitted). CalSavers requires *less* from employers than the ordinance upheld by this Court in *Golden Gate*, which required employers to keep track of employee hours and the extent they were worked in San Francisco. Thus, CalSavers is not preempted.

In order to avoid this straightforward conclusion, HJTA and DOL try three things: first, they try, but fail, to distinguish *Golden Gate* on its facts; second, they invite this Court to simply ignore *Golden Gate* and instead follow the out-of-circuit decision in *Donovan*, even though this Court in *Golden Gate* specifically held that *Donovan* does not apply in circumstances such as these; and third, they mischaracterize and distort the CalSavers program requirements; their briefs are littered with misstatements about the obligations imposed on employers by CalSavers.

2. HJTA and DOL do not, and cannot, effectively distinguish *Golden Gate* on its facts.

HJTA's attempts to distinguish *Golden Gate* fail. It argues that, unlike with CalSavers, the contributions in *Golden Gate* "were not from the employee's own money," and "any mistake would not affect the employee." HJTA Br. 40. This professed concern for employee welfare is specious. Employers that provide payroll deduction IRAs, *which are exempt from ERISA*, must deduct "the employee's own money" from payroll and transfer it to the IRA sponsor to cover the employee's contribution. Employers must also deduct state and local taxes from the "employee's own money." From the perspective of employees, Congress's concern was with the "mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds," *Golden Gate*, 546 F.3d at 648—not that an employer could make a clerical error in making deductions from payroll. Under CalSavers, employers have nothing to do with managing the funds.[7] Nothing in the CalSavers Act conflicts with ERISA's goal of protecting workers from employers' failure to keep a promise to provide benefits.[8]

DOL, for its part, tries to distinguish *Golden Gate* by arguing that in that case "employers could discharge their obligations by making payments [to the City program] without any ongoing maintenance or management," DOL Amicus Br. at 24, but that is simply not true. In *Golden Gate*, covered employers were required 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 working enough hours each

[7] Because employers do not contribute any monies into the CalSavers program, ERISA's goal of protecting employees from the broken promises of their employers is not implicated. *See Cal. Div. of Labor Standards v. Dillingham Constr. N.A., Inc.*, 519 U.S. at 327. In that respect, CalSavers poses even less of a concern than the program in *Golden Gate*, which required employers to make contributions to their employees' healthcare.

[8] As for HJTA's asserted concern that an employer may make a "mistake" in deducting employee contributions that could "affect the employee," HJTA Br. 40, an employer that fails to pay employee wages, whether those wages are designated for contribution to an IRA or for direct payment to the employee, will be liable under state law. *See, e.g., Vois v. Lampert*, 7 Cal. 5th 1141, 1148 (2019) (noting that failure to pay wages is a breach of contract and that there are criminal penalties for willful failure to timely pay wages due). Nor is HJTA correct in asserting that payroll deductions for anticipated federal and state taxes "is not the employee's own money." *Id.*

week to be "covered employees," the number of hours per quarter each employee worked, and how many of those hours were worked in San Francisco or someplace else. 546 F.3d at 643-44. Neither HJTA nor DOL explains how CalSavers imposes greater "ongoing maintenance or management" obligations on employers than the ordinance in *Golden Gate*, nor could they.[9]

Although DOL complains that CalSavers requires employers to determine employee eligibility on an "ongoing" basis, DOL Amicus Br. 18, the only eligibility requirement for employees is that they be at least 18 years old. California law imposes numerous restrictions on employment of minors, *see, e.g.,* Cal. Educ. Code §§ 4910, 4911; Cal. Lab. Code §§ 1286-1312, 1390-1394, so employers are already required to distinguish among their minor and adult employees.

[9] HJTA also seeks to distinguish *Golden Gate* on the grounds that it involved the question whether the ordinance established an *employee welfare benefit* plan affecting health care costs, whereas this case addresses whether the Act creates an *employee pension benefit* plan. HJTA Br. 41. The argument fails because ERISA's preemption statute does not distinguish between employee welfare benefit plans and employee pension benefit plans. *See* 29 U.S.C. § 1144(a).

Similarly, employers are already required by federal law to determine if their employees participate in a retirement plan, including a multiple-employer plan (see DOL Amicus Br. at 18), 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."[10] 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 DOL identifies, including what happens in DOL's example of an employee transferring from a California office to an Oregon office. *See* DOL Amicus Br. 19. 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 Oregon's state income tax and employment laws would govern the employment relationship. Expecting the employer also to

[10] *See* https://www.irs.gov/retirement-plans/common-errors-on-form-w2-codes-for-retirement-plans.

notify the CalSavers program is simply part of a multi-state employer's normal course of managing its workforce.[11]

3. HJTA and DOL provide no reason to simply ignore *Golden Gate* and instead follow the Eleventh Circuit's decision in *Donovan.*

Like the plaintiff in *Golden Gate*, whose preemption claims were rejected by this Court, both HJTA and DOL place heavy reliance on the Eleventh Circuit's decision in *Donovan,* 688 F.2d 1367, to support their argument that CalSavers establishes an employee benefit plan. *See* HJTA Br. 21, 31-32, 38; DOL Amicus Br. 8-10, 25-26. That reliance is misplaced; nothing has changed since *Golden Gate* that could justify a departure from its considered holding that *Donovan* does not apply the correct rule of decision in an ERISA preemption challenge to an "employer's administrative obligations imposed by a state or local law." *Golden Gate*, 546 F.3d at 650-651.[12]

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[11] The only employer plaintiff in this case is Howard Jarvis Taxpayers Association, which does not claim to be a multi-state employer. *See* ER355.

[12] Ignoring relevant Ninth Circuit authority, including *Velarde* and *Delaye*, DOL instead relies on an earlier First Circuit decision, *Simas v. Quaker Fabric Corp*., 6 F.3d 849 (1st Cir. 1993). DOL Amicus Br. 16. *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'

In *Donovan*, the court considered whether a group health insurance policy constituted an "employee benefit plan" under Title I of ERISA. 688 F.2d at 1369-70. In considering whether there was a "plan, fund or program," the Eleventh Circuit held that "[a]t a minimum, however, a 'plan, fund or program' under ERISA implies the existence of intended benefits, intended beneficiaries, a source of funding, and a procedure to apply for and collect benefits." *Id*. at 1372. It held that, although ERISA does not "require a formal written plan," the plan has to be "established or

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determination, in particular, is likely to provoke controversy and call for judgments based on information well beyond the employee's date of 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 *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 (1st Cir. 1994).

Similarly, DOL 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. Auto. Compressor, Inc.*, 673 F. Supp. 2d 560, 565 (E.D. Mich. 2009) (relying on *Velarde* and *Delaye*, while citing *Peterson* as contrary authority).

maintained" by an employer, and that "[a] decision to extend benefits is not the establishment of a plan." *Id*. at 1372-73.

This Court has repeatedly held that *Donovan* is limited to the situation where a formal plan is absent, and the question is raised whether a *de facto* plan has been created. *Golden Gate*, 546 F.3d at 652; *Cinelli v. Sec. Pacific Corp.*, 61 F.3d 1437, 1443 (9th Cir, 1995); *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 939 n.5 (9th Cir. 2003). This Court in *Golden Gate* also made clear that "satisfying the *Donovan* criteria was a necessary but not sufficient condition for the creation of an ERISA plan." 546 F.3d at 652.[13]

[13] DOL inexplicably argues that "[t]his Court repeatedly relied on *Donovan* to ascertain the existence of a plan, fund, or program." DOL Br. 9. This badly mischaracterizes Ninth Circuit law. The only case cited by DOL for this proposition, *Modzelewski v. Resolution Trust Corp*., 14 F.3d 1374 (9th Cir. 1994), not only did not rely on *Donovan*, but its sole mention of *Donovan* is in a citation to *Scott v. Gulf Oil Co.*, 754 F.2d 1499, 1504 (9th Cir. 1985). *See Modzelewski*, 14 F.3d at 1376. And, in *Golden Gate*, 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* [*Packing Co. v. Coyne*, 482 U.S. 1 (1987)] and [*Massachusetts v. Morash*, 490 U.S. 107 (1989)].

Golden Gate, 546 F.3d at 651.

And, more fundamentally, the Court stated that plaintiff "has not cited, and we have not discovered, any cases in which this court has applied *Donovan* to an employer's administrative obligations imposed by a state or local law," adding, "[w]e would be very hesitant to hold that the *Donovan* criteria apply to statutory administrative burdens imposed on employers where, as here, that employer has made no promises whatever to its employees." *Id*. That same caution applies here.

Finally, the court held that it need not even decide whether *Donovan* might apply because its criteria were not satisfied, given that the employers' "obligation ceases as soon as they make the required payments." *Id*. Here, too, the employers' obligation ceases as soon as they have transferred employee contributions to CalSavers.[14]

[14] DOL criticizes *Golden Gate* for supposedly reading *Sandstrom v. Cultor Food Science, Inc.*, 214 F.3d 795, 797 (7th Cir. 2000), as "suggest[ing] a conflict between applying *Donovan v. Dillingham* to state mandates and the holding in *Fort Halifax* [*Packing C. v. Coyne*, 482 U.S. 1 (1987)], arguing that *Sandstrom* "is not relevant because that case did not involve a government mandate." DOL Br. 25-26. *Golden Gate* actually quoted *Sandstrom* for the proposition that *Donovan* may not be "compatible with more recent decisions of the Supreme Court" as to "whether an informal policy or arrangement is a 'plan'." 546 F.3d at 652. And *Donovan* itself did not involve a government mandate. *See Donovan*, 688 F.2d at 1370.

4. HJTA and DOL repeatedly misstate the program requirements in an attempt to make it appear that CalSavers imposes discretionary duties on employers.

Unable to distinguish or marginalize *Golden Gate*, HJTA and DOL make a number of false and misleading statements about the program requirements in an attempt to make it look like employers are required to exercise significant discretion. Contrary to HJTA's claims, employers are not required to "determine proper deductions through ongoing administration," or to "automatically debit their employees' contribution and escalate their contributions." HJTA at 38, 53. Employers simply deduct and forward to CalSavers the regular contribution for each employee based on the employee's applicable contribution rate, which is communicated to employers via the CalSavers website. Cal. Code Regs. tit. 10, § 10003(c). Employers have no authority to determine a "proper" contribution level, or to "escalate" any employee's contributions. The default contribution rate of 5%, including annual increases in the default rate up to a maximum of 8%, are set by regulation; otherwise, contribution rates are determined by each participating employee. Cal. Code Regs. tit. 10, § 10005(a). And CalSavers informs the employer of the percentage rate for each participating employee; the employer merely implements those instructions. *Id*. § 10003(c).

Also untrue are HJTA's claims that "the employer is managing the employee's money," and that "the employee exercises no control over where the funds will be invested." HJTA Br. 21; *see id.* at 26. Far from "managing" anyone's money, employers are expressly prohibited from "[e]xercising any authority, control, or responsibility" over the CalSavers program beyond, as described above, providing basic information about eligible employees to CalSavers and remitting each participating employee's contributions to CalSavers. Cal. Code Regs. tit. 10, § 10003(d)(4). And, while the regulations provide for default investment options, participating employees are free to direct the program administrator to make alternative investment elections for "any portion of their existing balance or future contributions." *Id.* § 10005(a)(4), (b)(5).

HJTA's assertion, echoed by DOL, that "employers must constantly determine eligibility for themselves and their employees," and must "comply with an on-going administrative scheme with regular open enrollment periods," HJTA Br. 37, *see id.* at 40, is likewise incorrect. As explained, all employees over the age of 18 are eligible, *see* Cal. Code Regs. tit. 10, § 10000(*l*), so the employer's only responsibility with respect to employee eligibility is to ascertain whether any employee is a minor and keep track of when the employee will turn 18.

An employer's own eligibility will only change if the average number of its employees falls below five for any given calendar year, which requires at most a single calculation at the end of the year,[15] or if the employer decides to establish or contribute to a tax-advantaged retirement plan. Cal. Code Regs. tit. 10, §§ 10000(q), 10001(a)-(b). And, contrary to HJTA's contention, there is no open enrollment period; eligible employees may opt in or out of the program at any time. *Id*. § 10004(d), (e).[16]

[15] There is no complexity to adding four figures (the number of employees for each quarter), dividing by four, and ascertaining whether the result is a number less than five. Indeed, it is hard to imagine that an employer falling under the five-employee threshold would even need to consult their quarterly reports to make that determination. Nor is there any realistic chance that anyone would claim that an employer had somehow "established" an ERISA plan if it failed to notify CalSavers of its newly exempt status on New Year's Day, especially since a newly-exempt employer has 30 days to notify CalSavers of its change in status. *Compare* HJTA Br. 48 *with* Cal. Code Regs. tit. 10, 10001(a), (b).

[16] HJTA also incorrectly asserts that "the employer—by mandate—hands the [Employee Information Packet] to their employees themselves." HJTA Br. 53. While employers have access to the packets, Cal. Gov't Code § 100014(g), CalSavers provides these materials directly to eligible employees, Cal. Code Regs. tit. 10, § 100014(a). The employer also does not "enroll their employees" in the Program. HJTA Br. 27, 53. CalSavers "executes the enrollment," the employer merely provides CalSavers with employee contact information. Cal. Code Regs. tit. 10, §§ 10003(a), 10004(b).

HJTA also falsely claims that "employers are mandated to endorse CalSavers," and that "employer involvement is high under CalSavers" due in part to "the employer's forced endorsement," HJTA Br. 55-56; *see id.* at 7. In fact, employers are expressly prohibited from "endors[ing] . . . employee participation in the program." Cal. Code Regs. tit. 10, § 10003(d)(1).

Finally, HJTA falsely claims that the Act somehow "forc[es] employers who don't yet have an ERISA plan to offer a lesser State plan." HJTA Br. 30. Employers are free *at any time* to offer an ERISA plan or other tax-advantaged retirement plan, and doing so renders them "exempt employers" with no obligations under the Act. *See* Cal. Gov't Code §§ 100000(d)(1), (3); Cal. Code Regs. tit. 10, §§ 10000(d)(1), (3), (m), (q). An eligible employer under CalSavers ceases to be eligible "upon its adoption of, or participation in," a tax-qualified retirement program, and simply notifies CalSavers of its change in status. Cal. Code Regs. tit. 10, § 10001(b), (c). And no employer "offers" CalSavers if it elects not to adopt a qualified retirement program. It simply becomes subject to its mandates.

5. The fact that CalSavers is state-mandated, but covers private-sector employees, does not mean it is ERISA-preempted.

DOL argues incorrectly that CalSavers is preempted because CalSavers is a governmental plan, but does not fit within the express exemption from

ERISA's requirements for governmental plans. DOL Amicus Br. 21-23 (citing 29 U.S.C. § 1003(b)). Contrary to its contentions, the fact that CalSavers is a retirement savings vehicle for private, not State, workers is irrelevant, because neither CalSavers nor the State is acting in its capacity as an employer here, and CalSavers is not claiming the governmental plan exemption under ERISA. In fact, CalSavers regulations provide that the "federal government, the state, any county, any municipal corporation, or any of the state's units or instrumentalities" are exempt employers under the Act. Cal. Code Regs. tit. 10, § 10000(q).

Title I of ERISA generally applies to employee benefit plans established or maintained by employers. Because the federal, state and local governments are employers, absent an express exemption from ERISA's requirements, any employee benefit plans they provide for *their employees* would be ERISA plans. Section 10003(b)(1) addresses that circumstance and provides an exemption to the State and other government actors when they are acting *as employers.* But no exemption is necessary for programs, like CalSavers, that are neither established nor maintained by an employer for the benefit of its *own* employees.

Thus, the authorities on which DOL purports to rely are inapposite. Each involved the question, irrelevant here, of whether the plan at issue retained its status as a government plan under section 10003(b), even though it covered both government and non-government employees and employees. *See* DOL Advisory Opinion 2012-01A (Apr. 27, 2012) (opining that a Connecticut group health plan would not retain status as a government plan if it included a substantial level of private sector participation); *Ally v. Resolution Trust Corp.*, 984 F.2d 1201, 1206 (D.C. Cir. 1993) (holding that in its employment relationships, quasi-government agency functioned like a private enterprise and therefore its severance and retention plans were not government plans exempt from ERISA); *Navlet v. Port of Seattle*, 164 Wash. 2d 818, 229 (2008) (holding that employee benefit plan for Port employees did not lose status as a government plan simply because single non-governmental employee was a participant); *Hall v. Maine Mun. Employees Health Trust*, 93 F. Supp. 2d 73, 81-82 (D. Me. 2000) (holding that plans of individual municipal employers were government plans).

The fact that a program is mandated under state law will not by itself render the program exempt from preemption under ERISA. *See* HJTA Br. 32-7; DOL Amicus Br. 10-14. There is no dispute about that. But in order for any program, including one created by state law, to give rise to an ERISA plan, it must be a plan established or maintained by an employer for its employees, and the employer must exercise more than a modicum of discretion. *Golden Gate*, 546 F.3d at 650; *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d at 1317. Here, neither of those things is true. CalSavers is not an employee benefit plan sponsored by an employer for its employees, it is a program created and run by the State in its capacity as regulator, not as an employer, and, as discussed above, the actual employers of CalSavers participants exercise no discretion.[17]

B. CalSavers Does Not Create an ERISA Plan Because Neither the State Nor the Trust Is An "Employer" Under ERISA.

In a further attempt to bolster its "reference to" preemption theory, HJTA, but not DOL, argues that the State or the CalSavers Trust is an "employer" within the meaning of 28 U.S.C. § 1002(5). *See* HJTA Br. 32-

[17] In support of its claim that CalSavers establishes separate ERISA plans for each eligible employer, HJTA (but, notably, not DOL) also relies on DOL ERISA Advisory Opinion 2012-04A (May 12, 2012). *See* HJTA Br. 42-43. (Only the odd numbered pages of the opinion are included in the excerpts of record; a complete copy is attached as Exhibit 4 to Appellees' Request for Judicial Notice.) That Opinion does nothing to support HJTA's position.

The opinion request asked whether DOL would consider a program set up to provide benefits to employees of more than 500 unrelated employers to be a multiple-employer plan under ERISA. In that case, *the plan was intended to be a single ERISA plan, it was not structured as an IRA program exempt from ERISA*. *Id.* at 1, 3. The only issue was whether the arrangement established one ERISA-governed plan or many ERISA plans. In short, that opinion is completely irrelevant.

27. Under that provision, an "employer" means any person "acting directly as an employer, or indirectly in the interest of an employer," including a "group or association of employers acting for an employer in such capacity." The argument fails because the State/Trust are not acting in the interests of employers, directly or indirectly. CalSavers is intended to benefit employees, not their employers.

Kanne v. Conn. Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), on which HJTA relies, does not support HJTA's argument. It involved an association of construction industry employers that formed a trust for the purpose of administering a group health insurance plan for employees of the member employers. The court held the association could constitute a "group or association of employers acting for an employer in such capacity," within the meaning of the last phrase of the statutory definition. *Id*. at 493. There is no such unity of interest between the CalSavers Board and employers. Indeed, much of HJTA's brief is devoted to arguing—incorrectly—that CalSavers is contrary to the interests of employers and is coercive. *See* HJTA Br. 37-40, 43-4.

Courts that have considered the language "acting … indirectly in the interest of an employer" have inquired whether an agency relationship exists between the employer and the person purportedly acting "in the interest of an employer," and have concluded "that a person or corporation cannot possibly act in the interest of employers when such employers have no voice in the management or operation of the plan because no basis for an agency relationship exists." *MDPhysicians & Associates, Inc. v. Wrotenbery*, 762 F. Supp. 695, 698 (N.D. Tex. 1991). And, "many cases have required some cohesive bond between the employers, other than their common participation in the disputed plan, to help ensure that the plan administration is acting in the best interest of the employers." *Atl. Health Care Benefits Trust v. Foster*, 809 F. Supp. 365, 373 (M.D. Pa. 1992), *aff'd*, 6 F.3d 778 (3rd Cir. 1993).

Under these principles, the CalSavers Board/Trust cannot be held to be acting in the interests of employers, directly or indirectly. Employers subject to CalSavers have no say whatsoever in the program's management. CalSavers is not carrying out the will or acting in the interest of any employers that are subject to its provisions, and employer participation is mandatory. And, just as in *Golden Gate*, California employers that become subject to CalSavers have made "no promises whatsoever to [their] employees." *Id*. at 15. Thus, the CalSavers Board/Trust is not "acting in the interest of employers."

HJTA's subsidiary arguments on this point are also meritless. The fact that a trust is an entity that has the *legal capacity* to be an employer under ERISA, *see* HJTA Br. 35, is irrelevant where, as here, the CalSavers Trust is not acting as an employer with respect to its employees, or in the interest of, any employer. HJTA's argument that employers who do not offer an ERISA or other retirement plan somehow "choose" CalSavers, and from that it must be inferred that the State/Trust is acting on their behalf, is contradicted by the plain language of the statute. Participation for covered employers is mandatory, not a matter of choice (as HJTA emphasizes at several other points in its brief, *see, e.g.,* HJTA Br. 12, 14-15, 18, 20-22, 28-30, 35, 38, 40-41, 45-46, 51, 53).

Likewise, HJTA's citations to legislative history describing some of the advantages of CalSavers for small employers, HJTA Br. 36, are irrelevant here, because there is no claim that the statute is ambiguous. *See id.* at 35-37. Even if legislative history were potentially relevant, the promotional videos referenced by HJTA would have no interpretive force because the material was not available to the Legislature when it was considering the statute. *See Noori v. Countrywide Payroll & HR Solutions, Inc.*, 43 Cal. App. 5th 957, 969 n.11, 257 Cal. Rptr. 3d 102 (Cal. Ct. App. 2019); *Cal.*

Bldg. Indus. Ass'n v. State Water Resources Control Bd., 4 Cal. 5th 1032, 1042-43, 232 Cal. Rptr. 3d 64 (Cal. 2018).

Nor is it correct that "the purpose of CalSavers is to step into the shoes of employers with respect to workplace retirement plans." HJTA Br. 37. On the contrary, CalSavers is careful to preserve and leave undisturbed employer-sponsored retirement plans. *See, e.g.,* J. Mark Iwry, *Observations on Coverage, CalSavers, and ERISA Preemption*, 33 Benefits L.J., No. 3, 6, 10 (Autumn 2020) (hereafter "Iwry"). It is merely intended to provide a payroll deduction IRA alternative for the millions of California employees who are not eligible to participate in a tax-qualified employer plan because their employers, like HJTA, do not offer one. *Id.*[18]

Finally, HJTA's reliance on *Giardiello v. Balboa Insurance Co.*, 837 F.2d 1566 (11th Cir. 1988), and *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849 (9th Cir. 1994) ("*Tri Capital*"), is utterly misplaced. In *Giardiello*, the court held that a surety company was *not* acting "indirectly in the interest of an employer, in relation to an employee

[18] It is telling that, although CalSavers potentially affects thousands of employers, the only challenge to the program has been brought by a single employer that has only a handful of employees and will not need to even register under CalSavers until June 30, 2022, and only then if it has five or more employees on that date.

benefit plan when its purpose was to protect those the employer might harm." 837 F.2d at 1569. Here, CalSavers' clear intent is to benefit employees, not employers. *Tri Capital Corp.*, 25 F.3d 849, cited at page 37 of HJTA's Br., is even less helpful to HJTA, since it was overruled in *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electrical Co.*, 247 F.3d 920, 928-29 (9th Cir. 2001), which emphasized that *Tri Capital Corp* had been decided "before the Supreme Court changed the focus of ERISA preemption in [*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995)]."

C. The DOL 1975 Safe Harbor Applies

Because the CalSavers program is not established or maintained by an employer, it is not an ERISA plan. But even if the Court were to determine that CalSavers is established or maintained by covered employers, it would not be an ERISA-governed "employee benefit plan," since it satisfies the requirements of the 1975 Safe Harbor exempting payroll deduction IRA's from ERISA's reach.

DOL implemented the safe harbor, 29 C.F.R. section 2510.3-2(d), as part of a regulation intended to "clarif[y] the limits of the defined terms 'employee pension benefit plan' and 'pension plan' for purposes of Title I of the Act ... by identifying specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 1003-04 (9th Cir. 2010).

The 1975 Safe Harbor regulation provides that IRAs offered by employers do not constitute ERISA employee benefits plans if four conditions are met: (1) the employer makes no contributions to the accounts; (2) employee participation is "completely voluntary"; (3) the employer does not endorse the program and its only involvement is "to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor"; and (4) the compensation the employer receives is limited to "reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs." 29 C.F.R. § 2510.3-2(d).

The DOL expanded upon this safe harbor regulation in 1999 by issuing Interpretive Bulletin 99-1, which was "intended to clarify the application of the IRA safe harbor set forth at 29 CFR 2510.3-2(d) and, thereby, facilitate the establishment of payroll deduction IRAs." Pursuant to that regulatory guidance, "certain IRAs which have little or no employer involvement, including no employer contributions, are excluded from the definition of 'employee pension benefit plan' and thereby completely excluded from ERISA coverage." *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200

F.3d 1223, 1230 (9th Cir. 2000). "[L]ittle or no employer involvement, including no employer contributions," accurately describes CalSavers.

In 2016, DOL issued a safe harbor specifically directed to state-sponsored plans like CalSavers. 81 Fed. Reg. 59,464 (Aug. 30, 2016) (codified at 29 C.F.R. pt. 2510). That regulation provides an express safe harbor for state-run programs, like CalSavers, that employ an auto-enrollment opt-out structure like those currently used in the majority of large 401(k) plans, and which also are permitted for 403(b) plans.[19] In 2017, that regulation was withdrawn by Congress and President Trump under the Congressional Review Act ("CRA").[20] However, Congress has not acted to

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[19] See William E. Gilson, AARP, *More Companies Automatically Enroll Workers in Retirement Plans*(2017), https://www.aarp.org/retirement/retirement-savings/info-2017/automatic-enrollment-retirement-fd.html [last visited Oct. 12, 2020] (hereafter "Gilson"); Alight Solutions, 2017 Trends & Experience in Defined Contribution Plans, Executive Summary 2, https://alight.com/research-insights/executive-summary-2017-trends-experience [last visited Oct. 12, 2020] (hereafter "Alight Solutions"); Malito, Alessandra, Your Employer is Putting More of Your Money in a 401(k) – That's a Good Thing, MARKET WATCH (Feb. 13, 2020, 9:20 a.m.), https://www.marketwatch.com/story/your-employer-is-putting-more-of-your-money-in-a-401k-thats-a-good-thing-2020-02-13 [last visited Oct. 12, 2020]; IRS Rev. Rul. 2000-35.

[20] The repeal of the 2016 Safe Harbor was part of a systematic effort to use the CRA to fast-track the repeal of regulations enacted toward the end of the administration of President Obama. Prior to 2017, the CRA had been

forbid state-sponsored retirement plans, nor has there been any revocation of the 1975 Safe Harbor or Interpretive Bulletin 99-1.

Although HJTA does not concede the issue, *see* HJTA Br. 55-56, the 1975 Safe Harbor's requirements of no employer contributions, no employer endorsement, and limited employer compensation are indisputably met. 29 C.F.R. § 2510.3-2(d). The Act and regulations prohibit employer contributions and employer endorsement, and do not provide for *any* employer compensation. Cal. Gov't Code § 100012(j), 100014(a), (c)(1), (2); Cal. Code Regs. tit. 10, §§ 10003(d), 10005(c)(1). That leaves only the

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used only once to repeal a regulation – in 2001 by Congress and President George W. Bush to repeal a DOL regulation relating to ergonomics. Pub.L. 107-5. Under President Trump, the CRA was used to repeal 16 Obama-era regulations, H.J. Res. 41, Pub.L. 115-4 (enacted Feb. 14, 2017); H.J. Res. 38, Pub.L. 115-5 (enacted Feb. 16, 2017); H.J. Res. 40, Pub.L. 115-8 (enacted Feb. 28, 2017); H.J. Res. 37, Pub.L. 115-11 (enacted Mar. 27, 2017); H.J. Res. 44, Pub.L. 115-12 (enacted Mar. 27, 2017); H.J. Res. 57, Pub.L. 115-13 (enacted Mar. 27, 2017); H.J. Res. 58, Pub.L. 115-14 (enacted Mar. 27, 2017); H.J. Res. 42, Pub.L. 115-17 (enacted Mar. 31, 2017); H.J. Res. 69, Pub.L. 115-20 (enacted Apr. 3, 2017); H.J. Res. 83, Pub.L. 115-21 (enacted Apr. 3, 2017); H.J. Res. 34, Pub.L. 115-22 (enacted Apr. 3, 2017); H.J. Res. 34, Pub.L. 115-22 (enacted Apr. 3, 2017); H.J. Res. 43, Pub.L. 115-23 (enacted Apr. 13, 2017); H.J. Res. 67, Pub.L. 115-24 (enacted Apr. 13, 2017); H.J. Res. 66, Pub.L. 115-35 (enacted May 17, 2017); H.J. Res. 111, Pub.L. 115-74 (enacted Nov. 1, 2017); H.J. Res. 57, Pub.L. 115-172 (enacted May 21, 2018).

issue whether CalSavers is "completely voluntary," and HJTA and DOL's contention that only an opt-in program can satisfy this requirement.

CalSavers and other state-run retirement programs use the automatic enrollment/opt-out approach because they make it easier for employees to choose to participate, resulting in higher participation. *See, e.g.,* Advisory Council Report of the Working Group on Increasing Pension Participation and Benefit (Nov. 13, 2001) (available at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2001-increasing-pension-coverage-participation-and-benefits#5) (recommending that DOL "promote the use of automatic enrollment /negative election plans . . . to increase both plan participation and retirement savings"); Iwry at 7-8. Automatic enrollment/opt-out programs, like CalSavers, are already being used for other retirement plans, such as 401(k) plans and 403(b) plans. *See* Rev. Rul. 2000-8, 2000-1 (C.B. 617); Rev. Rul. 2000-35, Rev. Rul. 2000-2 (C.B. 138); Gilson; Alight Solutions at 2. And there is no evidence that use of the opt-out structure makes participation less than completely voluntary. In fact, about one-third of eligible employees in California have opted out of the program, showing that the election procedures give employees actual, total and effective control over their decision whether or not to contribute. *See* Appellees' Request for Judicial Notice, Exh. 1.

HJTA and DOL claim, however, that while an automatic enrollment/opt-out program is *voluntary*, it is not *completely voluntary*, for which proposition they rely on the repealed 2016 safe harbor. Prior to DOL's proposal of the 2016 safe harbor, however, DOL never asserted that an automatic enrollment/opt-out program did not satisfy the "completely voluntary" provision of the 1975 Safe Harbor. The only mention of this factor in the 1999 Interpretive Bulletin is as follows:

> The Department has specifically stated, in its Advisory Opinions, that *an employer may demonstrate its neutrality* with respect to an IRA sponsor in a variety of ways, including (but not limited to) *by ensuring that any materials distributed to employees in connection with an IRA payroll deduction program clearly and prominently state, in language reasonably calculated to be understood by the average employee, that the IRA payroll deduction program is completely voluntary*. . . .

Interpretive Bulletin 99-1 n.2. The CalSavers website page for employees as well as the employee information packet, plainly complies with the 1999 Interpretive Bulletin, stating: "*Your participation is completely voluntary: you can opt out or back in at any time*." https://saver.CalSavers.com/home/savers.html (emphasis added), Appellees' Request for Judicial Notice, Exh. 2.

Other relevant DOL guidance issued prior to the adoption of the 2016 safe harbor provides further support for a finding that participation in CalSavers is "completely voluntary." DOL's Field Assistance Bulletin No. 2006-2 (Oct. 27, 2006) opined that the "completely voluntary" requirement for an analogous safe harbor for group insurance programs, 29 C.F.R. § 2510.3-1(j),[21] was satisfied when an employer unilaterally opened a health savings account (HSA) for an employee with employer funds, because the employee retained sole control over expending or otherwise withdrawing the funds. *Id*. (available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2006-02). Here, too, employees retain exclusive control over their CalSavers accounts, including the ability to withdraw funds from the account.[22]

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[21] This safe harbor contains essentially the same four factors present in the 1975 Safe Harbor, including that "[p]articipation in the program is completely voluntary for employees or members." 29 C.F.R. § 2510.3-1(j)(2).

[22] HJTA mistakenly cites two DOL advisory opinions for the proposition that "automatic enrollment, payroll debiting, escalation, and opt-out features are unacceptable." HJTA Br. 54 (citing DOL Advisory Opinion 84-25A (June 18, 1984), and DOL Advisory Opinion 82-67A (Dec. 21, 1984)). Neither opinion even discusses either the "completely voluntary" prong of the safe harbor or IRA programs with automatic enrollment/opt-out features.

Moreover, courts that have considered the "voluntariness" prong of 29 C.F.R. section 2510.3-1(j) or section 2510.3-2(d) have held its purpose "is to identify programs sponsored by the employer and meant to be a benefit of employment." *Ames v. Jefferson Pilot Fin. Co.*, 515 F. Supp. 2d 1050, 1055-56 (D. Ariz. 2007) (emphasis added) (quoting *Meadows v. Employers Health Ins.*, 826 F. Supp. 1225, 1229 (D. Ariz. 1993)); *see also Scott v. Assurant Employee Benefits*, No. 04-2714 M1/V, 2005 WL 2436819, at *6 (W.D. Tenn. Sept. 30, 2005). This, too, suggests that CalSavers is "completely voluntary," because CalSavers is not intended by the employers to provide an employee benefit. The court in *Ames* held that employee participation in a benefit plan was "completely voluntary" within the meaning of the safe harbor, even though the plan had a minimum participation level imposed by the insurance provider, concluding that the minimum participation requirement "does not suggest [the employer's] intent to offer the Plan as a benefit of employment."[23] Here, the automatic-

[23] In contrast, in *Meadows*, the employer agreed with an insurance carrier that 100% of eligible employees would be covered by the group life and AD&D insurance and 75% of all eligible employees would be covered by the group medical insurance being offered. In holding that the plan was not completely voluntary, the court concluded that "[i]f the benefit was

enrollment/opt-out feature of the CalSavers program is a requirement imposed by the State, not the employer, and does not suggest any employer's intent to provide "a benefit of employment." *Ames*, 515 F. Supp. 2d at 1055-56.[24]

Nor have either HJTA or DOL posited any policy reason why an opt-out structure should fail the "completely voluntary" prong while an opt-in

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meant to be an option for employees there would be no participation requirement of 75% or 100%." *Meadows*, 826 F. Supp. at 1229.

[24] CalSavers is not aware of any case holding that an auto-enrollment/opt-out program fails the "completely voluntary" requirement of either the 1975 Safe Harbor or the analogous safe harbor for group insurance, 29 C.F.R. section 2510.3-1(j). The only cases that have addressed the "completely voluntary" requirement—and there are very few—have addressed fact situations that bear no resemblance to the CalSavers program and do not purport to draw a distinction between "voluntary" and "completely voluntary." *See 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, but disagreed whether other requirements of the safe harbor were met). And the only cases that mention automatic enrollment do not indicate that employees had the right to opt-out—a critical distinction. In *Carter v. Guardian Life Ins. Co. of Am.*, Civ. No. 11-3-ART, 2011 WL 1884625, at *1 (E.D. Ky. 2011), there was no suggestion that employees could opt-out of the program and, in any event, the employer endorsed the plan and paid the premiums, taking the program plainly outside the protections of the safe harbor. Similarly, in *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489, 492-93 (9th Cir. 1988), the Court noted that it was ambiguous whether participation was "voluntary or automatic," but held that the safe harbor did not apply because it was clear that the sponsoring employer group endorsed the plan.

structure should not. As noted, their sole support for their argument that an opt-out program fails the 1975 Safe Harbor is precatory language in the 2016 safe harbor, which was adopted four decades after the 1975 Safe Harbor, and which Congress repealed in its entirety, thus wiping out the precatory language on which they rely. HJTA claims that ignoring the statements contained in the repealed regulation "would insult the extensive work of the DOL," but this is illogical. The 2016 safe harbor was issued to make clear DOL's fundamental conclusion that state-run automatic deduction opt-out IRA plans *should not* be subject to ERISA preemption, and that treating them as exempt from ERISA *did not* raise concerns for DOL. And, of critical importance, DOL did not conclude that state-run programs like CalSavers would be preempted by ERISA absent the 2016 safe harbor; it explained that "the objective of the safe harbor is to *reduce the risk* of [automatic enrollment / opt-out] state programs being preempted if they were ever challenged." 80 Fed. Reg. 72006-01, 72006, 2015 WL 7253624 (Nov. 18, 2015) (emphasis added). Relying on precatory comments in the repealed regulation while ignoring DOL's overarching conclusion that state-run automatic enrollment retirement savings programs should be exempt from ERISA makes no sense.

The very issuance of the 2016 safe harbor reflected DOL's considered judgment that state-run automatic enrollment/opt-out programs do not cause harm to employees or any other harm ERISA was intended to prevent. While the disapproval of the 2016 safe harbor deprives the State of the *additional protection* that it specifically directed to state-run plans, that is all; no other inference should be drawn from the disapproval.[25]

[25] HJTA also argues that CalSavers fails the safe harbor "because it does not abide by IRC § 408(a)," because CalSavers purportedly does not comply with the "exclusive benefit" rule of section 408 (a), and "CalSavers has not shown itself to have a qualifying trustee" (i.e., a bank or "DOL-approved [sic] non-bank trustee). HJTA Br. 56. This argument assumes that it is not enough that the Act provides that the program must establish IRA plans as required by 26 U.S.C. § 408(a), Cal. Gov't Code §§ 100000(e), 100008, 100043, 100049, but that CalSavers must independently prove that the IRAs that have in fact been established comply with the statutory requirement for IRAs that they be established for the exclusive benefit of the account holders, and that the trustee for the program be a bank or other Department of Treasury-approved trustee (not DOL-approved as stated by HJTA). The Act is not susceptible to an interpretation that it allows a program that does not provide for establishment of individual IRA accounts for the exclusive benefit of the account holders, or that it would allow CalSavers to avoid Department of Treasury requirements for the program trustee *See* 26 U.S.C. § 408. (Ascensus Trust Company is the trustee for the program. *See* https://www.treasurer.ca.gov/calsavers/implementation.pdf.) This charge, which is emblematic of HJTA's blunderbuss attack on the Act, is even more bizarre when one considers that this lawsuit was filed before the Program was launched, before a trustee for the program was retained, and before any regulations for the program had been adopted.

IV. CALSAVERS DOES NOT OTHERWISE IMPROPERLY REFERENCE ERISA PLANS.

While DOL limits its "reference to" preemption theory to the argument that CalSavers creates an ERISA plan, HJTA suggests that even if CalSavers does not create an ERISA plan, the program improperly references ERISA because "[i]n 1974, Congress occupied the field of private employee retirement savings plans with ERISA." HJTA Br. 23.

This sweeping theory is unsupported by the case law. Indeed, HTJA appears to be unfamiliar with well-settled law that ERISA does not apply to the typical IRA. *See* HJTA Br. 26 (arguing, incorrectly, that "[b]y enacting a program that creates and invests in IRAs, the State has established an ERISA plan"). As this Court has made clear, "IRAs are specifically excluded from ERISA's coverage." *Charles Schwab & Co. v. Debickero*, 593 F.3d 916, 919 (9th Cir. 2010). "There is nothing in the Congressional Record or in the language of the legislation dealing with ERISA, to indicate that ERISA was designed to include IRAs within the definition of 'employee benefit program or a plan.'" *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 522 B.R. 41, 58 (Bankr. S.D.N.Y. 2014).

HJTA is similarly mistaken when it proclaims, without citation to authority, that 29 CFR section 2510.3-2(d) "is *the* rule on which IRAs will not constitute ERISA plans." HJTA Br. 44 (emphasis in original). The safe harbor provision has no relevance at all to IRAs set up by individuals directly with financial institutions. The employer is a complete stranger to that transaction, and there is no question as to whether the employer has a hand in establishing or maintaining the arrangement. In the CalSavers context, too, the employer has no say in the process. Likewise, the provision in DOL's Interpretive Bulletin 99-1 giving employers choice with respect to IRA sponsors for IRAs that employers offer to their employees has no application where employers have declined to offer an IRA program to their employees, *see* 29 C.F.R. § 25099.99-1(d), just as it would be inapplicable to an individual IRA an employee may set up at a financial institution.

HJTA's contention that through CalSavers "California has set itself up as an alternative adjudicator of ERISA compliance" is even more fanciful. HJTA Br. 28. HJTA hypothesizes that an employer will have to "prove the existence of an ERISA-covered plan" to "defend against an accusation of noncompliance" with the Act. HJTA Br. at 28. This fails because employers that already have ERISA or other tax-advantaged retirement plans *are not required to do anything*. *See* Cal. Code Regs. tit. 10, §§ 10000(q), 10002(d) (providing that employers that maintain or contribute to a tax-qualified retirement plan are exempt employers prohibited from participating in CalSavers); *id*. § 10001(d) (providing that "Exempt Employers may, but need not, inform the Administrator of their exemption from the Program"). And any employer who has an ERISA-covered plan must comply with ERISA's reporting requirements, and therefore can readily "prove" the existence of the plan, in the unlikely event that it was required to do so.[26] Finally, since CalSavers does not impose any requirements on ERISA plans,

[26] In a recent decision now on appeal to this Court, *ERISA Industry Committee v. City of Seattle*, No. C18-1188 TSZ, 2020 WL 2307481 (W.D. Wash. May 5, 2020), appeal docketed, No. 20-35472 (9th Cir. May 29, 2020), the district court held that a city-mandated program that required hotel businesses to make health care expenditures on behalf of certain employees, which could be satisfied through additional compensation to employees or payments to certain third-party programs, including ERISA plans, was not preempted by ERISA. The court held that *Golden Gate* was controlling precedent. Similarly, in *California Hotels & Lodging Ass'n v. City of Oakland*, 393 F. Supp. 3d 817 (N.D. Cal. 2019), the district court followed *Golden Gate* in holding that an ordinance that effectively required employers to choose between 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.

it does not interfere with the "national uniformity objective of ERISA." *See* HJTA Br. 29.[27]

In sum, "[t]o 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)). Like the ordinance in *Golden Gate*, the 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. As was the case in *Golden Gate*, "employers need not

[27] DOL argues that under the CalSavers regulations, employers who offers IRAs that somehow fail to satisfy the 1975 Safe Harbor would not be exempt from CalSavers, and therefore the CalSavers Act requires such employers to participate in CalSavers even though they offer an ERISA plan. DOL Br. 26 n. 2. This same argument was rejected in *Golden Gate*, in which the court specifically recognized that some employers that offered ERISA plans would also be required to make payments under the ordinance: "The City-payment option allows employers to make payments directly to the City, if they so choose, without requiring them to establish, or to alter, existing ERISA plans." 546 F.3d at 646. Here, too, if an employer with an ERISA plan is not for any reason exempt under the Act, it can participate in CalSavers without altering its ERISA plan(s) in any way.

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.

V. CalSavers Is Not "Connected" With an ERISA Plan

The district court also correctly held that CalSavers does not have an impermissible connection with ERISA and should be affirmed on that point. ER015-16. The Act does not have an impermissible connection with ERISA because it neither interferes with ERISA's uniform regulatory scheme nor has a mandatory effect on any ERISA plan's administrative practices. *See Golden Gate*, 546 F.3d at 655-57.

One purpose of ERISA is to ensure that ERISA plan sponsors are subject to a single, "'uniform body of benefit laws.'" *Golden Gate*, 546 F.3d at 655 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). Thus, ERISA preempts state laws "'which prohibit employers from structuring their employee benefit plans in a particular manner.'" *Id*. (quoting *Shaw v. Delta Airlines*, 463 U.S. 85, 97-100 (1983). Here, as in *Golden Gate*, the Act does not have an impermissible connection with ERISA "because it does not require an employer to adopt an ERISA plan" or other retirement plan, and does not "require any employer to provide specific benefits through an existing ERISA plan" or other plan. *Id*. Nor does it require that an employer make any changes to, or take action with respect to, an ERISA plan.

Undeterred, HJTA next argues that a "connection" to ERISA is unnecessary, because CalSavers "conflicts with ERISA in multiple ways," and "[a]ny inherent conflict with ERISA suffices . . . ." HJTA Br. 43 (citation omitted). HJTA fails to identify any genuine conflict.

First, contrary to HJTA's repeated assertion, Congress did not intend to give employers complete "autonomy" to "select zero, one or more IRA payroll deduction providers." HJTA Br. 35; *see also, e.g., id.* at 21 ("CalSavers erases the employer autonomy established by existing ERISA regulation over IRA payroll deduction programs"); *id.* at 35 ("any employer must decide what to do (or not do) about retirement savings"). This claim, which permeates HJTA's brief, fundamentally misunderstands ERISA.

"In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Cal. Div. of Labor Standards v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 326-27 (1997) (quoting *Mass. v. Morash*, 490 U.S. 107, 115 (1989)). ERISA's "reporting, disclosure, and fiduciary duty requirements" were meant "to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Dillingham*, 519 U.S. at 327 (quoting *Morash*, 490 U.S. at 115); *Golden Gate*, 546 F.3d at 647. In other words, ERISA was enacted to protect employees from employers' broken promises.

Meanwhile, "from the perspective of employers, '[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans,'" thereby "eas[ing] the administrative burdens on employers and plan administrators, thereby reducing costs to employers." *Id*. (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004)). Congress also wanted to encourage employers to offer these plans by "creat[ing] a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516–17 (2010).

Although ERISA does not require employers to offer employee benefits, it was not intended, as HJTA repeatedly suggests, to give employers "autonomy" to deprive their employees of a simple and effective method of saving for retirement through payroll deductions. Nor, as modern ERISA jurisprudence recognizes, was it intended to categorically prevent state regulations on employee benefits where those regulations have no effect on ERISA plans. *Golden Gate* 546 F.3d at 655-57.

HJTA's related contention that CalSavers forces employers to "choose between an ERISA plan and CalSavers" is likewise meritless. HJTA Br. 44. Employers are exempt from CalSavers if they offer a tax qualified 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 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.

DOL's argument that CalSavers establishes a plan that is "equivalent" to an ERISA plan is equally meritless. DOL Amicus Br. 11, 13,4. As explained, 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 at 919. In fact, employers may voluntarily establish payroll deduction IRA programs without thereby establishing (or maintaining) ERISA-governed plans. *See* DOL Interpretive Bulletin 99-1, 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 plans.

HJTA's further argument that CalSavers discourages employers from establishing ERISA plans "because it offers an option that is supposedly cheaper," HJTA Br. 43, also fails as a matter of law. No case suggests such a law would present an impermissible "connection" to or conflict with ERISA.

HJTA's further argument that small employers are put at risk of incurring "ERISA liability" if their staff size fluctuates and dips below five employees is meritless, if not frivolous. HJTA Br. 46. When an employer drops below five employees it becomes exempt from CalSavers and is no longer eligible. Cal. Code Regs. tit. 10, § 10001(b), (c). But even if that were not the case, it still would not be establishing or maintaining an ERISA plan because it still would not be exercising more than a "minimum quantum of discretion." *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d at 1317.

Nor does CalSavers conflict with ERISA by "forc[ing] large multi-state employers to risk ERISA liability" because of differing pension benefit plan requirements in different states. *See* HJTA Br. 49-50. For a multi-state employer not maintaining any plan, compliance with the Act and any other state's auto-IRA laws would be no different or more burdensome than complying with multiple state withholding and unemployment tax rules.

DOL's "in connection with" preemption theory heavily relies on *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), a case decided prior to *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995). As this Court has explained, however, "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 Trust Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920, 929 (9th Cir. 2001).

DOL also cites *Gobeille v. Liberty Mutual Insurance Co*., 136 S. Ct. 936 (2016), but that case actually supports the argument that CalSavers is not preempted. The Vermont statute at issue there required ERISA plans to submit reports to the State that were in addition to and in conflict with ERISA reporting requirements, but the Supreme Court invalidated the law *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.[28] CalSavers does not require any reporting, or anything else, by any ERISA plan. ERISA is not concerned with uniformity of state laws like the CalSavers Act that do not apply to ERISA plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11.

VI. PLAINTIFFS LACK STANDING UNDER ERISA.

HJTA and the individual Plaintiffs all lack statutory standing to bring an action under ERISA. "A plaintiff must . . . satisfy the non-constitutional standing requirements of the statute under which he or she seeks to bring suit." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004). In the Ninth Circuit, "a dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction." *Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). Here, plaintiffs seek relief under section 502(a)(3), 29 U.S.C. § 1132(a)(3) (Complaint ¶ 19), which contains specific standing requirements:

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[28] 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).

> A civil action may be brought - *** (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

The terms "participant," "beneficiary" and "fiduciary" are all defined by ERISA, and each connotes a specific relationship of a person to an employee benefit plan under ERISA. In other words, if there is no ERISA plan in play here, plaintiffs cannot be either a "participant" or "fiduciary" with standing to pursue a claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Because CalSavers does not create an ERISA plan for the reasons discussed above, none of the Plaintiffs have the requisite statutory standing.[29]

CONCLUSION

The judgment of the district court should be affirmed.

[29] HJTA argues that it has associational standing as a taxpayer advocacy organization to assert its supplemental state law claim under California Code of Civil Procedure section 526(a), HJTA Br. 59-60, but it presents no argument that the district court erred in declining to exercise supplemental jurisdiction over that claim. *See* HJTA Br. 14-15. Moreover, that state-law claim is plainly barred by the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984).

Dated: October 13, 2020

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20-15591

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM; FIONA MA, California State Treasurer,

Defendants-Appellees.

STATEMENT OF RELATED CASES

ERISA Industry Committee v. City of Seattle, No. C18-1188 TSZ, 2020 WL 2307481 (W.D. Wash. May 5, 2020), *appeal docketed*, No. 20-35472 (9th Cir. May 29, 2020), also raises ERISA preemption in the context of a city-mandated program intended to benefit employees, in that case, an ordinance that effectively required hotel businesses to make health care expenditures on behalf of certain employees, which could be satisfied through additional compensation to the employee or payments to certain third-party programs providing health care benefits, including but not limited to ERISA plans.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 20-15591

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