No. 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.

THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS PROGRAM AND JOHN CHIANG, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE CALIFORNIA SECURE CHOICE RETIREMENT SAVINGS INVESTMENT BOARD,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of California
No. 2:18-cv-01584-MCE-KJN | Hon. Morrison C. England, Jr.

AMICUS BRIEF OF ASCENSUS, LLC IN SUPPORT OF APPELLEES AND REQUESTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Ascensus, LLC hereby certifies that it is jointly owned by Genstar Capital, Aquiline Capital Partners, and Atlas Merchant Capital, none of which have any parent corporation or have 10% or more of its stock owned by a publicly held corporation.

Dated: October 20, 2020

Respectfully submitted,

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

A key issue in this appeal is whether employers' administrative tasks under the CalSavers Retirement Savings Program ("CalSavers") give rise to "plans" under the Employee Retirement Income Security Act of 1974 ("ERISA"). That issue turns on whether those tasks "involve the application of more than a modicum of discretion." *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, 546 F.3d 639, 650 (9th Cir. 2008). As the program administrator for CalSavers and the nation's largest independent provider of recordkeeping administrative services for benefits plans, *amicus* Ascensus, LLC is well positioned to assist the Court in understanding the nature and scope of an employer's role under CalSavers. And given that Ascensus administers both ERISA plans and non-ERISA benefits programs, it is intimately familiar with the difference between the two.

Founded in 1980, Ascensus's coverage includes everything from traditional and Roth IRAs, to 401(k)s, to health and educational savings plans, to state-facilitated IRA savings programs like CalSavers. Ascensus supports over 115,000 retirement plans, six million 529 plans, one million IRAs, and 660,000 consumer-

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[1] Pursuant to Federal Rule of Appellate Procedure 29, all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

directed health plans, including HSAs. Ascensus has $327 billion in assets under administration, and more than 112 million Americans use Ascensus's services.

In 2018, after a competitive bidding process, the California Secure Choice Retirement Savings Investment Board selected Ascensus to administer CalSavers. That selection followed Oregon and Illinois picking Ascensus through competitive bidding to administer similar state-facilitated savings programs. Ascensus provides a variety of services in this role, including custom administration websites, educational materials, and question-and-answer support for employers and employees.

As of October 12, 2020, under Ascensus's operation, over 30,000 workers have established and funded IRAs under the CalSavers program with over $11.9 million total assets, and those figures are projected to increase significantly as the program is further implemented during the next 24 months.[2] (By comparison, under nearly identical programs in Oregon and Illinois, which were introduced earlier and are more mature, workers have combined to establish and fund nearly 150,000 accounts with $100.4 million in assets.[3] And four other states—Maryland, Connecticut, New Jersey, and Colorado—have enacted similar programs and are

[2] Over 134,000 workers have established accounts, which can be funded over time.

[3] Over 586,000 workers in Oregon and Illinois have established accounts.

preparing to implement them.) Ascensus anticipates that CalSavers will ultimately help several million California workers save toward a financially secure retirement.

The breadth of Ascensus's activities has given Ascensus substantial experience in understanding the retirement landscape and CalSavers' position in it. Given that experience, Ascensus strongly believes that CalSavers will play a critical role in helping millions of Californians save for the first time, while avoiding any interference with ERISA.

INTRODUCTION AND SUMMARY OF ARGUMENT

Recognizing the critical importance of retirement savings, California enacted the CalSavers Retirement Savings Trust Act (the "CalSavers Act") to help millions of California workers achieve their retirement goals. Employees decide how much to contribute (if any, and up to certain limits) from their paychecks to their IRAs. Employers are mere conduits—during their normal payroll procedures, they simply deduct the exact percentage of pay a participating employee chooses to contribute and pass it on to Ascensus, the IRA custodian for CalSavers, in a process that generally takes no more than 20 minutes each payroll cycle. Employers do not select or manage investments, give investment advice, or set eligibility standards or savings rates, or even provide anything but basic information about CalSavers. *See, e.g.*, Cal. Code Regs. tit. 10, § 10003(e) (providing that employers "shall not" provide employees "advice or direction" about any "employee decision about the

Program”). In other words, any actual judgment call is dictated by the CalSavers program or the employee, never the employer.

Howard Jarvis nonetheless contends that those mechanical actions constitute “plans” established and maintained by employers under ERISA and thus CalSavers is preempted. Howard Jarvis is wrong. As the district court recognized, Howard Jarvis’s position is directly at odds with binding Ninth Circuit and Supreme Court precedent. *See Howard Jarvis Taxpayers Ass’n v. Cal. Secure Choice Retirement Sav. Program*, 443 F. Supp. 3d 1152, 1160 (E.D. Cal. 2020). This Court has made clear that employers’ limited actions to remit payments that fund benefits in compliance with a government mandate constitute a “plan” only if the employers’ obligations involve “‘*enough* ongoing, particularized, administrative, discretionary analysis to make the plan an ongoing administrative scheme.’” *Golden Gate*, 546 F.3d at 651 (citation omitted); *see id.* at 650 (requiring “more than a modicum of discretion”). *Golden Gate* rejected a preemption argument involving an arrangement substantially similar to CalSavers, where “the employer’s administrative obligations involve[d] mechanical record-keeping, and the employer’s payments to the City ‘[were] typically fixed, due at known times, and [did] not depend on contingencies outside the employee’s control.’” *Id.* at 651. Employers’ “administrative obligations” under CalSavers are just as mechanical.

Howard Jarvis barely acknowledges the employer-discretion test, and while the Department of Labor discusses various employer obligations under CalSavers, it does not directly argue that any involve more than a modicum of discretion. That silence is telling. Howard Jarvis and the Department know that CalSavers does not allow employers "more than a modicum of discretion" (*Golden Gate*, 546 F.3d at 650), and their attempts to distinguish *Golden Gate* fall flat.

Indeed, CalSavers' payroll-deduction arrangements stand even further from constituting a plan than did the employer payments in *Golden Gate* because unlike in *Golden Gate*, there are no employer contributions here, only employee contributions. Yet employees in benefits programs involving employer contributions "face far different risks and have far greater need for" ERISA's protections. *Massachusetts v. Morash*, 490 U.S. 107, 114 (1989). It is accordingly even clearer here than in *Golden Gate* that the arrangements are not "plans."

Moreover, the absence of discretion shows that CalSavers does not impede ERISA's objectives, including the purpose of ERISA preemption. Because employers do not make any judgment calls in implementing CalSavers, there is no room for employers to mismanage or abuse employees' savings. And because employers' tasks are mechanical, they do not face the burden of conflicting administrative schemes for benefit plans. As Ascensus can attest, employers' tasks are easily wrapped into their usual payroll processes, requiring negligible

investments of time and energy. CalSavers therefore is not preempted, and the district court's judgment should be affirmed.

ARGUMENT

ERISA preempts "all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a)." 29 U.S.C. § 1144(a); *see Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). Section 1003(a) describes "any employee benefit plan if it is established or maintained . . . by any employer." 29 U.S.C. § 1003(a); *see* 29 U.S.C. § 1002(2), (3). Howard Jarvis, supported by the Department of Labor, argues that Section 1144(a) preempts CalSavers because employers' payroll-deduction arrangements mandated by CalSavers constitute "plans" that are "established or maintained" by California employers.

The district court correctly rejected that position. It is well settled in this Circuit that employers' obligations in providing benefits "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. As Ascensus knows from its wealth of experience administering a wide variety of ERISA and non-ERISA benefit programs, employers do not exercise any discretion in complying with the CalSavers program requirements. Employers thus do not establish or maintain any "plan," and Section 1144(a) does not apply.

I. EMPLOYERS' ADMINISTRATIVE ACTIONS DO NOT CONSTITUTE A "PLAN" UNDER ERISA UNLESS THEY REQUIRE EXERCISING MORE THAN A MODICUM OF DISCRETION

A. ERISA preempts state laws that relate to employee benefit *plans*, not simply any provision of employee benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7-8 (1987); *see* 29 U.S.C. § 1144(a). ERISA defines "plan" "only tautologically" (*Fort Halifax*, 482 U.S. at 8; *see Morash*, 490 U.S. at 114; 29 U.S.C. § 1002(3)), so this Court and the Supreme Court have developed minimum requirements for an arrangement to constitute a "plan." Summarizing the precedents, this Court explained that the dividing line rests on the amount of discretion an employer uses in administering the arrangement: "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. A "minimal quantum of discretion" thus does not "turn a [benefits] agreement into an ERISA plan." *Velarde v. PACE Membership Warehouse, Inc.*, 105 F.3d 1313, 1317 (9th Cir. 1997). Rather, the linchpin is whether the employer needs to perform "'*enough* ongoing, particularized, administrative discretionary analysis' to make the plan an 'ongoing administrative scheme.'" *Ibid.* (emphasis in original) (quoting *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992)).

This Court has evaluated a variety of arrangements under that standard. *Golden Gate* is particularly instructive given the similarities of the employers' tasks

there and under CalSavers. In that case, the City of San Francisco required employers to make healthcare expenditures on behalf of certain employees. 546 F.3d at 643. The amount of expenditures depended on multiple factors that employers had to evaluate for their employees, but none of them crossed the line of too much discretion. For instance, to determine whether an employee was covered by the ordinance, the employer had to determine whether each employee was "supervisorial" or "managerial" and thus excluded. *Id.* at 651. For covered employees, employers had to track hours worked and whether the employee worked in San Francisco or elsewhere. *Ibid.* And if the employer had an ERISA plan that met the required healthcare expenditure under the city's ordinance, the employer satisfied the law. *Id.* at 646-647.

The Court held that those determinations did not entail enough discretion to render the arrangements "plans." "[T]he 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 (quoting *Morash*, 490 U.S. at 115). To the extent that some of the obligations involved "potentially subjective judgments," they "amount[ed] to nothing more than the exercise of 'a modicum of discretion.'" *Ibid.*

Golden Gate built on other decisions that likewise illuminate the difference between a "plan" and a provision of benefits that does not implicate ERISA. For

instance, a severance package that depended on whether the employee was terminated for cause did not exceed the "minimal quantum of discretion sufficient to" become a "plan." *Velarde*, 105 F.3d at 1317; *see Delaye v. Agripac, Inc.*, 39 F.3d 235, 237-238 (9th Cir. 1994). Nor did an "arithmetical calculation to determine the amount of" benefits. *Velarde*, 105 F.3d at 1717; *see Morash*, 490 U.S. at 115 ("Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address."); *Delaye*, 39 F.3d at 238 ("simple arithmetical calculations and clerical determination do not require ongoing, particularized, administrative, discretionary analysis") (citing *James v. Fleet/Norstar Fin. Grp., Inc.*, 992 F.2d 463, 468 (2d Cir. 1993)). By contrast, where the benefits turned on whether the "employee's job was 'substantially equivalent'" to another job, the employer had to engage in too much ongoing, discretionary decision-making. *Bogue*, 976 F.2d at 1323.[4]

In sum, the dispositive question this Court must analyze is how much discretion, if any, employers retain in complying with the CalSavers Act.

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[4] These cases and ERISA's plain language show that Howard Jarvis's contention that *all* "automatic savings arrangement[s]" (Br. 25) are preempted is frivolous. Only an arrangement that rises to the level of a "plan" might fall within Section 1144(a).

B. Although Howard Jarvis and the Department of Labor do not make their positions clear, it appears they may believe that the factors in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (en banc), suffice to render an arrangement a "plan," regardless of whether employers' obligations are ministerial. *See* HJTA Br. 31-32, 38 (asking whether "'a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits'") (quoting *Donovan*, 688 F.2d at 1373); DOL Br. 8-10. Indeed, except for a footnote addressing a different issue (DOL Br. 12 n.1), the Department does not even write the word "discretion."

Their dependence on *Donovan* is obviously misplaced. Their positions are squarely foreclosed by the multiple decisions discussed above that require a minimum quantum of discretion for an arrangement to be a "plan." *Cf. Golden Gate*, 546 F.3d at 651-652; *Sandstrom v. Cultor Food Science, Inc.*, 214 F.3d 795, 797 (7th Cir. 2000) (Easterbrook, J.) (explaining that *Donovan* is likely not "compatible with more recent decisions of the Supreme Court, which emphasize different considerations when asking whether an informal policy or arrangement is a 'plan'"). Accordingly, to the extent that Howard Jarvis and the Department continue to press this position, it should be rejected out of hand as inconsistent with binding Supreme

Court and Circuit precedent. Rather, if the employer's discretion is sufficiently limited, then the arrangement cannot be a "plan."[5]

II. EMPLOYERS DO NOT EXERCISE DISCRETION IN FULFILLING THEIR OBLIGATIONS UNDER CALSAVERS

The payroll-deduction arrangements do not constitute "plans" under ERISA. As Ascensus has seen in practice, employers fulfill their obligations with little effort and without exercising any discretion. Moreover, complying with the CalSavers Act does not impede ERISA's goals of protecting retirement funds from employer abuse or providing a uniform administrative scheme for ERISA plans. ERISA therefore does not preempt CalSavers, and the district court's judgment should be affirmed.

A. Employers' CalSavers Actions Are Entirely Ministerial

1. Employers' actions under CalSavers do not come close to flunking *Golden Gate*'s employer-discretion test. Employers must complete a simple sign-up process and perform minimal ongoing administrative tasks.

a. To sign up with CalSavers, employers first register on a website with just three pieces of information: federal tax identification number, California payroll tax number, and an access code. Next, they can add a payroll representative or delegate

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[5] Even if "a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits" under CalSavers (*Donovan*, 688 F.2d at 1373), those elements are not provided by the employers but rather by the State. Employers thus still would not have "established" or "maintained" a plan.

to help facilitate CalSavers. Third, they upload their roster of eligible employees (*i.e.*, anyone over the age of 18). *See* Cal. Code Regs. tit. 10, § 10000(l). Employees—not employers—decide how to personalize their savings elections (including choosing their investments) or whether to opt out of participating altogether. Fourth, any employer that wants to send its employees' contributions via ACH debit registers its bank account.

Based on its experience assisting thousands of employers, Ascensus calculates that that entire sign-up process takes no more than 21-55 minutes depending on the size of the employer. And Howard Jarvis and the Department cannot identify any discretionary judgment call that an employer must make in executing those steps.

b. The ongoing obligations—deductions, deposit of employee contributions, and keeping track of employees' status and contributions elections—are no more demanding. During the employer's usual payroll process, the employer deducts a percentage of each participating employee's pay to submit to a CalSavers IRA for that employee. Again, the employer does not determine how much to deduct or whether to deduct; that discretion is lodged in the employee, and the instructions to implement the employee's choices are provided by CalSavers. The employer's only other obligation is implementing any changes that employees make to the deduction percentage, including removing employees from the payroll deductions as necessary. An employer need not actively monitor employees' choices, as it receives

e-mail notifications from CalSavers about changes that affect employees' contribution amounts. And carrying out these changes fits easily into employers' normal payroll processes.

Ascensus calculates that these ongoing obligations typically require 10-20 minutes each payroll cycle. And again, these tasks are entirely ministerial. Only the CalSavers Board and employees exercise any discretion.

2. As *Golden Gate* demonstrates, those actions fall well short of establishing or maintaining an ERISA "plan." Employers' tasks are mechanical; the CalSavers program and the employees retain all the discretion. All employers do is register for the program, set up and adjust payroll deductions chosen by their employees (including adding or removing employees), and submit employees' contributions to the CalSavers IRA custodian. None of those steps involves an ounce of discretion or requires a judgment call. *See Golden Gate*, 546 F.3d at 644 (no discretion in "multiplying the total number of hours paid for each of its covered employees during the quarter . . . by the applicable health care expenditure rate"). Employers simply do as the CalSavers Act mandates and their employees direct. Employers do not manage investments or pick savings rates; they are not even responsible for disseminating information or answering employees' questions about CalSavers. Just as in *Golden Gate*, a CalSavers employer conducts "mechanical record-keeping," and their "payments to the [State] 'are typically fixed, due at known times, and do

not depend on contingencies outside the employee's control.'" *Id.* at 651. Indeed, the classification of an employee as "managerial" or "supervisorial" in *Golden Gate* (*ibid.*) and the "for cause" determination in *Velarde* (105 F.3d at 1317) demanded far more discretion than any of the actions an employer must take to comply with the CalSavers program requirements.

This Court's bottom-line assessment of the San Francisco ordinance is thus equally true of CalSavers: "[A]n employer has no responsibility other than to make the required payments for covered employees, and to retain records to show that it has done so." *Golden Gate*, 546 F.3d at 650; *see* J. Mark Iwry, *Observations on Coverage, CalSavers, and ERISA Preemption*, 33 Benefits L.J., No. 3, at 10 (Autumn 2020) (explaining that under CalSavers an employer acts "as a conduit by offering its payroll system as a delivery mechanism for employees to save their own pay").

It is true enough that an employer is exempt from the CalSavers mandate if it provides a qualified retirement plan. But that fact does not put the employer to any kind of meaningful choice. The State has decided that employers *must* participate in CalSavers; the existence of an exemption to that mandate does not imbue the employer with impermissible discretion. Again, the ordinance in *Golden Gate* created even more discretion without triggering ERISA: "Employers may choose to make up the difference between their existing health care expenditures and the

minimum expenditures required by the Ordinance either by altering existing ERISA plans or by establishing new ERISA plans. However, they need not do so." 546 F.3d at 646. An employer under CalSavers, however, would never have to "alter[] [an] existing ERISA plan[]." *Ibid.* Moreover, that kind of baseline decision—essentially whether to provide benefits at all—inheres in *every* benefit arrangement. If the decision whether to provide benefits in some form sufficed to make an arrangement a "plan," then all provisions of benefits not specifically excluded would fall under ERISA. But as the Supreme Court and this Court have explained, that is not the law Congress wrote, which is why there are thousands of retirement programs that do not constitute ERISA "plans."

Depriving employers of discretion was thus by design. *See* Iwry, *supra*, at 9-11, 19-20. The California legislature deliberately crafted the CalSavers program to minimize employers' administrative burden. In short, employers have no discretion because the State acted carefully to preclude discretion. All employers have to do is assist in implementing the choices made by their employees. Employers "otherwise have no discretion regarding the funds," and thus the arrangements are not plans. *Howard Jarvis*, 443 F. Supp. 3d at 1160.

3. Howard Jarvis and the Department barely even attempt to impute any meaningful discretion to California employers. Howard Jarvis obliquely acknowledges the discretion test, but aside from *ipse dixit* assertions, does not

explain why any of the employer obligations require more than a modicum of discretion. *Cf., e.g.*, HJTA Br. 21. The Department of Labor identifies various actions employers must take (DOL Br. 17-19), though it conspicuously fails to call any of them "discretionary." *See ibid.* (never using that word). As that silence suggests, these obligations are not remotely discretionary, and the Department's brief reveals only how far it must stretch to try to dodge binding precedent.

Howard Jarvis and the Department instead largely resort to trying to distinguish *Golden Gate*. Their efforts fail. Howard Jarvis emphasizes that in *Golden Gate* the money submitted from the employer to the government "was not the employee's own money" (Br. 39), but does not explain what that has to do with the discretion test this Court employed in *Golden Gate* and earlier precedents.

What's more, the fact that, unlike the *Golden Gate* ordinance, the CalSavers program does not use employer contributions only *strengthens* the argument that the payroll-deduction arrangements are not ERISA "plans." *See, e.g.*, *Cal. Div. of Labor Standards v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 326-327 (1997). Arrangements involving employer contributions entail "far different risks" and thus present "far greater need for the reporting and disclosure requirements that" ERISA plans must satisfy. *Morash*, 490 U.S. at 120; *see id.* at 115; *Cal. Div. of Labor Standards*, 519 U.S. at 326-327. By contrast, even if CalSavers' payroll-deduction arrangements could somehow pose any risks to employees, those risks would be

"indistinguishable from 'the danger of defeated expectations of wages for services performed,' a hazard with which ERISA is unconcerned." *Cal. Div. of Labor Standards*, 519 U.S. at 327. Howard Jarvis's "distinction" of *Golden Gate* thus undermines its position.

The Department tries to distinguish *Golden Gate* by simply ignoring the part of that opinion that is directly on point. The Department notes that San Francisco's Health Access Plan "was a 'government entitlement program available . . . regardless of employment status,' funded primarily by taxpayer dollars." DOL Br. 24 (quoting *Golden Gate*, 546 F.3d at 653). But that discussion comes from the part of *Golden Gate* addressing whether the Health Access Plan itself was an ERISA plan. *See* 546 F.3d at 653 ("b. The HAP as an ERISA Plan"). The relevant part of *Golden Gate* for the issue before this Court is the discussion of whether employers' payment obligations gave rise to a "plan." The Department has no way to distinguish the Court's analysis and holding there. Because *Golden Gate* plainly supplies the controlling rubric, the absence of discretion under CalSavers forecloses Howard Jarvis's and the Department's challenges on this point.

To that end, employers' obligations in the cases the Department cites involved real judgment calls, not the ministerial obligations that the CalSavers Act imposes. *See Collins v. Ralston Purina Co.*, 147 F.3d 592, 596 (7th Cir. 1998) (whether the employee's "job responsibilities were 'substantially reduced,' which sets a standard,

but hardly an easily discernible one”); *Edwards v. Lockheed Martin Corp.*, 954 F. Supp. 2d 1141, 1149 (E.D. Wash. 2013) (employer could deny benefits “based upon the needs of the business”); *Ditchey v. Mechanics Bank*, No. 15-CV-04103-JSC, 2016 WL 730290, at *4 (N.D. Cal. Feb. 24, 2016) (whether the employee “has experienced ‘a material diminution in the scope of [her] responsibilities, duties or authority or any material change in [her] title, position or reporting relationship,’ or a material reduction in the executive’s base compensation, or a material breach by the Bank of the executive’s employment agreement”) (alterations in original); *Saad v. Boeing Co.*, No. CV 08-2984-JFW (SHX), 2009 WL 10671429, at *5 (C.D. Cal. Feb. 4, 2009) (“[T]he Plan Administrator, in its sole discretion, may deny benefits if it determines that the layoff occurred because of an ‘outsourcing of work.’”); *Stanley v. CNH Am. LLC*, No. CV 07-1290-PHX-ECV, 2007 WL 9724816, at *2 (D. Ariz. Nov. 1, 2007). (“whether the employee has been offered a ‘comparable position’”); *Greathouse v. Glidden Co.*, 40 S.W.3d 560, 566 n.3 (Tex. Ct. App. 2001) (describing eligibility determinations, including “unsatisfactory job performance”). Those decisions ultimately support CalSavers—they confirm that discretion is the key

question and that employers' actions under CalSavers do not resemble the types of tasks that cross that line.[6]

It is indeed telling that the Department does not actually describe the relevant determination in a single one of the cases it relies on. *See* DOL Br. 16-17. And in any event, none of those cases could overcome the binding panel precedent of *Golden Gate* and that line of Ninth Circuit authority. As Ascensus has observed in practice, employers comply with CalSavers without exercising any meaningful judgment calls. The payroll-deduction arrangements are not ERISA plans.

B. CalSavers Does Not Impose Obligations That Interfere With ERISA's Goals

That the ministerial arrangements circumscribed by the CalSavers Act do not constitute "plans" is underscored by two main reasons that Congress "legislate[d] with respect to *plans* rather than to benefits," namely, to prevent employer mismanagement and abuse of retirement plans and to establish a uniform regulatory

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[6] *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849, 853 (1st Cir. 1993), held that a "'for cause' determination, in particular, is likely to provoke controversy and call for judgments." *Cf. also Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 679-680 (8th Cir. 2004) (employer "had to determine whether a particular termination was with or without cause, and in some circumstances whether a change of control had occurred"). No employer action under CalSavers is comparable to a "for cause" determination, and regardless *Simas*'s holding cannot be squared with this Court's decision in *Velarde*.

scheme for ERISA plan administration. *Fort Halifax*, 482 U.S. at 8, 11, 15 (emphasis added); *see Golden Gate*, 546 F.3d at 647.

First, ERISA's fundamental goal is "to safeguard employees from the abuse and mismanagement of funds that had been accumulated to finance various types of employee benefits." *Morash*, 490 U.S. at 112. Accordingly, "ERISA is concerned with 'benefit plans,' rather than simply 'benefits,' because '[o]nly plans involve administrative activity potentially subject to employer abuse.'" *Golden Gate*, 546 F.3d at 649 (quoting *Fort Halifax*, 482 U.S. at 16). An employer has the opportunity to mismanage benefits only when it retains sufficient discretion over those benefits. *Id.* at 650-651.

An employer's CalSavers tasks do not implicate those concerns, which derive solely from the existence of an employer's discretion over the funds for employees' benefits. *See Golden Gate*, 546 F.3d at 651 ("It is within the exercise of that discretion that an employer has the opportunity to engage in the mismanagement of funds and other abuses with which Congress was concerned when it enacted ERISA."); *cf. Morash*, 490 U.S. at 115 ("If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed—a danger Congress chose not to regulate in ERISA."). Here, the employer deducts from an employee's pay and submits to CalSavers' IRA custodian exactly the amount dictated by the employee and by the statutes and regulations

governing CalSavers, no more and no less. And the employer has no involvement whatsoever with what is done with those contributions. This aspect of the situation is virtually identical to *Golden Gate*: "the employer's administrative obligations involve mechanical record-keeping, and the employer's payments to the [State] 'are typically fixed, due at known times, and do not depend on contingencies outside the employee's control.'" 546 F.3d at 651 (quoting *Morash*, 490 U.S. at 115). The only "choice" an employer could make is to provide benefits via a qualified plan in lieu of complying with the CalSavers mandate. *See supra* pp. 14-15. But that is hardly an alternative that risks endangering employees' retirement savings.

Second, while ERISA "afford[s] employers the advantages of a uniform set of administrative procedures," this uniformity "concern only arises . . . with respect to" plans, because "[o]nly a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation." *Fort Halifax*, 482 U.S. at 11-12. Again, *Golden Gate* eliminates any concern on this front regarding CalSavers. What this Court wrote about the San Francisco ordinance applies with full force to CalSavers' structure: "The Ordinance does not require any employer to adopt an ERISA plan or other health plan. Nor does it require any employer to provide specific benefits through an existing ERISA plan or other health plan. . . . The Ordinance thus preserves ERISA's 'uniform regulatory regime.'" 546 F.3d at 655-656. Even if CalSavers could "influence[]" an employer to adopt an

ERISA plan to avoid the CalSavers mandate, "such influence is entirely permissible." *Id.* at 656. And this case presents an even easier question than *Golden Gate* because employers do not themselves make contributions. *See supra* pp. 16-17. Employers' roles here thus "present none of the risks that ERISA is intended to address." *Morash*, 490 U.S. at 115. Again, employers simply identify and deduct a specified amount from their employees' payrolls.

Ascensus's experience reveals that in practice CalSavers does not subject employers to any problems with "patchwork" obligations. The simplicity in complying with CalSavers' limited mandates and the little time required to do so indicates that CalSavers does not "introduce considerable inefficiencies." *Fort Halifax*, 482 U.S. at 11. Moreover, companies that operate in multiple states have told Ascensus that implementing CalSavers has been easy, and Ascensus has seen no evidence of interference with the ERISA plans it administers. *Cf.* Iwry, *supra*, at 9 (explaining that CalSavers was "expressly designed to avoid interfering" with ERISA). Employers' ministerial tasks do not implicate ERISA's uniformity interests. The arrangements are not "plans."

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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October 20, 2020

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FOR THE NINTH CIRCUIT

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