**No. ________**

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In The

# Supreme Court of the United States

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

*Petitioners,*

v.

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

*Respondents.*

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

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Considering California's infamous record of mismanagement, corruption, and the cavernous underfunding of its *public* employee retirement systems, is California permitted under federal law (ERISA) to now require *private* employers to automatically debit employee paychecks and surrender those earnings to the State to manage as "retirement savings," despite the State expressly disclaiming any fiduciary accountability, and despite Congress having exercised its authority under the Congressional Review Act to veto a Department of Labor regulation that briefly carved out an ERISA Safe Harbor for such state-run automatic retirement savings plans?

## CORPORATE DISCLOSURE STATEMENT

The Howard Jarvis Taxpayers Association is a 501(c)(3) nonprofit public benefit corporation incorporated under the laws of the State of California. HJTA has no parent corporation, and no publicly held company owns more than 10% of its stock, as it has none.

## RELATED PROCEEDINGS

*Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program*, No. 20-15591, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 6, 2021.

*Howard Jarvis Taxpayers Ass'n v. Cal. Secure Choice Ret. Sav. Program*, No. 2:18-cv-01584-MCE-KJN, U.S. District Court for the Eastern District of California. Judgment entered March 10, 2020.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Howard Jarvis Taxpayers Association, Jonathan M. Coupal, and Debra A. Desrosiers, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS

The panel opinion of the Ninth Circuit Court of Appeals is published at 997 F.3d 848 and appears in the Appendix (App.) at pages 1-36. The Court of Appeals' Denial of the Petition for Rehearing *en banc* is published at 2021 U.S. App. LEXIS 17857 and appears in the Appendix at page 80. There are two district court decisions. The March 10, 2020, Memorandum and Order is published at 443 F.Supp.3d 1152 and appears in the Appendix at pages 37-55. The Order making this decision final appears in the Appendix at page 56. The unpublished March 29, 2019 Memorandum and Order appears in the Appendix at pages 57-79.

## JURISDICTION

The district court had jurisdiction over this case pursuant to clause 2 of Article VI of the United States Constitution, 28 U.S.C. § 133, 29 U.S.C. § 1132(e-d), and 28 U.S.C. § 1367. The district court entered judgment in favor of Defendants on March 10, 2020, dismissing the case. (App. 56.) Plaintiffs timely appealed.

On May 6, 2021, the Ninth Circuit Court of Appeals affirmed the dismissal. (App. 36.) Petitioners then sought rehearing *en banc*, which was denied on June 15, 2021. (App. 80.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court extended time for petitioning for certiorari by its Monday, July 19, 2021, Order.

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## STATUTES AND REGULATIONS

29 U.S.C. § 1002(2) (App. 81-83) defines an "employee pension benefit plan" as "any plan, fund, or program . . . 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" does one of two things: (1) provides retirement income to employees, or (2) results in a deferral of income until employee termination or beyond.

29 U.S.C. § 1002(2)(B) (App. 82) authorizes the Secretary of the Department of Labor to create exempt categories from pension plans via regulation.

29 U.S.C. § 1002(1) (App. 81) defines an "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent" it provides medical, surgical, hospital, accident, disability, death, unemployment, vacation, apprenticeship, training, daycare, scholarships, prepaid legal services or

other benefits "other than pensions on retirement or death, and insurance to provide such pensions."

29 U.S.C. § 1144(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

29 C.F.R. § 2510.3-2(d) ["Individual Retirement Accounts."] and 29 C.F.R. § 2509.99-1(d) ["Employer Limitations on the number of IRA sponsors offered under the program."] (App. 93-95) comprise the relevant Department of Labor regulation is known as the 1975 Safe Harbor.

29 C.F.R. § 2510.3-2 formerly included a subsection (h) known as the 2016 Safe Harbor. Subsection (h) was signed by Phyllis C. Borzi, Assistant Secretary to the Employee Benefits Security Administration, U.S. Department of Labor, on August 24, 2016. (App. 86-92.) It was titled "Certain State savings programs." Its text can be found at the conclusion of 81 Fed.Reg. 59464, containing the Department of Labor's final publication regarding "Savings Arrangements Established by States for Non-Governmental Employees."

California Senate Bill 1234 (2012), entitled "Retirement Savings Plans," was the bill that created "The California Secure Choice Retirement Savings Trust Act." The Act was codified and has been amended at length in California Government Code sections 100000-100050.

California Government Code section 100046 declared CalSavers implemented on January 1, 2017. (App. 99-101.)

Public Law 115-35, effective May 17, 2017, entitled "Joint Resolution: Disapproving the rule submitted by the Department of Labor relating to savings arrangements established by States for non-governmental employees," stated:

> Joint Resolution
>
> Disapproving the rule submitted by the Department of Labor relating to savings arrangements established by States for non-governmental employees.
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> That Congress disapproves the rule submitted by the Department of Labor relating to "Savings Arrangements Established by States for Non-Governmental Employees" (published at 81 Fed.Reg. 59464 (August 30, 2016)), and such rule shall have no force or effect.
>
> Speaker of the House of Representatives.
> Vice President of the United States and President of the Senate.

(App. 85.)

## STATEMENT OF THE CASE

This is a case of first impression. Howard Jarvis Taxpayers Association (HJTA), California's largest taxpayer advocacy group, brought this action to stop California from arrogantly proceeding with a state-run private retirement system that Congress disapproved when it vetoed the only Safe Harbor that would have allowed such programs.

The California Secure Choice Retirement Savings Trust Act, or "CalSavers" (Cal. Gov. Code, §§ 100000-100050) is an automatic retirement savings mandate, akin to the federal government's Social Security program. CalSavers took effect on January 1, 2017, and requires private employers of five or more employees to automatically deduct from employee paychecks a specified percentage of their earnings, and turn it over to the State.

Once in State hands, the employee's money will not have the security that Congress, through the Employee Retirement Income Security Act (ERISA) intended. It will not be segregated in a separate account for safekeeping but will be commingled with other funds. It will not be invested at the employee's direction, but will be subject to California's maze of divestment rules focusing more on political correctness than return on investment. And it will not be protected by any fiduciary duty or contractual liability, but will be at risk under a statute that expressly disclaims any responsibility for loss.

Employers too will be stripped of ERISA's protections. California has hundreds of thousands of small businesses whose staff fluctuates above and below five employees based on things like summer tourism, holiday shopping, and contractual demands. These employers will be thrown in and out of CalSavers' mandate, repeatedly exposing them to potential liability to the State and to their own employees. If individual states are allowed to intrude into this field of private retirement regulation that Congress expressly preempted through ERISA, then multi-state employers will face a labyrinth of different rules, contrary to the nationwide uniformity that ERISA was designed to guarantee.

HJTA submits that CalSavers is preempted by ERISA. HJTA filed this action in May 2018. In July, the State filed a Motion to Dismiss. After requesting supplemental briefs, the District Court on March 29, 2019, granted the State's motion, but with leave to amend. In April 2019, HJTA filed a First Amended Complaint. The State filed a second Motion to Dismiss in May.

On September 13, 2019, the United States entered the case by filing a Statement of Interest agreeing with HJTA that CalSavers is preempted by ERISA. Nonetheless, the District Court on March 10, 2020, granted the State's second Motion to Dismiss, this time without leave to amend.

HJTA noticed its appeal to the Ninth Circuit on April 1, 2020. The parties filed their briefs. The United States Department of Labor also filed an Amicus Brief,

again concurring with HJTA that CalSavers is preempted by ERISA.

The Ninth Circuit issued its Decision on May 6, 2021, and denied HJTA's Petition for Rehearing *en banc* on June 15, 2021. It is from that Decision that HJTA now petitions this Court for certiorari.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit called this case asserting ERISA preemption of CalSavers a "novel and important question in the law governing retirement benefits." (App. 4.) Indeed it is, as it implicates ERISA's core concerns for the security of private employee retirement savings and the uniformity of standards and rules governing private employers.

CalSavers must be reviewed for ERISA preemption because vested retirement funds are being automatically deducted from employee paychecks, yet the State disclaims all liability for the safety of those employee funds and has no base level of state funding to insure the security of employee funds.

California Government Code section 100036 provides, "The state shall not have any liability for the payment of the retirement savings benefit earned by program participants pursuant to this title. The state, and any of the funds of the state, shall have no obligation for payment of the benefits arising from this title." (App. 98.)

In its inaugural year, the newly formed CalSavers Board requested a $170 million loan from the State's General Fund. (Cal. Dept. of Finance, Budget Change Proposal 0984-001-BCP-2017-GB, Fiscal Year 2017-2018, p. 1, https://esd.dof.ca.gov/Documents/bcp/1718/FY1718_ORG0984_BCP1288.pdf.) That the loan ultimately approved was for only 10% of the amount requested demonstrates the State's reluctance to put its own money at risk even as it risks the wages of private workers. (CalSavers Financial Statements with Independent Auditor's Report, June 30, 2019, p. 13, https://www.treasurer.ca.gov/calsavers/reports/audits/2019-final-audit-report.pdf.)

California made headlines this year when the State Auditor discovered that the State's Employment Development Department, which administers the unemployment insurance program, paid an estimated $31 *billion* in fraudulent claims during the first half of 2020. Individual households were each being mailed hundreds or thousands of checks per month, but this draining of EDD's account apparently raised no suspicions. The money lost by the State's incompetence was money that private employers paid into the system. Rather than cover the loss, the State simply raised its rates on those innocent employers. (*See* Said, Carolyn, *California's EDD fraud failures could saddle innocent with taxes, penalties*, January 28, 2021, https://www.sfchronicle.com/business/article/California-EDD-created-fertile-ground-for-30-15905622.php.)

The State of California wants the federal courts to overlook its express disclaimer of accountability for safekeeping the money it takes from private employees

because, after all, it is the government and can be trusted. Judging from the EDD scandal, however, if CalSavers were raided and employee funds disappeared, the innocent employees would bear the loss.

It is well settled that Congress preempted the field of private retirement savings through ERISA, creating a uniform structure that provides autonomy to employers and security to employees. (*Gobeille v. Liberty Mut. Ins. Co.* (2016) 577 U.S. 312, 136 S.Ct. 936, 944, citing *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504, 523). Under ERISA, private employers are not required to offer a retirement plan for their employees. When employers decide to offer retirement, they are free to choose any plan on the market, secure in the knowledge that all legally marketed plans are ERISA-compliant. With ERISA-compliant plans, employees have control over decisions such as whether to save for retirement, what percentage of their income to set aside, and what kinds of investments they're comfortable with. Under ERISA, employees are owed fiduciary duties and have access to the federal courts to resolve disputes.

Here, California is inserting itself into this federally preempted field and imposing its own mandates and rules that conflict with ERISA's structure. This strips both employers and employees of their rights under federal law.

CalSavers forces employers to offer a retirement plan – either an ERISA plan or the CalSavers plan – or else face fines and penalties. (Cal. Gov. Code, §§ 100032; 100033; Cal. Code Regs. Tit. 10, § 10008; *see*

*also* former Cal. Unemp. Ins. Code, § 1088.9.) Under the CalSavers plan, unless an employee takes the initiative to educate himself, find and file the proper paperwork, and do so within a limited window of time for opting out of the program, he is automatically enrolled and a state-specified percentage of his earnings is deducted and remitted to the State to be managed as the State sees fit. (Cal. Gov. Code, § 100032(f-j).) The State disclaims any fiduciary responsibility for guarding these funds or paying them back to the employees who earned them. And, unless this Court reverses the Ninth Circuit's declaration that CalSavers is exempt from ERISA, employees will have no federal cause of action if their funds are lost in the next California government scandal.

Senate Bill 1234, the bill that created CalSavers, was passed in reliance upon an anticipated U.S. Department of Labor regulation exempting state-run retirement savings plans from ERISA. As explained by the CalSavers Board in its $170 million General Fund loan request, "Before the Program can open for enrollment, SB 1234 requires the Board to report to the Governor and Legislature: . . . That the United States Department of Labor (DOL) has finalized a regulation setting forth a safe harbor for savings arrangements established by states for nongovernmental employees for the purposes of the federal Employee Retirement Income Security Act (ERISA)." (Cal. Dept. of Finance, Budget Change Proposal 0984-001-BCP-2017-GB, Fiscal Year 2017-2018, p. 5, https://esd.dof.ca.gov/Documents/bcp/1718/FY1718_ORG0984_BCP1288.pdf.)

The anticipated DOL regulation became known as the 2016 Safe Harbor. It was added to 29 C.F.R. § 2510.3-2 on August 30, 2016, as subsection (h). (App. 86-92.)

Congress has authority under the Congressional Review Act to review regulations promulgated by administrative agencies to ensure they do not overstep congressional authorizations. By a joint resolution of both houses, Congress can disapprove regulations that have overstepped. Unless the President overrules the resolution of Congress, the regulations are repealed. (5 U.S.C. § 801.)

Exercising its authority under the Congressional Review Act, Congress repealed the 2016 Safe Harbor on May 17, 2017, eight months after its adoption. (App. 85.)

Lacking the safe harbor required by SB 1234, CalSavers should have folded its tent. Instead, in defiance of Congress and even its own enabling act, CalSavers proceeded full steam ahead. As a fig leaf, CalSavers' Executive Director paid a private lawyer to write a letter opining that CalSavers is not preempted by ERISA. (*See* Letter from David Morse to Katie Selinski dated May 16, 2017, at https://www.treasurer.ca.gov/news/releases/2017/20170518/k-l-gates-opinion.pdf.) With that barest of cover, CalSavers is ordering employers to sign up for the program, to automatically enroll their employees, and to remit payroll deductions.

Other states are watching. So far, California is getting away with its plan to take control of private

retirement decisions. Unless this Court grants certiorari and reverses the Ninth Circuit, the precedent will be set and, before long, there will be a smorgasbord containing each state's version of CalSavers, throwing into confusion whether employees' earned wages will ever get returned if, for example, they move from one state to another, or if they temporarily work in a state but are not domiciled there, or if their employer filled out the wrong paperwork for that state 20 years ago, or if they never retire, or if the state's program becomes insolvent, etc. ERISA plans, which provide employees their own personal accounts that follow them when they move, and that operate under uniform federal rules, are not haunted by such problems.

Congress, through ERISA, preempted the field of private retirement security. Congress has provided no safe harbor allowing states to overlap ERISA with their own different regulations. In the one instance when an Executive Branch agency attempted to create such a safe harbor, Congress repealed it. This is an easy case. CalSavers is preempted by ERISA. This Court should grant certiorari, reverse the Ninth Circuit, and invalidate the CalSavers program.

## ARGUMENT

### I. The Congressional Repeal of the 2016 Safe Harbor for State-Run Automatic Payroll Deduction IRAs Cannot Be Meaningless as the Ninth Circuit Found.

ERISA is a federal law that sets minimum standards for retirement plans and health plans provided to employees in private industry, for the protection of both employers and employees. ERISA requires plan sponsors to provide participants with certain disclosures, including important information about plan funding. ERISA imposes fiduciary responsibilities on those who manage and control plan assets; it requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue in federal court for benefits and breaches of fiduciary duty. Any arrangement that falls within the broadly defined category of "employee pension benefit plans" must comply with ERISA or qualify for a "safe harbor" exemption.

Congress repealed a safe harbor proposed by the U.S. Department of Labor for certain state-run payroll deduction IRAs, known as the 2016 Safe Harbor, declaring in a joint resolution on May 17, 2017:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> That Congress disapproves the rule submitted by the Department of Labor relating to "Savings Arrangements Established by States

> for Non-Governmental Employees" (published at 81 Fed.Reg. 59464 (August 30, 2016)), and such rule shall have no force or effect.

(Pub. Law 115-35; App. 85.)

The Ninth Circuit mysteriously concluded that the Congressional Act of repealing the 2016 Safe Harbor did not resolve this case. (App. 15.) The Court erred. Had the Department of Labor believed that state-run payroll deduction IRAs were already authorized by ERISA, it would have been unnecessary to promulgate a regulation exempting them; and if Congress intended CalSavers to be exempt, it would not have repealed the regulation. Congress cannot be presumed to act for no purpose. Nor should the DOL be presumed to have worked for no purpose in drafting the 2016 Safe Harbor. (*See also* Moore, Kathryn, *State Automatic Enrollment IRAs after the Trump Election: Are They Preempted by ERISA?* (2019) 27 Elder L.J. 51, 109 ["In light of the disapproval of the 2016 regulatory safe harbor, there is a serious question as to whether the state automatic enrollment IRA programs are preempted by ERISA."].)

The 2016 Safe Harbor was intended to permit state-run automatic savings programs. Now that it has been repealed, it would take a new Act of Congress to permit CalSavers and similar state programs. When a rule is disapproved under the Congressional Review Act, "it may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, *unless the reissued or*

*new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule*." (5 U.S.C. § 801(b)(2), emphasis added.) Congressional intent is crystal clear, then, that *Congress* can consider a national automatic IRA law, such as the one recently proposed in the *Build Back Better Act*, but states may not enter this federal ground. It has not been "specifically authorized" by Congress.

### A. CalSavers Is a Subject of Federal Law, Not Traditional State Law.

This is a case of national importance pitting one exclusive federal law against various encroaching state laws and programs, as well as countless potential local government laws and programs. The federal government assumed *full* leadership over private retirement savings programs almost fifty years ago when it enacted ERISA. Since that time, state track records at managing *governmental employee* pension plans have been terrible, particularly in states that now want to tap into private payrolls through state-run automatic savings programs. California, Illinois, and New York, for example, have well-documented histories of mismanagement, corruption, and unfunded liabilities exceeding $100 billion. Concerns for mismanagement and abuse of retirement funds drove the creation of ERISA. Pressure is mounting on states to manage their public pension liabilities, some of which are in crisis. For the retirement plans of all private employees, however, Congress intended to be the protector, not a bystander to the states.

In 1974, Congress occupied the field of private employee retirement savings with ERISA. 29 U.S.C. § 1144(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." A uniform system would have been "difficult to achieve . . . if a benefit plan [were] subject to differing regulatory requirements in different States." (*Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 9.) Specific to CalSavers, the preemption clause was designed to "establish ***pension plan regulation as exclusively a federal concern***." (*Alessi v. Raybestos Manhattan, Inc.* (1981) 451 U.S. 504, 505, emphasis added.)

This exclusive federal concern is broad, including as it relates to state government action. Comments noted by the Supreme Court from the Congressional record explain:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974).
>
> Senator Williams echoed these sentiments: "It should be stressed that ***with the narrow exceptions specified in the bill***, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent

> State and local regulation of employee benefit plans. This principle is ***intended to apply in its broadest sense to all actions of State or local governments***, or any instrumentality thereof, which have the force or effect of law." *Id*. at 29933.

(*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 99, emphasis added.)

Accordingly, only Congress may authorize or implement an automatic IRA mandate. For example, the Automatic Retirement Plan Act of 2017, introduced, but not enacted, following the Congressional repeal of the 2016 Safe Harbor, would have amended ERISA at 29 U.S.C. § 1144 to exempt "qualified state laws" regarding automatic IRAs on certain terms and conditions. (H.R. 4523, 115th Cong.) And if Congress were to enact a national automatic IRA mandate, even that would need an ERISA exemption. For example, the Automatic IRA Act of 2011 in section 2(f) would have amended ERISA to exempt the federal government's own automatic IRA program. (*See also* Automatic IRA Act of 2013, H.R. 2035, S. 245, 113th Cong. § 2(d) [same]; Automatic IRA Act of 2015, S. 245, 114th Cong. § 2(d) [same].) This proves that Congress has never intended for automatic IRAs to be exempt from ERISA without a safe harbor, no matter who creates them. And lacking a safe harbor, they are preempted.

### B. The Ninth Circuit Disregarded *Chevron* Deference, *Auer* Deference, and the Central Arguments of the United States.

Broadly speaking, *Chevron U.S.A., Inc. v. National Resources Defense Counsel* requires deference to an agency's interpretation of the *statutes* it administers and *Auer v. Robbins*, recently affirmed by this Court, requires similar deference to an agency's interpretation of its *regulations*.

The Ninth Circuit did not address *Chevron* or *Auer* deference. Without necessarily agreeing with these doctrines in all circumstances, and knowing that much continues to be written about them, these doctrines are current law. Thus, they require deference to Department of Labor interpretations that CalSavers is preempted.

The intent of Congress is clear in its repeal of the 2016 Safe Harbor. Disapproving the rule permitting state-run savings plans plainly means that Congress disapproved CalSavers and similar programs. If Congress had intended for CalSavers to survive, it would have either not disapproved the 2016 Safe Harbor or specified that the new rule was unnecessary because such programs are already authorized.

Even if Congressional intent were not clear, however, there must be deference to the consistently expressed Department of Labor interpretations that, without a special exemption, state-run automatic payroll deduction plans are preempted by ERISA, because

those interpretations are "based on a permissible construction of" ERISA. (*Chevron U.S.A., Inc. v. National Resources Defense Counsel, Inc.* (1984) 467 U.S. 837, 842-843.) The DOL's construction would have to rise to the level of impermissible to be invalid.

Similarly, courts must defer to the DOL's interpretation of its own regulations unless plainly erroneous or inconsistent. (*Auer v. Robbins* (1997) 519 U.S. 452; *Kisor v. Wilkie* (2019) 139 S.Ct. 2400; *Bassiri v. Xerox Corp.* (9th Cir. 2006) 463 F.3d 927, 931.)

The Department of Labor's interpretation that CalSavers is preempted by ERISA has been consistent, beginning with the safe harbor's regulatory language, and continuing through its briefings to the District Court and Ninth Circuit here. And while the current presidential administration instructed the Department to cease participation just before oral argument took place at the Ninth Circuit, the DOL's briefings remain official analyses, and have not been changed. This constitutes decades of consistent DOL interpretation to which deference is owed under *Chevron* and *Auer*.

The 2016 Safe Harbor specifically referred to CalSavers throughout, by its former nomenclature, the California "Secure Choice" program. (81 Fed.Reg. 59464, n. 5; 59471, n. 34; 59472, 59473, n. 40; 59474, n. 44.) It stated as its purpose: "This document describes circumstances in which state payroll deduction savings programs with automatic enrollment would not give rise to the establishment of employee pension benefit

plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA)." (81 Fed.Reg. 59464.) It stated clearly that, without the 2016 exemption, state-run automatic-enrollment programs would be preempted by ERISA for failing one of the tests (the "completely voluntary" test) of the 1975 Safe Harbor. Phyllis Borzi, Assistant Secretary of the Employee Benefits Security Administration, indicated this when she explained the meaning of "completely voluntary" under the 1975 Safe Harbor on November 16, 2015, and on August 24, 2016. (80 Fed.Reg. 72006; 81 Fed.Reg. 59464.) Ms. Borzi painted this picture of DOL and Congressional intent in 1975:

> In essence, if the employer merely allows a vendor to provide employees with information about an IRA product and then facilitates payroll deduction for employees who ***voluntarily initiate*** action to sign up for the vendor's IRA, the employer will not have established, and the arrangement will not be, an ERISA pension plan.

(81 Fed.Reg. 59464, 59465, emphasis added.)

To be "completely voluntary," an employee must self-initiate the IRA payroll deduction arrangement. CalSavers automates deductions.

CalSavers has an opt-out form which employees may use during or 30 days following the automatic enrollment process. But opt-out features do not satisfy the 1975 Safe Harbor. Opt-out features are not "completely voluntary." (80 Fed.Reg. 72006, 72008-72009;

*id*. at n. 12; 81 Fed.Reg. 59464, 59465-59466; 59470-59473.) The DOL "intended 'completely voluntary' to mean considerably more than that employees are free to opt out." (80 Fed.Reg. at p. 72008.)

Accordingly, the DOL has been clear since 1975 that each time employees are automatically enrolled in an IRA program, an ERISA plan is created, "trigger[ing] ERISA's protections for the employee whose money is deposited into an IRA." (*Id.* at p. 59465, n. 14.) And the fact that California is requiring employers to do the automatic enrollment for the State does not transform CalSavers into a "completely voluntary" act of the employee. It cannot change the DOL interpretation: Employees with automatically deducted payroll IRAs are meant to have "ERISA's protections." (*Ibid*.)

Per 28 U.S.C. § 517, the United States filed a "Statement of Interest" in the District Court on September 13, 2019, and the DOL later filed an Amicus Brief to the Ninth Circuit on June 19, 2020. Each states that CalSavers is preempted by ERISA.

In its "Statement of Interest," the United States explained that CalSavers is preempted via "reference to" ERISA, because CalSavers as a whole is an ERISA plan, because employers must at minimum "maintain" ERISA plans, because CalSavers fails the 1975 Safe Harbor, because CalSavers has an "impermissible connection" with ERISA, and because of traditional conflict preemption principles. Specifically, it argued that CalSavers gives employers a "False Choice," *id*. at p. 2, and "takes away the freedom of choice that lies at the

core of ERISA." (*Ibid.*). By forcing employers to either adopt an ERISA plan or administer CalSavers, its interference with employer choice goes too far to be exempt. (*Id.* at p. 18.)

That only one of these reasons need be valid for ERISA to preempt CalSavers, and that these reasons were not analyzed by the Ninth Circuit, especially necessitates certiorari.

In its Amicus Brief, the DOL maintained the arguments made in the Statement of Interest, and further explained that to exempt CalSavers would be "contrary to ERISA's Structure." (Amicus Br., at p. I.) ERISA has spoken to what governments may do with their employees and to what private employers may do with their employees. ERISA's structure does not leave room for a state government to cross that boundary line and impose its own commands on private employers.

The Ninth Circuit's failure to defer to the DOL's interpretation of the ERISA statutes and regulations is grounds for granting certiorari.

## II. In a Fundamental Error, the Ninth Circuit Used Health Plan Cases to Decide a Pension Plan Case.

### A. The Distinction Between Health Plans and Pension Plans Needs Recognition and Analysis.

The cases the Ninth Circuit relied upon for preemption analysis of CalSavers were health insurance cases, not pension plan cases. (*Golden Gate Restaurant Association v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639; *Gobeille v. Liberty Mutual Insurance Co.* (2016) 136 S.Ct. 936; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.* (1995) 514 U.S. 645; *Washington Physicians Serv. Association v. Gregoire* (9th Cir. 1998) 147 F.3d 1039; *Stuart v. UNUM Life Insurance Co.* (9th Cir. 2000) 217 F.3d 1145 [group insurance plan, subject to welfare plan definition and separate safe harbor, 29 C.F.R. § 2510.3-1(j)]; cf. *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.* (9th Cir. 1987) 809 F.2d 617, 625 ["Even if an employer does no more than arrange for a 'group-type insurance program,' it can establish an ERISA plan, unless it is a mere advertiser who makes no contributions on behalf of its employees. 29 C.F.R. § 2510.3-1(j). . . . We must remember that the existence of an ERISA plan is a question of fact, to be answered in the light of all the surrounding circumstances from the point of view of a reasonable person. *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*)"].)

Pension plans are distinct from health insurance and involve a different Congressional concern – protecting the security of employees' savings for future retirement rather than providing coverage for today's medical expenses. Because of this distinction, the original strictness of ERISA preemption has never been loosened as to pension plans. Notably, none of the seminal cases in which the pendulum swung somewhat away from strict ERISA preemption were pension plan cases. (*Gobeille v. Liberty Mutual Insurance Co.*, *supra*, 136 S.Ct. 936 [healthcare data reporting]; *DeBuono v. NYSA-ILA Medical & Clinical Services Fund.* (1997) 520 U.S. 806 [hospital taxes]; *Cal. Division of Labor Standards Enforcement v. Dillingham* (1997) 519 U.S. 316 [prevailing wages]; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, *supra*, 514 U.S. 645 [hospital surcharges]). Because pension plans are in a different ERISA context than the one discussed by the Ninth Circuit, certiorari should be granted.

Prior to this case, the Ninth Circuit itself had declared that pension plans are subject to analysis "distinct" from health plans. (*Golden Gate Restaurant Association v. City and County of San Francisco* (9th Cir. 2008) 546 F.3d 639, 651-652.) In distinguishing health insurance from pension plans, the Ninth Circuit in *Golden Gate* explained that the definition of a pension plan subject to ERISA is "so broad" that "virtually any contract that provides for some type of deferred compensation will establish a de facto pension plan" whether or not the employer intended to establish an

ERISA plan. (*Ibid.*; *Modzelewski v. Resolution Trust Corp.* (9th Cir. 1994) 14 F.3d 1374, 1377.) Despite its own precedent, the Ninth Circuit in this case relied on *Golden Gate*, which did not concern a pension plan, to find CalSavers exempt from ERISA because employers do not intend to establish an ERISA plan; they are simply following the State's instructions.

The Court erred. To the extent *Golden Gate* applies at all, it teaches that CalSavers is subject to ERISA. Since CalSavers is subject to ERISA, but does not comply with ERISA, it is preempted, and therefore disallowed.

### B. CalSavers Requires Employees to Trust their Employer with their Vested Retirement Money. The Ninth Circuit's Use of *Golden Gate* is Thus Inapplicable and Unreliable. *Modzelewski* Commands a Stricter Test for Pension Plan Cases.

It is novel, and vital to decide, whether a State may manage a private employee's vested retirement funds. California's track record at managing pooled public pensions is dismal as a matter of public knowledge. And CalSavers is poised to commingle the private employee funds with state and local public pensions at the Board's discretion. (Cal. Gov. Code, §§ 100004(c); 100010(a)(8) and (a)(12); App. 96-97.)

Unlike the deduction from one's paycheck of taxes, health insurance premiums, and even Social Security

contributions, employees have an immediately vested interest in their own wages dedicated to a retirement account. They lose their vested interest in wages deducted to pay taxes, but they do not lose this interest when funds are deducted for transfer to a retirement fund. (*Modzelewski v. Resolution Trust Corp.*, *supra*, 14 F.3d at p. 1378.)

The moment an automatic payroll deduction occurs under CalSavers, an employee must trust the employer to remit their funds to the State. An unscrupulous or careless employer may fail to transmit the funds to the State. Thus, an ERISA-protected risk arises. But if CalSavers is exempt from ERISA, as the Ninth Circuit held, then ERISA and the federal courts are of no help to the employee. Assuming the remittance occurs, the employee's money is then not protected by the State of California either. (Cal. Gov. Code, § 100036; App. 98.) At the instant of deduction, the employee is required to blindly trust both the employer and the State of California with their financial future. This is unprecedented.

It is novel and vital to decide whether a State may direct and automate the deduction of private employee paychecks because that creates the exact opportunity for mismanagement (failure to remit) ERISA serves to address as a federal concern. But the employee's only remedy if remittance does not occur under CalSavers will be in state court. This frustrates the intent of Congress when it passed ERISA in 1974 to, in part, provide federal court protection for employees whose retirement savings were lost or stolen.

To protect employees whose employer provided a retirement savings plan as an employment benefit, the 1975 Safe Harbor for payroll deduction IRAs was born. (40 Fed.Reg. 34527.) The 1975 Safe Harbor is, to this day, the only expression of intent by Congress or the Department of Labor to permit payroll-deduction IRA programs. The 1975 Safe Harbor created a market for ERISA-compliant payroll deduction IRAs. The 1999 Interpretive Bulletin later clarified that employers have autonomy over selecting IRA sponsors. (29 C.F.R. § 2509.99-1(d); App. 94-95.)

Because employers are not required to offer a retirement benefit and, if they do, have autonomy over selecting IRA sponsors, employers have an ERISA *right to reject* CalSavers. But the State of California here is forcing itself as an IRA sponsor upon employer and employee.

Creation of *automatic* employment-based IRAs using the employee's own money simply cannot escape ERISA. The State contends that its program either qualifies for the 1975 Safe Harbor or that it just doesn't need to. The Ninth Circuit agreed that it doesn't need to, and ended its analysis there. The Ninth Circuit disregarded that CalSavers creates automatic employment-based IRAs using the employee's own money, expressly disclaiming all liabilities except for the employer's liability under state law. The preemption analysis thus remains inadequate, with an overly simplistic conclusion: because the employers are merely following the State's instructions, the largest ever automatic IRA payroll deduction program – which would

undisputedly be subject to ERISA otherwise – is exempt from ERISA. (Cf. *Charles Schwab & Co. v. Debickero* (9th Cir. 2010) 593 F.3d 916 ["***independent*** IRA" . . . "established ***by Wilson personally***" with no employer involvement was not subject to ERISA]. Emphasis added.) The Ninth Circuit erred. There is no place for CalSavers outside of ERISA because the employee doesn't initiate the payroll deduction and a governmental plan may not be created for private employees.

Because of these distinguishing facts, there is no direct case on which to rely in deciding the question presented. But the case the Ninth Circuit and District Court relied upon is definitely wrong. *Golden Gate Restaurant Association v. City and County of San Francisco*, *supra*, 546 F.3d 639, is both inapplicable and unreliable. (*See also* Moore, Kathryn, *State Automatic Enrollment IRAs after the Trump Election: Are They Preempted by ERISA?* (2019) 27 Elder L.J. 51, 92-93, n. 243, 247 [finding *Golden Gate* distinguishable from state automatic enrollment plans because three of the four factors used in *Golden Gate* to exempt program at issue do not apply].)

In *Golden Gate*, San Francisco employers were mandated to financially support the City's healthcare plan known as the "Health Access Plan" or HAP. The HAP was not a retirement plan, not based upon employment relationships, did not create accounts, and did not use or direct channeling of the employee's own money. It was a government entitlement program "available to low- and moderate-income residents of

San Francisco, regardless of employment status." (*Id*. at p. 653.) Employers could satisfy their duty under the ordinance by writing a check for what was a *de facto* tax to support the healthcare plan for San Francisco residents. (*Id.* at p. 657.) In short, the Ninth Circuit found no ERISA preemption because employer "obligation ceases as soon as they make the required payments." (*Id*. at p. 652.) Unlike here, however, the employers in *Golden Gate* were not writing checks *out of their employees' wages*.

The *Golden Gate* precedent is also unreliable as many believe it was incorrectly decided and that the HAP actually was preempted by ERISA. Reviewing the complexity of the non-alternative payments and effects on employer health plan choices, eight judges dissented from the denial of the petition for rehearing *en banc*, finding that the "decision in this case creates a circuit split with the Fourth Circuit Court of Appeals, renders meaningless the tests this Court set out in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), conflicts with other Supreme Court cases establishing ERISA preemption guidelines, and, most importantly, flouts the mandate of national uniformity." (*Golden Gate*, *supra*, Denial of Pet. for Rehearing *en banc* (9th Cir. 2009) 558 F.3d 1000, 1004.) Thus, the Ninth Circuit decision finding that ERISA does not preempt CalSavers relies on a case that does not apply to retirement plans, may not stand the test of time, and conflicts with this Court's decision in *Shaw*.

Nonetheless, the Ninth Circuit found that *Golden Gate* "stands for the proposition that an employer's non-discretionary administrative obligations under a government-mandated benefit program do not, without more, 'run the risk of mismanagement of funds or other abuse' by employers, which is ERISA's focus." (App. 24.) But the employee's own money – not at stake in *Golden Gate* – could easily be mismanaged here, triggering the need for ERISA scrutiny. Therefore, no matter how "mechanical" (App. 26), a task it may be for employers to calculate and remit IRA contributions, CalSavers *creates* the very opportunity for mismanagement that is ERISA's central focus, even as stated in *Golden Gate*. Where a State *creates* the opportunity for abuse, mistake, or mismanagement which ERISA regulates as its central focus, surely Congress intends ERISA to apply.

When *Golden Gate* declares pension plans distinct from health plans, it points specifically to another case which remains underutilized here: *Modzelewski v. Resolution Trust Corp.*, *supra*, 14 F.3d at p. 1374. *Modzelewski*, the Ninth Circuit declared in *Golden Gate*, was in the "distinct" area of pension plans, and thus was not eligible for the deferential analysis applied in *Golden Gate*. (546 F.3d at pp. 621-652 ["ERISA's definition of 'employee pension benefit plan' is distinct from its definition of 'employee welfare benefit plan'."].) If pension plan analysis should not apply to health plan analysis, the converse should be true.

In the same portion of *Golden Gate*, the Ninth Circuit also referenced *Donovan v. Dillingham* (11th Cir.

1982) 688 F.2d 1367, which provides the well-known four-factor test for finding an ERISA plan. The well-known *Donovan* test determines, from the surrounding circumstances, if a *de facto* ERISA plan has been created as follows: "In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." (688 F.2d at p. 1373.) This is easily done as to CalSavers, and the Department of Labor agreed in each of its writings.

Both *Donovan* and *Modzelewski* remain good law and CalSavers needs analysis thereunder. In *Modzelewski*, the concept of vesting appears and should be considered here because employee wages are being deducted and transferred to CalSavers. *Modzelewski* holds that as soon as wages are deducted for remittance to a retirement plan, employees have a vested right in those wages as retirement funds.

The Ninth Circuit itself has gone straight to the *Donovan* test when examining the establishment of a pension plan. Per *Modzelewski* citing *Donovan*, "[w]e have interpreted this language [of 29 U.S.C. § 1002] broadly, holding that a pension plan is established if a reasonable person could 'ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits.' . . . That is clearly a sufficient allegation of the *establishment* of a plan." (*Modzelewski*, 14 F.3d at p. 1376, emphasis added.) The D.C. Circuit has also gone straight to the *Donovan* factors to

determine existence of a pension plan. (*Kenney v. Roland Parson Contracting Corp.* (D.C. Cir. 1994) 28 F.3d 1254.) Preemption of CalSavers should be determined under the *Donovan* test confirmed in *Modzelewski*.

### C. "Modicum of Discretion" is the Wrong Test Because CalSavers Creates an IRA Payroll Deduction Program, not a Severance Payment.

Instead of applying the *Donovan* test confirmed in *Modzelewski*, the Ninth Circuit employs a test from *Golden Gate* called "modicum of discretion." (App. 49-51.) But this test is out of context and does not apply to CalSavers.

Per the "modicum of discretion" test, if employers have only a ministerial duty to pay money, then ERISA is not implicated. This is the wrong test for pension plans where the money belongs to the employee, not the employer. However, even if it applied, the Ninth Circuit overlooked what CalSavers requires employers to *do*. As will be discussed below, applying this "modicum of discretion" test to a pension plan is no different than applying the third factor of the 1975 Safe Harbor in isolation. Additionally, defining "ministerial" is still a vague and amorphous inquiry that deserves input from this Court. Most importantly, though, it is simply the wrong test because *Golden Gate* draws the test exclusively from severance pay cases and CalSavers is not a severance payment mandate.

*Golden Gate* was the first, and until now was the only, non-severance-pay case to apply the "modicum of discretion" test. As discussed, employers were required to calculate annual payments to the HAP based on hours of employee time. This calculation of a *once-annual* payment was deemed to impose a mere "modicum of discretion" on the part of the employer, and thus not to create an ERISA plan.

By contrast, in *Bogue v. Ampex Corp.* (9th Cir. 1992) 976 F.2d 1319, the Ninth Circuit found that an employer's discretion in a severance pay program surpassed a "modicum of discretion." The Court named *three* non-exclusive factors in determining whether the degree of discretion exercised by an employer surpassed the "modicum of discretion" threshold: (1) the duration of the arrangement's term; (2) the number of participants; and (3) a case-by-case determination of terms. (*Id*. at p. 1323.) Even assuming that CalSavers' *per-pay-period* calculations and paperwork can be deemed ministerial, the other two factors identified in *Bogue* – duration of the program (indefinite) and volume of participants (all of California's private employees without existing ERISA plans) – weigh toward a finding of preemption. The sheer scale of CalSavers, the higher risk of employer error, and the fact that employee, not employer, funds are involved, puts it in another category to which "modicum of discretion" analysis is insufficient.

The "modicum of discretion" test has, until *Golden Gate* and now, been narrowly confined to severance pay cases, mainly distinguishing between those that

require one-time calculations or a multiplicity of calculations. (*See, e.g.*, *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1; *Bogue v. Ampex Corp*, *supra*, 976 F.2d 1319; *Velarde v. PACE Membership Warehouse* (9th Cir. 1997) 105 F.3d 1313; *Collins v. Ralston Purina Co.* (7th Cir. 1998) 147 F.3d 592; *see ibid.* at p. 596 [modicum of discretion test failed where severance payments were not made at one time, but caused "the prospect of paying out disbursements of varying amounts to its managers and at varying times."].) But none of these cases involve payroll deductions and the ones with any level of an ongoing administrative duty were found to be subject to ERISA. The "modicum of discretion" test is too vague for an IRA payroll deduction program, particularly one of this scale, and is inapplicable for determining ERISA preemption outside of the severance payment context. The Ninth Circuit erred. Certiorari should be granted.

### III. CalSavers Fails the 1975 Safe Harbor for Payroll Deduction IRAs

Having determined (erroneously) that CalSavers imposes only a "modicum of discretion" on employers, the Ninth Circuit concluded that ERISA does not preempt CalSavers because "it is established and maintained by the State, not employers" (App. 4), although the Court admitted that its approach was based on "scant" authority. (App. 22.)

One glaring problem with the Court's approach is that the "modicum of discretion" test discussed above

is the equivalent of the third factor of the 1975 Safe Harbor. Applying the third factor – the "modicum of discretion," a.k.a. the "degree of employer involvement" test in isolation transforms the third factor of the test into the *whole test*. It converts one factor of a four-part test into a stand-alone Get-Out-of-ERISA-Free card. This impermissibly renders the other three factors meaningless surplusage.

### A. All Four Factors of the 1975 Safe Harbor Test Apply to CalSavers.

The notion that Congress must have intended to exempt CalSavers from ERISA because a state created it requires careful attention. There is simply no legislative evidence for this and it is opposite what must be presumed. Hawaii's own prepaid healthcare plan was not exempt until Congress passed special legislation because it did not fit an "express" or "specific" exemption in ERISA. (*Standard Oil Co. v. Agsalud* (1980) 633 F.2d 760, 764.) Congress has considered a national automatic IRA program, and accompanied it each time with an express exemption from ERISA. (*See* Automatic IRA Act of 2011, S. 1557, 112th Cong.; Automatic Retirement Plan Act of 2017, H.R. 4523, 115th Cong.) If Congress itself needs an exemption, then there is no vacuum where states get a free pass.

The understanding since 1974 has been that ERISA would apply to *all* employment-based IRAs absent a safe harbor. (*See Cline v. Industrial Maintenance Engineering and Contracting Co.* (9th Cir. 2000)

200 F.3d 1223, 1230 ["The Regulations provide that certain 'individual retirement accounts' or 'individual retirement annuities,' collectively 'IRAs,' fall within the scope of ERISA and others do not. 29 C.F.R. § 2510.3-2. Under this regulation, certain IRAs which have little or no employer involvement, including no employer contributions, are excluded from the definition of 'employee pension benefit plan' and are thereby completely excluded from ERISA coverage."]. They are excluded *because* they pass the four-factor 1975 Safe Harbor test. On August 15, 1975, the Department of Labor wrote, regarding the developing 1975 Safe Harbor:

> Comments received by the Department of Labor pursuant to the June 9 proposed regulations indicated a substantial need for guidance in two areas of coverage not addressed in the June 9 proposal: individual retirement programs under section 2002(a) of the Act, and voluntary gratuitous payments traditionally made by employers to retirees not covered or inadequately covered by a pension plan. The comments were to the effect that the silence of the proposed regulations on these subjects would lead to a conclusion that the requirements of Title I of the Act were applicable and that, *as a consequence of the expected burden of compliance, individuals and employers would terminate these programs. Such results would be clearly undesirable*.

(40 Fed.Reg. 34527, emphasis added.)

The 1975 Safe Harbor for IRA payroll deduction programs was born. It has four factors. All four must be met to exempt an IRA payroll deduction plan: (1) no contributions by the employer; (2) "completely voluntary" participation by the employee; (3) minimal employer involvement limited to remitting payroll deductions and not endorsing the program; and (4) no consideration to employers from the program. (App. 93.) As the District Court found, primarily due to failure under the second factor, "CalSavers is not entitled to the exemption set forth in the 1975 Safe Harbor." (App. 73.)

To exempt CalSavers from ERISA, the Ninth Circuit's analysis essentially applies the third factor of the 1975 Safe Harbor in isolation. There is no evidence of Congressional intent for this strange interpretation that one factor may be isolated to exempt a program just because a state creates the scheme. Ironically, the Ninth Circuit correctly acknowledges that if employers are mandated to take ERISA actions, the state's mandate will not exempt them from ERISA. (App. 26.) Although this contradicts its conclusion, the Court nonetheless rules that the exercise of state power somehow exempts CalSavers from ERISA. This was error because a state mandate does not by itself save a program from ERISA application. (*Standard Oil Co. v. Agsalud*, *supra*, 633 F.2d at p. 764; *Gobeille v. Liberty Mutual* (2016) 136 S.Ct. 936; *Fort Halifax*, *supra*, 482 U.S. at pp. 7, 12, 16.) As shown above, states, and even Congress itself, need a special exemption if they cannot pass the full 1975 Safe Harbor test. The

four-factor 1975 Safe Harbor applies here, and CalSavers clearly fails the second prong of the test by automatically deducting employee paychecks.

### B. CalSavers Fails the Second Factor of the 1975 Safe Harbor Test.

As explained above, the 1975 Safe Harbor for IRA payroll deduction programs has four factors. The second factor requires "completely voluntary" participation by the employee. For a plan to be "completely voluntary," an employee must self-initiate the IRA payroll deduction arrangement. CalSavers, however, automates both enrollment in the plan and deductions from an employee's paycheck unless the employee learns of his right to opt out, obtains the correct forms, completes them correctly, and submits them within 30 days following the start of the automatic enrollment period.

This burdensome "right" to opt out does not make CalSavers "completely voluntary." Even if it were easy, an opt-out feature does not satisfy the 1975 Safe Harbor. (80 Fed.Reg. 72006, 72008-72009; *id*. at n. 12; 81 Fed.Reg. 59464, 59465-59466; 59470-59473.) The DOL "intended 'completely voluntary' to mean considerably more than that employees are free to opt out." (80 Fed.Reg. at p. 72008.)

By failing to satisfy the second factor of the 1975 Safe Harbor test, CalSavers does not qualify for the exemption applicable to payroll deduction IRAs. It is

not ERISA-compliant. It is preempted by ERISA. The Ninth Circuit erred. Certiorari should be granted.

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## CONCLUSION

For the reasons explained, including that CalSavers lost the 2016 Safe Harbor that was specifically designed to exempt it, that CalSavers fails the 1975 Safe Harbor for IRA payroll deduction programs, and that the Ninth Circuit relied solely on an unreliable and inapplicable case to declare CalSavers exempt, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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