
CITY OF BALTIMORE

BERNARD C. “JACK” YOUNG
Mayor



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July 29, 2020

VIA EMAIL

The Honorable Videtta A. Brown
Courthouse East
111 N. Calvert St., Room 205
Baltimore, MD 21202
Sameerah.mickey@mdcourts.gov

**Re: *Mayor and City Council of Baltimore v. BP P.L.C. et al.*,
Case No.: 24-C-18-004219**

Dear Judge Brown,

The Mayor and City Council of Baltimore (the “City”) submits the recent decision in *United States v. California*, No. 2:19-cv-02142 WBS EFB, __ F. Supp. 3d __, 2020 WL 4043034 (Eastern Dist., Cal., July 17, 2020) (Ex. A) in further support of its opposition to Defendants’ Motion to Dismiss for Failure to State a Claim. The opinion supports the City’s position here that its claims are not preempted by the Foreign Affairs Doctrine.

In *United States v. California*, the federal government challenged an agreement between the State of California and the province of Quebec, Canada, that links their respective greenhouse gas emissions trading programs and allows for certain emissions reductions in one jurisdiction to be used to comply with certain emissions reduction requirements in the other. The U.S. asserted that the foreign affairs doctrine preempts the agreement, rendering it therefore unconstitutional.¹ More specifically, the U.S. argued that the agreement is preempted because it allegedly stands as an obstacle to achievement of the purposes of the Global Climate Protection Act of 1987 (“GCPA”) and the United Nations Framework Convention on Climate Change of 1992 (“UNFCCC”), and because the agreement “undermine[s] the federal government’s ability to” negotiate a new climate change agreement. *Id.* at *7.

The district court rejected the United States’ arguments and granted summary judgment to defendant California, finding the agreement is not preempted under the foreign affairs doctrine. The court held that the U.S. “failed to identify a clear and express foreign policy that directly conflicts with” the agreement and accompanying state laws at issue, *id.*, specifically rejecting the GCPA, the

¹ The U.S. had also asserted that the agreement was unconstitutional because it violated the Treaty Clause and Compact Clause, and the Foreign Commerce Clause. The court previously granted summary judgment to defendant California on the Treaty Clause and Compact Cause claims. *See U.S. v. California*, __ F.Supp.3d __, 2020 WL 1182663 (E.D. Cal., March 12, 2020). The U.S. moved to dismiss its Foreign Commerce Clause claim in the litigation leading to the decision discussed herein; the court granted the motion. 2020 WL 4043034, fn 8.

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UNFCCC and the federal government’s ongoing engagement in international negotiations as a basis for conflict preemption. *Id.* at *6–7.

The district court also found that the President’s authority to negotiate international agreements did not preempt California’s agreement with Quebec because the agreement does not intrude on the federal government’s foreign affairs power.² Importantly, the court noted “the absence of concrete evidence that the President’s power to speak and bargain effectively with other countries has actually been diminished,” and observed that “hypothetical or speculative fears cannot support a finding that this state program has more than an incidental effect on foreign affairs.” *Id.* at *12 (citations omitted).

U.S. v. California supports denial of the Defendants’ Motion to Dismiss, as it rejects arguments set forth both by Defendants and *amicus* United States that Plaintiffs’ claims are preempted by or unconstitutional under the foreign affairs doctrine.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Suzanne Sangree".

Suzanne Sangree
Director of Affirmative Litigation

Cc/Counsel of Record via electronic service

² In assessing “field” preemption the court determined that California’s agreement with Quebec did not fall into an area of traditional state responsibility because it “extended beyond an area of traditional state competence by creating an international carbon market.” *Id.* at *9. That aspect of the decision is plainly distinguishable from the case at bar. The City’s case seeks local remedies for local harms, including harms to local infrastructure, caused by Defendants’ production and marketing of fossil fuels; it does not establish an international agreement with any foreign entity nor seek to regulate foreign conduct. *See* Plaintiffs’ Opposition to Defendants’ Motion to Dismiss for Failure to State a Claim, 64–68.

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc.,

Defendants.

No. 2:19-cv-02142 WBS EFB

MEMORANDUM AND ORDER RE:
SECOND CROSS-MOTIONS FOR
SUMMARY JUDGMENT

1 Plaintiff United States of America ("United States")
2 brought this action against the State of California¹ and other
3 related individuals and entities² alleging, inter alia,
4 California's cap-and-trade program is preempted under the Foreign
5 Affairs Doctrine. (First Am. Compl. ("FAC") (Docket No. 7).)
6 Presently before the court are the parties' cross-motions for
7 summary judgment on that claim alone. (Docket Nos. 102, 108,
8 110.)

9 I. Summary of Facts and Procedural History

10 The court exhaustively set forth relevant facts in its
11 previous Order granting defendants' summary judgment on the
12 Treaty Clause and Compact Clause. (See MSJ Order at 2-16 (Docket
13 No. 91).) For purposes of this Order, the court will offer brief
14 summaries of the relevant treaties, statutes, agreements, and
15 actions directly bearing on the Foreign Affairs Doctrine claim.

16 A. Relevant Policies

17 Beginning in the 1950s, "Congress enacted a series of
18

19 ¹ State defendants include Gavin C. Newsom, in his
20 official capacity as Governor of the State of California; the
21 California Air Resources Board; Mary D. Nichols, in her official
22 capacity as Chair of the California Air Resources Board; and
23 Jared Blumenfeld, in his official capacity as Secretary of
California's Environmental Protection Agency ("CalEPA"). These
defendants will collectively be referred to as "State defendants"
or "California."

24 ² The Western Climate Initiative, Inc. defendants are the
25 Western Climate Initiative, Inc. ("WCI, Inc."); Mary D. Nichols,
26 in her official capacity as Vice Chair of WCI, Inc. and a voting
27 board member of WCI, Inc.; and Jared Blumenfeld, in his official
28 capacity as a board member of WCI, Inc. These defendants will
collectively be referred to as "WCI, Inc. defendants." The court
dismissed non-voting board members Kip Lipper and Richard Bloom
from the action on February 26, 2020. (Docket No. 79.)

1 statutes designed to encourage and to assist the States in
2 curtailing air pollution.” Chevron, U.S.A., Inc. v. Nat. Res.
3 Def. Council, Inc., 467 U.S. 837, 845 (1984). Among these was
4 the Clean Air Act, 42 U.S.C. § 7401 et seq., which provided that
5 “pollution control at its source is the primary responsibility of
6 States and local governments.” 42 U.S.C. § 7401(a)(3). Since
7 then, regulation of air pollution -- including greenhouse gases,
8 see Massachusetts v. EPA, 549 U.S. 497, 532 (2007) -- has been
9 viewed as a “joint venture” between “the States and the Federal
10 Government” as “partners in the struggle against air pollution.”
11 In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods.
12 Liab. Litig., 959 F.3d 1201, 1214 (9th Cir. 2020) (quoting Gen.
13 Motors Corp. v. United States, 496 U.S. 530, 532 (1990)).

14 In 1987, Congress passed the Global Climate Protection
15 Act of 1987 (“GCPA”), Title XI of Pub. L. 100-204, 101 Stat.
16 1407, note following 15 U.S.C. § 2901. Its ultimate aims were to
17 “increase worldwide understanding of the greenhouse gas effect”
18 and “foster cooperation among nations to develop more extensive
19 and coordinated scientific research efforts with respect to the
20 greenhouse effect.” Id. §§ 1103(a)(1)-(2). The GCPA directed
21 the Environmental Protection Agency (“EPA”) to author a report to
22 Congress detailing a “coordinated national policy on global
23 climate change” and ordered the Secretary of State to work
24 “through the channels of multilateral diplomacy” to combat global
25 warming. Id. §§ 1103(b)-(c); see also Massachusetts, 549 U.S. at
26 508.

27 In conformity with the GCPA, President George H.W. Bush
28 signed, and the Senate ratified, the United Nations Framework

1 Convention on Climate Change of 1992 ("1992 Convention"). (First
2 Decl. of Rachel E. Iacangelo ("First Iacangelo Decl.") ¶ 4, Ex. 2
3 at D1316 (Docket No. 12-2).) The 1992 Convention sought to
4 "stabiliz[e] [] greenhouse gas concentrations in the atmosphere
5 at a level that would prevent dangerous anthropogenic
6 interference with the climate system" by adopting "regional
7 programmes containing measures to mitigate climate change." (Id.
8 at ¶ 3, Ex. 1 at 4, Arts. 2, 4.) Following these national and
9 international directives, the federal and state governments have
10 sought to combat greenhouse gas emissions in a variety of ways,
11 including through cap-and-trade programs.

12 In 2006, the California legislature enacted the
13 California Global Warming Solutions Act of 2006, Cal. Health &
14 Safety Code § 38500 et seq. ("the Global Warming Act"). The
15 Global Warming Act aimed to assuage "serious threat[s] to the
16 economic well-being, public health, natural resources, and the
17 environment of California" by adopting a series of programs to
18 limit the emissions of greenhouse gases. See Cal. Health &
19 Safety Code § 38501(a). The legislature charged the California
20 Air Resources Board ("CARB") with the task of designing an
21 "integrated and cost-effective regional, national, and
22 international . . . program[]" to "achieve the maximum . . .
23 reductions in greenhouse gas emissions." Cal. Health & Safety
24 Code §§ 38560, 38561(a), 38562(c)(2), 38564.

25 CARB promulgated regulations to implement a cap-and-
26 trade program in October 2011. (Decl. of Rajinder Sahota
27 ("Sahota Decl."), ¶ 20 (Docket No. 50-2); First Decl. of Michael
28 S. Dorsi ("First Dorsi Decl."), Ex. 4 (Docket No. 50-3).)

1 California's cap-and-trade program was intended to provide a
2 market-based approach to reducing greenhouse gas emissions. CARB
3 establishes yearly caps, called "budgets," to limit the amount of
4 emissions a group of particular sources, called "covered
5 entities," may emit for a set period. (Sahota Decl. ¶ 21); Cal.
6 Code Regs. tit. 17, § 95802(a). At year's end, covered entities
7 are required to acquire and surrender "compliance instruments"
8 equivalent to the metric tons of greenhouse gas they emit.
9 (Sahota Decl. ¶ 22.) Budgets then decrease each year to
10 encourage covered entities to reduce their emissions. (Id. ¶
11 21.)

12 California's cap-and-trade program includes a
13 "framework for linkage" to accept the compliance instruments of
14 other "states and [Canadian] provinces" to "provide an additional
15 cost containment mechanism . . . and secure additional
16 [greenhouse gas emission] reductions." (First Dorsi Decl. ¶ 7,
17 Ex. 5 at 193); see also Cal. Code Regs. tit. 17, §§ 95940-43.
18 After an external trading system is approved by the legislature
19 and California's Governor, see Cal. Gov. Code § 12894(f), covered
20 entities can use compliance instruments acquired through linked
21 jurisdictions to satisfy their compliance obligations in
22 California, and vice versa. Cal. Code Regs. tit. 17, §§
23 95942(d)-(e). California contracted with Western Climate
24 Initiate, Inc. ("WCI, Inc."), a non-profit corporation, to
25 facilitate linkages by tracking ownership of the compliance
26 instruments.³ (First Decl. of Greg Tamblyn ("First Tamblyn
27

28 ³ WCI, Inc.'s services are limited to technical and
administrative support alone. See Cal. Gov. Code § 12894.5(a)(1)

1 Decl.") ¶ 5 (Docket No. 46-2); see also Agreement 11-415 Between
2 Air Resources Board and WCI, Inc. ("Agreement 11-415") (Docket
3 No. 7-3).)

4 On February 22, 2013, CARB requested that California's
5 Governor, Edmond G. Brown, Jr., make the findings required by law
6 to link California's cap-and-trade program with Quebec's.

7 (Sahota Decl. ¶ 32.) Governor Brown made the four linkage
8 findings in April 2013. (Id. ¶ 33.) After the programs were
9 linked in September 2013, the parties signed an agreement
10 memorializing their commitment "to work jointly and
11 collaboratively toward the harmonization and integration of
12 [their] cap-and-trade programs for reducing greenhouse gas
13 emissions" ("2013 Agreement"). (Id. ¶¶ 44-49; First Dorsi Decl.,
14 ¶ 10, Ex. 8.) The linkage between California and Quebec became
15 operational by regulation on January 1, 2014. Cal. Code Regs.
16 tit. 17, § 95943(a)(1).

17 In 2016, various parties to the 1992 Convention --
18 including the United States -- entered into the Paris Agreement
19 of 2015 by executive order ("Paris Accord"). (First Iacangelo
20 Decl. ¶ 5, Ex. 3 at 3.) In furtherance of the 1992 Convention,
21 the Paris Accord aims to "hold[] the increase in the global
22 average temperature to well below 2 degrees Celsius" and
23 "pursu[e] efforts to limit the temperature increase to 1.5
24 degrees Celsius above pre-industrial levels." (Id.) In June
25

26 ("California's participation in the [WCI, Inc.] requires that its
27 sole purpose be to provide operational and technical support to
28 California . . . [g]iven its limited scope of activities, the
[WCI, Inc.] does not have the authority to create policy with
respect to any existing or future program or regulation.").

1 2017, President Trump announced the United States would withdraw
2 from the Paris Accord and instead “negotiate a new deal that
3 protects our country and its taxpayers.”⁴ (Id. ¶ 7, Ex. 5 at 5.)

4 President Trump’s announcement did not deter California
5 from expanding its cap-and-trade program. A linkage between
6 California, Quebec, and Ontario became operational by regulation
7 on January 1, 2018, although the relationship with Ontario ended
8 shortly thereafter. See Cal. Code Regs. tit. 17, § 95943(a)(2).
9 Despite Ontario’s withdrawal, California and Quebec remain
10 parties to the Agreement on the Harmonization and Integration of
11 Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions
12 (“the Agreement”), signed by each jurisdiction following the
13 linkage in 2017.⁵ (First Iacangelo Decl. ¶ 28, Ex. 26.)

14 The Agreement memorializes each jurisdiction’s
15 commitment to harmonizing their cap-and-trade programs to ensure
16 compatibility while respecting each jurisdiction’s individual
17 sovereignty. (See generally Agreement.) It “does not modify any
18 existing statutes and regulations nor does it require or commit
19 the Parties or their respective regulatory or statutory bodies to
20 create new statutes or regulations.” (Id. at 9.) While Article
21 17 provides that parties “shall endeavor to provide” other
22 signatories with 12 months’ notice before withdrawing, (id. at

23
24 ⁴ The United States did not submit formal notification of
25 its withdrawal from the Paris Accord until November 4, 2019.
26 (First Iacangelo Decl. ¶ 8, Ex. 6.) Under the Paris Accord’s
27 withdrawal provision, a party cannot withdraw until a year after
28 it provides formal notice. (Id.) The United States’ withdrawal
will not take effect until November 4, 2020. (Id.)

⁵ This Agreement replaced the 2013 Agreement between
California and Quebec. (See Agreement at 2.)

1 10), the jurisdictions are effectively “free to withdraw at any
2 time.” (See MSJ Order at 28.)

3 B. Procedural History

4 The United States initially filed this action in
5 October 2019, asserting that the Agreement, Agreement 11-415, and
6 “supporting California law”⁶ operationalizing California’s cap-
7 and-trade agreement are unconstitutional under Article I’s Treaty
8 and Compact Clauses⁷ and the Foreign Affairs Doctrine.⁸ (See
9

10 ⁶ Both sides understand that the “Agreement” is the 2017
11 Agreement on the Harmonization and Integration of Cap-and-Trade
12 Programs for Reducing Greenhouse Gas Emissions and “Agreement 11-
13 415” refers to the contract between California and WCI, Inc.
14 (See USA Second Mot. for Summ. J. (“USA Second MSJ”) at 2 n.1
15 (Docket No. 102).) However, the United States now asks the court
16 to broaden the scope of its challenge to “start[] with”
17 California’s Global Warming Act and include the “preparatory and
18 implementing activities” from that point on. (Id.) The court
19 declines to do so. Instead, the court will confine its analysis
20 to the challenged provision of the Global Warming Act explicitly
21 mentioned in the complaint, California Health & Safety Code §
22 38564, as well as California Code of Regulations, Title 17,
23 Sections 95940-43 pursuant to the complaint’s prayer for relief.
24 (See FAC at 31-32; see also MSJ Order at 25, n.12.)

19 ⁷ The Treaty Clause of Article I, Section 10 of the
20 United States Constitution provides in relevant part that “[n]o
21 State shall enter into any Treaty, Alliance, or Confederation . .
22 .”. U.S. Const. Art. I, § 10, cl. 1. Later in that section, the
23 Compact Clause provides “[n]o State shall, without the Consent of
24 Congress . . . enter into any Agreement or Compact with another
25 State, or with a foreign Power . . .” U.S. Const. Art. I, § 10,
26 cl. 3.

24 ⁸ The United States moved to dismiss its fourth cause of
25 action under the Foreign Commerce Clause in its second motion for
26 summary judgment. (USA Second MSJ at ii.) Defendants do not
27 oppose its dismissal. (Docket Nos. 108 & 109.) Accordingly, the
28 court will GRANT plaintiff’s motion to dismiss its claim under
the Foreign Commerce Clause pursuant to Federal Rule of Civil
Procedure 15(a).

1 Compl. (Docket No. 1).) After filing an amended complaint, the
2 United States moved for summary judgment on its Treaty and
3 Compact Clause claims on December 11, 2019. (USA First Mot. for
4 Summ. J. (Docket No. 12).) The WCI, Inc. defendants and
5 California in turn moved for summary judgment on those claims,⁹
6 (see WCI, Inc. First Mot. for Summ. J. (Docket No. 46); CA First
7 Mot. for Summ. J. (Docket No. 50)), and this court granted
8 defendants' motions and denied summary judgment for the United
9 States on March 12, 2020. (See MSJ Order.) Before the court now
10 are the parties' cross-motions for summary judgment on the United
11 States' sole remaining claim, under the Foreign Affairs Doctrine.
12 (Docket Nos. 102, 108, 110.)

13 II. Standard

14 A party seeking summary judgment bears the initial
15 burden of demonstrating the absence of a genuine issue of
16 material fact as to the basis for the motion. Celotex Corp. v.
17 Catrett, 477 U.S. 317, 323 (1986). A material fact is one that
18 could affect the outcome of the suit, and a genuine issue is one
19 that could permit a reasonable trier of fact to enter a verdict
20 in the non-moving party's favor. Anderson v. Liberty Lobby,
21 Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate
22 when, viewing the evidence in the light most favorable to the

23 ⁹ The Environmental Defense Fund, Natural Resources
24 Defense Council, and International Emissions Trading Association
25 were permitted to intervene as defendants on January 15, 2020.
26 (Docket No. 35.) While they did not file independent motions for
27 summary judgment, they filed briefs in opposition to the United
28 States' first motion for summary judgment. (Docket Nos. 47, 48.)
The organizations have also filed oppositions to the United
States' second motion for summary judgment. (Docket Nos. 105,
106.)

1 nonmoving party, there is no genuine dispute as to any material
2 fact. Acosta v. City Nat'l Corp., 922 F.3d 880, 885 (9th Cir.
3 2019) (citing Zetwick v. Cty. of Yolo, 850 F.3d 436, 440 (9th
4 Cir. 2017)).

5 Where, as here, parties submit cross-motions for
6 summary judgment, "each motion must be considered on its own
7 merits." Fair Hous. Council of Riverside Cty., Inc. v. Riverside
8 Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal citations and
9 modifications omitted). "[T]he court must consider the
10 appropriate evidentiary material identified and submitted in
11 support of both motions, and in opposition to both motions,
12 before ruling on each of them." Tulalip Tribes of Wash. v.
13 Washington, 783 F.3d 1151, 1156 (9th Cir. 2015). Accordingly, in
14 each instance, the court will view the evidence in the light most
15 favorable to the non-moving party and draw all inferences in its
16 favor. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097
17 (9th Cir. 2003) (citations omitted).

18 III. Discussion

19 "[T]he Constitution entrusts [the nation's foreign
20 affairs] solely to the Federal Government." Zschernig v. Miller,
21 389 U.S. 429, 436 (1968); see also United States v. Pink, 315
22 U.S. 203, 233 (1942). Accordingly, under the Foreign Affairs
23 Doctrine, the Supremacy Clause of Article VI, Clause 2, of the
24 United States Constitution preempts state laws that intrude on
25 the federal government's exclusive power over foreign affairs.
26 See U.S. Const. Art. VI, cl. 2; Movsesian v. Victoria
27 Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc)
28 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418-20

1 (2003)).

2 The Foreign Affairs Doctrine encompasses “two related,
3 but distinct, doctrines: conflict preemption and field
4 preemption.” Id. (citing Garamendi, 539 U.S. at 418–20.) Under
5 conflict preemption, “a state law must yield when it conflicts
6 with an express federal foreign policy.” Id. (citing Garamendi,
7 539 U.S. at 421). Conversely, under field preemption, a state
8 law may be preempted “even in the absence of any express federal
9 policy” if it “intrudes on the field of foreign affairs without
10 addressing a traditional state responsibility.” Id. at 1072
11 (citing Deutsch v. Turner Corp., 324 F.3d 692, 709 n.6 (9th Cir.
12 2003)). The United States argues that the Agreement, Agreement
13 11-415, and supporting California law are preempted under either
14 theory. (USA Second MSJ at 16; FAC ¶¶ 174–75, 178.) Each will
15 be examined in turn.

16 A. Conflict Preemption

17 “The exercise of the federal executive authority means
18 that state law must give way where . . . there is evidence of
19 clear conflict between the policies adopted by the two.”
20 Garamendi, 539 U.S. at 421. “[T]he likelihood that state
21 legislation will produce something more than incidental effect in
22 conflict with express foreign policy of the National Government
23 would require preemption of the state law.” Id. at 420 (emphasis
24 added); see also Clark v. Allen, 331 U.S. 503, 517 (1947).
25 Foreign policy may be expressed through a “federal action such as
26 a treaty, federal statute, or express executive branch policy.”
27 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d
28 954, 960 (9th Cir. 2010) (citations omitted). A federal statute

1 can also preempt state law when the state law “stands as an
2 obstacle to the accomplishment and execution of the full purposes
3 and objectives of Congress.” Crosby v. Nat’l Foreign Trade
4 Council, 530 U.S. 363, 373 (2000) (citing Hines v. Davidowitz,
5 312 U.S. 52, 67 (1941)).

6 The United States argues California’s cap-and-trade
7 program is preempted on multiple fronts. First, the United
8 States contends that the program creates an obstacle to the
9 effectuation of the GCPA and the 1992 Convention. (USA Second
10 MSJ at 17, 24-26.) Second, separate and apart from any statute
11 or treaty, the United States argues that the program is
12 “inconsistent” with President Trump’s withdrawal from the Paris
13 Accord and should be preempted for that reason. (Id. at 19.)
14 California responds that its program is consistent with both the
15 GCPA and the 1992 Convention and, and if anything, acts in
16 furtherance of their ultimate goals. (CA Second Mot. for Summ.
17 J. (“CA Second MSJ”) at 16 (Docket No. 110).) Additionally,
18 California contends that its program has little to no effect on
19 the President’s ability to withdraw from the Paris Accord. (Id.
20 at 18-19.)

21 First, the court will consider the GCPA’s preemptive
22 effect on California’s cap-and-trade program.¹⁰ The United States

23 ¹⁰ California, WCI, Inc., and defendant-intervenors EDF
24 and NRDC argue plaintiff’s GCPA claim was not properly raised in
25 its First Amended Complaint. (CA Second Mot. for Summ. J. (“CA
26 Second MSJ”) at 29 (Docket No. 110); WCI, Inc. Second Mot. for
27 Summ. J. (“WCI, Inc. Second MSJ”) at 10-11 (Docket No. 108);
28 Environmental Defense Fund & Natural Resources Defense Council
Opp’n to USA Second MSJ (“EDF & NRDC Second Opp’n”) at 31-32
(Docket No. 106).) Much like the dispute over the Clean Air Act
claim raised in the plaintiff’s reply during the first motion for

1 argues that the GCPA presents an “obstacle” to the President’s
2 ability to develop international climate policy under Crosby v.
3 National Foreign Trade Council, 530 U.S. 363, 366-69 (2000).
4 (USA Second MSJ at 23-24.)

5 In Crosby, Massachusetts attempted to impose its own
6 trade sanctions on Burma¹¹ by banning state entities from buying
7 goods or services from any person doing business with the
8 country. 530 U.S. at 367. Three months after Massachusetts’
9 restrictions came into force, Congress passed a law “imposing a
10 set of mandatory and conditional sanctions on Burma” that were to
11 remain in effect “[u]ntil such time as the President determine[d]
12 and certifie[d] to Congress that Burma has made measurable and
13 substantial process in improving human rights practices.” Id. at
14 368 (citation omitted). The Supreme Court held Massachusetts’
15 ban on trade with Burma stood as an obstacle to the federal
16 government’s more tempered approach by “fenc[ing] off” the
17 President’s “access to the entire national economy” and this
18 effectively negated Congress’ “delegation of effective
19 discretion” to the President. Id. at 373, 381.

20 Crosby does not support a finding of obstacle
21 preemption in this case because plaintiff is ascribing power to
22

23 summary judgment, (see MSJ Order at 31-32 n.14), the state and
24 other parties had an opportunity to entertain and properly
25 respond to the argument. Accordingly, the court finds it
appropriate to consider the GCPA claim.

26 ¹¹ The Supreme Court noted that while the military
27 government of “Burma” changed its country’s name to “Myanmar” in
28 1989, the parties, state law, and federal law all continued to
refer to the country as “Burma” at the time of the case. 530
U.S. at 366 n.1. This court will use the opinion’s language.

1 the GCPA that Congress itself did not. The GCPA was an
2 appropriations rider adopted in 1987. As the Second Circuit
3 noted, it “consists almost entirely of mere platitudes.”
4 Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 382-83
5 (2d Cir. 2009), rev’d on other grounds, 564 U.S. 410 (2011).
6 Beyond requiring the Secretary of State and the EPA to submit a
7 report to Congress within a two-year period, “the 1987 Act
8 appears to require no action of any kind.” Id. at 383. The GCPA
9 only articulates abstract goals that the United States “should
10 seek to” accomplish, including “increas[ing] worldwide
11 understanding of the greenhouse effect” or “work[ing] toward
12 multilateral agreements” to assuage climate change. Title XI of
13 Pub. L. 100-204, 101 Stat. 1407, note following 15 U.S.C. § 2901,
14 §§ 1103(a)(1)-(4). The Agreement, Agreement 11-415, and the
15 provisions of California law challenged by the United States do
16 not stand as an obstacle to the GCPA’s general aims.

17 Furthermore, the 1992 Convention does not preempt the
18 challenged agreements and regulations because they are entirely
19 consistent with its objectives. The “ultimate objective” of the
20 1992 Convention is “to achieve . . . stabilization of greenhouse
21 gas concentrations in the atmosphere at a level that would
22 prevent dangerous anthropogenic interference with the climate
23 system.” (First Iacangelo Decl. ¶ 3, Ex. 1 at 4, Art. 2.)
24 Article 3 of the 1992 Convention explicitly provides that
25 “policies and measures [] deal[ing] with climate change should be
26 cost-effective so as to ensure global benefits at the lowest
27 possible cost,” and Article 4 echoes the same. (Id. at Art. 3, ¶
28 3; see also Art. 4, ¶ 1(f).) The Agreement, Agreement 11-415,

1 and the challenged regulations act in harmony with these goals by
2 regulating greenhouse gas emissions in a cost-effective manner.
3 Without a “clear conflict between the policies adopted,” conflict
4 preemption is inappropriate. See Garamendi, 539 U.S. at 421.

5 Finally, the United States contends that California’s
6 cap-and-trade program directly conflicts with President Trump’s
7 withdrawal from the Paris Accord. (USA Second MSJ at 19.) Its
8 argument is twofold. First, it argues that the program is
9 inconsistent with the President’s withdrawal because it
10 “facilitates Canada’s participation in [the Paris Accord].”
11 (Id.) Second, it contends the contested agreements “undermine
12 the federal government’s ability to develop a new international
13 mitigation arrangement.” (Id.) These arguments, too, fall short
14 of meeting the requirements of conflict preemption.

15 First, under the current form of Article 6 of the Paris
16 Accord,¹² member jurisdictions can set national greenhouse gas
17 emission reduction targets, called “nationally determined
18 contributions.” (First Iacangelo Decl. ¶ 5, Ex. 3 at 7, Art. 6
19 ¶¶ 1-2.) These operate like California’s “budgets” in its cap-
20 and-trade program, capping a party’s overall emissions. In order
21 to comply with these contribution requirements, Article 6
22 provides that parties can acquire “internationally transferred
23 mitigation outcomes” from other participating jurisdictions.
24 (Id. ¶¶ 2-3.) This is functionally equivalent to California

25 ¹² The court recognizes the ongoing debates regarding
26 Article 6’s implementation guidelines. (CA Request for Judicial
27 Notice ¶ 3 (Docket No. 111); see also Br. of Amicus Nature
28 Conservancy at 17 (Docket No. 119-1).) The court relies on the
text of Article 6 included in the Paris Accord rather than any of
the proposed implementation proposals.

1 businesses using compliance instruments acquired from linked
2 jurisdictions to fulfill emissions obligations under California
3 law.

4 The United States claims that California could
5 “facilitate[] Canada’s participation in the Paris Agreement” by
6 providing Canada with mitigation outcomes to satisfy its
7 contribution obligation. (USA Second MSJ at 20.) However, that
8 argument suffers from several flaws. Article 6 cabins the
9 exchange of internationally transferred mitigation outcomes to
10 “Parties” to the Paris Accord. (First Iacangelo Decl. ¶ 5, Ex. 3
11 at 7, Art. 6 ¶ 2.) Specifically, “[t]he use of [] mitigation
12 outcomes to achieve nationally determined contributions under
13 this Agreement shall be voluntary and authorized by participating
14 Parties.” (Id. at ¶ 3 (emphasis added).)

15 Neither California nor Quebec are “[p]arties” to the
16 Paris Accord, and therefore they are incapable of authorizing
17 compliance instruments to be used in this way. While Canada will
18 remain a party to the Paris Agreement, the United States’
19 withdrawal will be complete on November 4, 2020. (First
20 Iacangelo Decl. ¶ 8, Ex. 6.) Even if Canada were to ask the
21 United States to authorize the use of mitigation outcomes
22 acquired from California, (USA Second MSJ at 23), the United
23 States will presumably be unable to authorize the use after
24 November. This is well before Canada’s 2030 contribution target
25 is due, a target for which they intend to “explore” the use of
26 mitigation outcomes. (See, e.g., Second Decl. of Michael Dorsi
27 (“Second Dorsi Decl.”), Exs. 26-27, 29 (Docket No. 110-1).)
28 Consequently, California’s cap-and-trade program cannot

1 facilitate Canada's participation in the Paris Accord in the way
2 the United States alleges.

3 Second, the United States argues the contested
4 agreements "advance[] cross-border emissions mitigation
5 strategies that the United States has rejected" and "undermine
6 the federal government's ability to develop a new international
7 mitigation arrangement." (USA Second MSJ at 19.) These
8 arguments, however, do not point to any specific federal policy,
9 either on the record or in development. While the United States
10 argues the "triggering treaty, statute, or executive action need
11 not itself state an exact 'foreign policy' that the state law
12 conflicts with," (USA Second MSJ at 18), case law holds
13 otherwise.

14 To support conflict preemption, foreign policy must be
15 expressed through a "federal action such as a treaty, federal
16 statute, or express executive branch policy." Von Saher, 592
17 F.3d at 960 (citations omitted). To find otherwise would
18 endanger the "system of dual sovereignty between the States and
19 the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 457
20 (1991). Accordingly, the Supreme Court, as well as the Ninth
21 Circuit, have recognized conflict preemption only in the face of
22 a clear and definite foreign policy. See, e.g., Garamendi, 539
23 U.S. at 420-21 ("The issue of restitution for Nazi crimes has in
24 fact been . . . formalized in treaties and executive agreements
25 over the last half century."); Crosby, 530 U.S. at 378 ("The
26 State has set a different course, and its statute conflicts with
27 federal law at a number of points by penalizing individuals and
28 conduct that Congress was explicitly exempted or excluded from

1 sanctions."); Movsesian, 670 F.3d at 1071; Von Saher, 592 F.3d at
2 960.

3 The United States cites no authority for the
4 proposition that an intent to negotiate for a "better deal" at
5 some point in the future is enough to preempt state law. Indeed,
6 there is a clear distinction between the act of negotiation and
7 the resulting policy. Cent. Valley Chrysler-Jeep, Inc. v.
8 Goldstene, 529 F. Supp. 2d 1151, 1186 (E.D. Cal. 2007), as
9 corrected (Mar. 26, 2008) (Ishii, J.) ("[A] means to achieve an
10 acceptable policy" is not "the policy itself.").¹³ "In order to
11 conflict or interfere with foreign policy . . . the interference
12 must be with a policy, not simply with the means of negotiating a
13 policy." Id. at 1186-1187. Consequently, plaintiff's arguments
14 that California's program undermines the federal government's
15 ability to negotiate new agreements are more properly addressed
16 under field preemption.

17 Overall, the United States has failed to identify a
18 clear and express foreign policy that directly conflicts with
19 California's cap-and-trade program. Accordingly, the court finds
20

21 ¹³ Central Valley involved a challenge to regulations
22 setting limits on carbon dioxide emissions for cars and certain
23 trucks in California. The court concluded that the regulations
24 were not expressly preempted by the Energy Policy and
25 Conservation Act because its preemptive scope "encompass[ed] only
26 those state regulations that are explicitly aimed at the
27 establishment of fuel economy standards." 529 F. Supp. 2d at
28 1175. In so doing, the court rejected "the President's avowed
intent to seek . . . agreements with foreign countries" because
the Supreme Court's guidance concerned cases with tangible
agreements and treaties. 529 F. Supp. 2d at 1186 (discussing
Garamendi, Crosby, and Zschernig). Accordingly, the court found
the President's comments were "more accurately described as a
strategy" rather than "the policy itself." Id.

1 California's program is not barred by conflict preemption.

2 B. Field Preemption

3 "Unlike its traditional statutory counterpart, foreign
4 affairs field preemption may occur even in the absence of a
5 treaty or federal statute, because a state may violate the
6 Constitution by establishing its own foreign policy." Von Saher,
7 592 F.3d at 964 (quoting Deutsch, 324 F.3d at 709 (internal
8 modifications omitted)). To discern whether the law
9 impermissibly impacts foreign affairs, the court must consider
10 whether the state law "(1) has no serious claim to be addressing
11 a traditional state responsibility and (2) intrudes on the
12 federal government's foreign affairs power." Movsesian, 670 F.3d
13 at 1074 (citing Garamendi, 539 U.S. at 426). A plaintiff must
14 show both elements to prevail. See id.; see also Cassirer v.
15 Thyssen-Bornemisza Collection Found., 737 F.3d 613, 617 (9th Cir.
16 2013). The court will consider each in turn.

17 1. Traditional State Responsibility

18 To determine whether the state law addresses a
19 traditional state responsibility, "the required inquiry cannot
20 begin and end . . . with the area of law that the state statute
21 addresses." Movsesian, 670 F.3d at 1075; see also Von Saher, 592
22 F.3d at 964-65. Instead, the court must assess the "real purpose
23 of the state law" by considering the regulation's text and
24 history.¹⁴ Id. (quoting Von Saher, 592 F.3d at 964).

25 ¹⁴ Despite the court's previous admonition to the United
26 States that it would not consider statements from California's
27 governors, past or present, because they are "no more than
28 typical political hyperbole," (MSJ Order at 13 n.7), the United
States heavily relies on these statements to "prove" the "real
purpose" of California's cap-and-trade program. (See USA Second

1 Section 38564 and the challenged regulations were
2 passed as part of (or in furtherance of) California's Global
3 Warming Act. See Cal. Health & Safety Code § 38500 et seq. In
4 the Act's legislative findings and declarations, the California
5 legislature found that global warming posed "a serious threat" to
6 the state's "economic well-being, public health, natural
7 resources, and [] environment," noting it was likely to have
8 "detrimental effects on some of California's largest industries."
9 Id. §§ 38501 (a)-(b). While it recognized "[n]ational and
10 international actions" would be "necessary to fully address the
11 issue of global warming," California hoped to "exercise a global
12 leadership role" by reducing its greenhouse gas emissions and
13 "encouraging other states, the federal government, and other
14 countries to act." Id. §§ 38501(d)-(e). Accordingly, Section
15 38564 provides:

16 [CARB] shall consult with other states, and the
17 federal government, and other nations to
18 identify the most effective strategies and
19 methods to reduce greenhouse gases, manage
20 greenhouse gas control programs, and to
facilitate the development of integrated and
cost-effective regional, national, and
international greenhouse gas reduction programs.

21 Cal. Health & Safety Code § 38564. Pursuant to this mandate,
22 California Code of Regulations, Title 17, Sections 95940-43
23 sought to "facilitate . . . regional, national, and international
24

25 MSJ at 33-34, 36-37.) Neither Movsesian nor Von Saher considered
26 similar statements, instead confining their inquiry to the text,
27 legislative history, or an official government publication. See
28 Movsesian, 670 F.3d at 1075-76; Von Saher, 592 F.3d at 965. As
the court previously recognized, these statements are "entitled
to no legal effect" and they will not be considered. (MSJ Order
at 13 n.1.)

1 greenhouse gas reduction programs” by setting forth procedures to
2 accept compliance instruments “issued by an external greenhouse
3 gas emissions trading system.” Cal. Code Regs. tit. 17, §§
4 95940-43. This design was intended in part to “minimize[] costs”
5 for California businesses and “maximize[] benefits for
6 California’s economy.” Cal. Health & Safety Code § 38501(h);
7 (see also MSJ Order at 8-9).

8 California argues its cap-and-trade program regulates
9 emissions and in-state businesses in a fashion that is consistent
10 with its traditional police power. (CA Second MSJ at 34-37.) As
11 this court has previously recognized, it is well within
12 California’s power to enact legislation to regulate greenhouse
13 gas emissions and air pollution. (See MSJ Order at 30); see
14 also, e.g., Rocky Mountain Farmers Union v. Corey, 913 F.3d 940,
15 945-46, 953 (9th Cir. 2019); Am. Fuel & Petrochem. Mfrs. v.
16 O’Keefe, 903 F.3d 903, 913 (9th Cir. 2018). California can also
17 “subject[] both in and out-of-jurisdiction entities to the same
18 regulatory scheme to make sure that out-of-jurisdiction entities
19 are subject to consistent environmental standards.” Rocky
20 Mountain Farmers, 913 F.3d at 952 (finding California’s low
21 carbon fuel standards did not violate the Commerce Clause).

22 However, a state’s police power is not without limits.
23 Section 38564’s plain text contemplates “facilitat[ing] the
24 development of” programs with “other nations.” Cal. Health &
25 Safety Code § 38564. This invokes an exercise of power typically
26 reserved to the federal government. See, e.g., Pink, 315 U.S. at
27 233 (“Power over external affairs is not shared by the States; it
28 is vested in the national government exclusively.”); Hines, 312

1 U.S. at 63 (“The Federal Government, representing as it does the
2 collective interests of the . . . states, is entrusted with full
3 and exclusive responsibility for the conduct of affairs with
4 foreign sovereignties.”).

5 “Courts have consistently struck down state laws which
6 purport to regulate an area of traditional state competence, but
7 in fact, affect foreign affairs.” Von Saher, 592 F.3d at 964
8 (citations omitted). This practice is particularly prevalent
9 when the focus of a state law extends beyond the enacting state’s
10 borders. See, e.g., id.; Movsesian, 670 F.3d at 1075-77.

11 California contends that its cap-and-trade program is “expressly
12 targeted” at mitigating compliance costs for California
13 businesses. (CA Second MSJ at 35, 41.) While the court has
14 previously recognized that this is one effect of linkage (see MSJ
15 Order at 8-9), an ancillary benefit conferred on in-state
16 entities does not absolve a state from acting outside of its
17 traditional state responsibility. See Movsesian, 670 F.3d at
18 1076 (quoting Von Saher, 592 F.3d at 965).

19 In its current form,¹⁵ California’s cap-and-trade
20 program has extended beyond an area of traditional state

21 ¹⁵ It would, however, likely be within California’s power
22 to participate in a purely domestic market, so long as the
23 agreement does not violate the requirements of the Compact
24 Clause. (See generally MSJ Order III(B).) Indeed, “external”
25 compliance instruments are defined as those from any program
26 “other than the California Cap-and-Trade Program.” Cal. Code
27 Regs. tit. 17, § 95942 (defining “external greenhouse gas
28 emissions trading system”). Compliance instruments need not be
from international sources. Domestic programs, such as the
Regional Greenhouse Gas Initiative (“RGGI”) in the Northeast and
Mid-Atlantic, have facilitated a comparable cap-and-trade program
since 2009. (Second Dorsi Decl. ¶ 7, Ex. 21 at 61.) The court
is unaware of any legal challenges to the RGGI.

1 competence by creating an international carbon market. The Ninth
2 Circuit's decisions in Von Saher and Movsesian are particularly
3 pertinent here.

4 In Von Saher, the Ninth Circuit held a statute creating
5 a cause of action for "any owner, or heir or beneficiary of any
6 owner, of Holocaust-era artwork" against "any museum or gallery"
7 that displayed or sold the artwork exceeded California's
8 traditional state responsibilities. 592 F.3d at 958-59 (citation
9 omitted). While the court recognized California had an interest
10 in regulating property and museums "within its borders," the
11 statute's broad scope "belie[d] California's purported interest
12 in protecting its residents and regulating its art trade" because
13 it permitted suit against entities "whether [they were] located
14 in the state or not." Id. at 965 (citation omitted).

15 Similarly, in Movsesian, the en banc Ninth Circuit
16 overturned an insurance regulation permitting Armenian Genocide
17 victims and their heirs to recover in California because it
18 applied "only to a certain class of insurance policies . . . and
19 specifie[d] a certain class of people . . . as its intended
20 beneficiaries." 670 F.3d at 1075. As "laudable" as California's
21 attempts were to "provide potential monetary relief and a
22 friendly forum for those who suffered from certain foreign
23 events," it did not concern an area of traditional state
24 responsibility. Id. at 1076.

25 Although there were likely individuals in California
26 who would have been subject to the laws and policies preempted in
27 Von Saher and Movsesian, in each case, the laws' external focus
28 and application signaled that their "real purpose" was to control

1 behavior beyond California's borders. California's cap-and-trade
2 program exceeds a traditional state interest in a similar way.
3 While linkage will help businesses fulfill their compliance
4 obligations within California, the program was created with the
5 expressed intent to have "far-reaching effects" including
6 "encouraging other . . . countries to act." See Cal. Health &
7 Safety Code §§ 38501(c)-(e). The regulations and the Agreement
8 were enacted in order to effectuate this broad purpose.
9 Accordingly, the court finds California's cap-and-trade program
10 extends beyond the area of traditional state responsibility.

11 2. Intrusion on Federal Government's Power

12 The court must next address the question of whether
13 California's cap and trade program intrudes on the United States'
14 foreign affairs power. The Constitution "entrusts" power over
15 foreign affairs "to the President and the Congress." Zschernig,
16 389 U.S. at 432 (citing Hines, 312 U.S. at 63). These powers are
17 enumerated and delegated in Article I, Section 8, and Article II,
18 Section 2 of the Constitution. In part, Congress can declare
19 war, punish international crimes, and maintain an army and
20 navy. U.S. Const., art. I, § 8. The President alone is vested
21 with the authority to receive ambassadors and other public
22 ministers, and the President and Congress together share the
23 power to "make Treaties" and "appoint Ambassadors" by and through
24 the Senate's "Advice and Consent."¹⁶ Id., art. II, § 2. In
25 "making" a treaty, however, "[the President] alone negotiates . . .

26 ¹⁶ The President's power to "make Treaties" under Article
27 II is separate and apart from Article I's prohibition on states
28 from entering into a "Treaty, Alliance, or Confederation"
discussed in this court's previous order. (MSJ Order at 17-24.)

1 . . . the Senate cannot intrude; and Congress itself is powerless
2 to invade it.” United States v. Curtiss-Wright Exp. Corp., 299
3 U.S. 304, 319 (1936); see also Zivotofsky v. Kerry, 576 U.S. 1,
4 13-14 (2015).

5 “To intrude on the federal government’s foreign affairs
6 power, a [state’s action] must have more than some incidental or
7 indirect effect on foreign affairs.” Gingery v. City of
8 Glendale, 831 F.3d 1222, 1230 (9th Cir. 2016) (quoting Cassirer,
9 737 F.3d at 617) (alterations in original). To have more than
10 some incidental or indirect effect, state laws must “impair the
11 effective exercise of the Nation’s foreign policy” or have some
12 “great potential for disruption.” Zschernig, 389 U.S. at 435,
13 440.

14 The United States principally argues California’s cap-
15 and-trade program diminishes the President’s power to “engage in
16 international deal making on behalf of the United States.” (USA
17 Second MSJ at 38.) Again, the United States relies on Crosby to
18 suggest the President’s power to negotiate is impeded by
19 California’s “inconsistent political tactics.” (USA Second MSJ
20 at 36 (quoting Crosby, 530 U.S. at 381.) However, Crosby’s facts
21 differ from the case here in three material respects: first, in
22 Crosby, the President’s power was at its “maximum”; second, the
23 scope of the laws are markedly different; and third, there was
24 actual evidence that the President’s power to negotiate had been
25 impeded. See 530 U.S. at 374-75, 381-84.

26 First, as the Supreme Court explained in Crosby,
27 “[w]hen the President acts pursuant to an express or implied
28 authorization of Congress, his authority is at its maximum, for

1 it includes all that he possesses in his own right plus all that
2 Congress can delegate.” Id. at 375 (quoting Youngstown Sheet &
3 Tube. Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J.,
4 concurring)). There, Congress provided the President “with
5 flexible and effective authority over economic sanctions against
6 Burma” through the Foreign Operations, Export Financing, and
7 Related Programs Appropriations Act. Id. at 374. This
8 delegation gave the President the power to exercise as much
9 “economic leverage against Burma . . . as our law will admit.”
10 Id. at 375-76.

11 “[I]n the absence of either a congressional grant or
12 denial of authority” there is a “zone of twilight” in which the
13 President’s authority is less clear. Youngstown, 343 U.S. at
14 637. Here, unlike in Crosby, there has not been a comparable
15 statutory grant. Consequently, the President’s authority is not
16 at its maximum. While the President can, to an extent, “act in
17 external affairs without congressional authority,” id. at 635,
18 absent an express delegation of power from Congress, “[i]t is not
19 for the President alone to determine the whole content of the
20 Nation’s foreign policy.” See Zivotofsky, 576 U.S. at 21; (see
21 also Br. of Amici Curiae Professors of Foreign Relations Law at
22 9-14 (Docket No. 113).) Accordingly, Crosby is distinguishable
23 in this respect.

24 Second, unlike Crosby, California’s cap-and-trade
25 agreement as applied concerns agreements between sub-national
26 actors, rather than a state-wide prohibition on trade with an
27 entire nation. In Crosby, Massachusetts’ law broadly prohibited
28 “doing business” with the nation of Burma, making it “impossible”

1 for the President to fully exercise the “coercive power of the
2 national economy.” 530 U.S. at 367, 377. Here, the United
3 States provides no evidence that an agreement between a state and
4 a province of a foreign nation could “fence[] off” portions of
5 the national economy in a similar way. See id. at 377, 381.
6 Instead, California’s program mirrors the many thousands of
7 agreements individual states have entered into with foreign
8 jurisdictions, including those addressing climate change. (See
9 Br. of Amici States (Docket No. 116) & First Dorsi Decl. ¶ 17,
10 Ex. 15 (citing Michael J. Glennon & Robert D. Sloane, Foreign
11 Affairs Federalism: The Myth of National Exclusivity 60-61 (2016)
12 (noting “[m]ore than four hundred agreements exist between the
13 states and Canadian provinces”).)

14 The third, and most critical, difference between Crosby
15 and this case is the absence of concrete evidence that the
16 President’s power to speak and bargain effectively with other
17 countries has actually been diminished. In Crosby, the Court
18 cited three specific examples to demonstrate how Massachusetts’s
19 law threatened the President’s power to negotiate: (1) a number
20 of allies/trading partners had filed formal complaints protesting
21 Massachusetts’s law with the federal government; (2) Japan and
22 the European Union had filed formal complaints against the United
23 States in the World Trade Organization (“WTO”) claiming the
24 United States had violated a plurilateral agreement among members
25 of the WTO; and (3) the Executive “consistently” represented that
26 the Massachusetts’s law “has complicated its dealing with foreign
27 sovereigns and proven an impediment to accomplishing objectives
28 assigned to it by Congress.” 530 U.S. at 382-84. As the Court

1 found, "this evidence in combination" was "more than sufficient"
2 to show that Massachusetts's law stood as an obstacle to the
3 president effectuating his congressional obligation. Id. at 385.
4 Here, in contrast, the United States has failed to offer similar
5 evidence that California's cap-and-trade program interferes with
6 the President's powers.

7 The United States continually stresses that the
8 President withdrew from the Paris Accord in order to negotiate
9 for a "better deal." (USA Second MSJ at 19-23.) However, the
10 United States offers no concrete evidence that California's cap-
11 and-trade program has interfered with either negotiations for a
12 better deal or the nation's imminent withdrawal from the Paris
13 Accord. (See Part III(A) at 15-16, supra.) The United States
14 repeatedly suggests California's program would incentivize other
15 countries to negotiate with California to the exclusion of the
16 federal government. (See USA Second MSJ at 38; USA Reply in
17 Support of Second MSJ at 23-24, 35 (Docket No. 125).) That is a
18 distinct possibility, but the United States offers no evidence
19 that this has happened or will happen.

20 These arguments also plainly ignore the limiting
21 principles provided by California law and Article 6 of the Paris
22 Accord. See, e.g., Cal. Gov. Code § 12894(f)(1) ("The
23 jurisdiction with which [CARB] proposes to link has adopted
24 program requirements for greenhouse gas reductions . . . that are
25 equivalent to or stricter than those required [by California
26 law]."); Cal. Code Regs. tit. 17, § 95942(i) (permitting CARB to
27 terminate linkage if the linked jurisdiction falls out of
28 compliance with California law); First Iacangelo Decl. ¶ 27, Ex.

1 25 at 9 (“Any jurisdiction that wishes to link with the
2 California Program . . . will need to be a member of WCI, Inc.”);
3 (see Part III(A) at 15-16, supra).

4 Finally, while individuals in the executive branch in
5 Crosby “consistently” maintained that Massachusetts law
6 jeopardized the President’s power, 530 U.S. at 383-84, concerns
7 about the effect of California’s cap-and-trade program on the
8 President’s negotiation power are of recent vintage. (Compare
9 Second Dorsi Decl., Ex. 22 at 127, 129 (discussing California’s
10 cap-and-trade program as “complementary” to federal policies
11 working to reduce emissions in 2014), with FAC ¶ 3 (describing
12 California’s cap-and-trade program an “intrusion[]” into “the
13 federal sphere” in 2019).)

14 While the President indisputably has “a unique role in
15 communicating with foreign governments,” Zivotofsky, 576 U.S. at
16 21, the United States has failed to demonstrate that the power to
17 do so has been substantially circumscribed or compromised by
18 California’s cap-and-trade program. As California recognizes, a
19 future treaty would have “appropriate preemptive effect over
20 inconsistent state laws.” (CA Reply in Support of Second MSJ at
21 15 (Docket No. 127).) But in the interim, hypothetical or
22 speculative fears cannot support a finding that this state
23 program has more than an incidental effect on foreign affairs.
24 See Gingery, 831 F.3d at 1230; see also Incalza v. Fendi North
25 Am., Inc., 479 F.3d 1005, 1010 (9th Cir. 2007) (“A hypothetical
26 conflict is not a sufficient basis for preemption.”).

27 The United States has failed to show that California’s
28 program impermissibly intrudes on the federal government’s

1 foreign affairs power. Because the court must find both that a
2 state law has exceeded a traditional state responsibility and
3 intrudes on the federal government's foreign affairs power to be
4 preempted, Movsesian, 670 F.3d at 1074, the court will grant
5 defendants' motions for summary judgment on plaintiff's field
6 preemption claim.

7 IT IS THEREFORE ORDERED that the State of California
8 and WCI, Inc.'s motions for summary judgment (Docket Nos. 108,
9 110) be, and the same hereby are, GRANTED. Plaintiff's motion
10 for summary judgment (Docket No. 102) is DENIED. The Clerk of
11 Court is instructed to enter judgment in favor of all defendants
12 and against the United States.

13 Dated: July 16, 2020



14 WILLIAM B. SHUBB
15 UNITED STATES DISTRICT JUDGE
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