XAVIER BECERRA
Attorney General of California
MICHAEL P. CAYABAN
Supervising Deputy Attorney General
MICHAEL S. DORSI, SBN 281865
MICAELA M. HARMS, SBN 329552
PHILLIP M. HOOS, SBN 288019
THEODORE A.B. MCCOMBS, SBN 316243
M. ELAINE MECKENSTOCK, SBN 268861
Deputy Attorneys General
1515 Clay St., 20th Floor
Oakland, CA 94612-1492
Telephone: (510) 879-0299
Fax: (510) 622-2270
E-mail: Elaine.Mechenstock@doj.ca.gov
Attorneys for State Defendants[1]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE 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., Defendants.	2:19-cv-02142-WBS-EFB **STATE DEFENDANTS' NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT** Date: June 29, 2020 Time: 1:30 PM Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: 10/23/2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 29, 2020 at 1:30 p.m., or at the Court's convenience thereafter, in Courtroom 5 (the Honorable William B. Shubb presiding), located at 501 I Street, Sacramento, California, State Defendants will and hereby do move for summary judgment in favor of Defendants on Plaintiff's Third Cause of Action in its Amended Complaint.

CROSS MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, State Defendants move for summary judgment on Plaintiff's Foreign Affairs preemption claim on the grounds that there is no genuine issue of material fact as to this claim, and that State Defendants are entitled to judgment as a matter of law because neither California's 2017 agreement with Quebec, nor California's laws and regulations linking its cap-and-trade program to Quebec's, are preempted by the Foreign Affairs doctrine or any other doctrine or law.

This motion is supported by the State Defendants' Memorandum in Support of State Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion, Statement of Undisputed Facts, Response to Plaintiff's Statement of Undisputed Facts, the Declaration of Rajinder Sahota, Request for Judicial Notice, the Declaration of Michael S. Dorsi and attached exhibits, other material submitted in this case, any evidence and/or arguments that State Defendants may offer at the hearing on this motion, and any other matter the Court may consider.

Further, State Defendants seek an entry of final judgment in their favor. This Court granted partial summary judgment to Defendants as to Plaintiff's First and Second Causes of Action. Plaintiff seeks to abandon its Fourth, and final, Cause of Action. Accordingly, a grant of summary judgment against Plaintiff's Third Cause of Action must result in a judgment of final judgment.

Dated: May 18, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL P. CAYABAN
Supervising Deputy Attorney General

/s/ M. Elaine Meckenstock
M. ELAINE MECKENSTOCK
Deputy Attorney General
Attorneys for State Defendants

XAVIER BECERRA
Attorney General of California
MICHAEL P. CAYABAN
Supervising Deputy Attorney General
MICHAEL S. DORSI, SBN 281865
MICAELA M. HARMS, SBN 329552
PHILLIP M. HOOS, SBN 288019
THEODORE A.B. MCCOMBS, SBN 316243
M. ELAINE MECKENSTOCK, SBN 268861
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612-1492
Telephone: (510) 879-0299
Fax: (510) 622-2270
E-mail: Elaine.Meckenstock@doj.ca.gov
Attorneys for State Defendants[*]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, **v.** THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE 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., Defendants.	2:19-cv-02142-WBS-EFB **STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Date: June 29, 2020 Time: 1:30 p.m. Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: October 23, 2019

[*] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

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INTRODUCTION

More than six years ago, California amended its cap-and-trade program, a market-based mechanism for reducing greenhouse gas emissions in a cost-effective manner, to accept compliance instruments issued by Quebec, thereby expanding cost-reduction opportunities for California businesses. After unsuccessfully challenging this linkage under the Treaty and Compact Clauses, Plaintiff has filed a new motion asserting preemption under the Foreign Affairs doctrine. Plaintiff's preemption theories also fail.

Although Plaintiff's main theory is conflict preemption, Plaintiff cannot establish *any* conflict with a foreign policy of the United States, let alone the clear conflict required to preempt part of a state air pollution control program. Plaintiff does not—and cannot—assert any conflict with the express foreign policy adopted by both the Executive and Legislative branches in the United Nations Framework Convention on Climate Change (UNFCCC). In fact, California's linkage with Quebec's cap-and-trade program advances the core purpose and principles of the UNFCCC to reduce greenhouse gas emissions in a cost-effective manner. This leaves Plaintiff attempting to establish conflict with the unilateral policy of the Executive. But while Plaintiff relies on the President's decision to withdraw from the Paris Agreement as the relevant foreign policy, California's linkage with Quebec plainly did not prevent the withdrawal, which Plaintiff admits *will* become effective later this year, regardless of any action California has taken or could take. And Plaintiff fails to explain how a program that benefits businesses in the United States, by lowering the cost of emissions reductions, conflicts with concerns expressed by the Executive about unfair burdens imposed by the Paris Agreement. In addition, while Plaintiff contends that the linkage facilitates Canada's continued participation in the Paris Agreement, Plaintiff is only able to do so through a convoluted chain of speculation that is the antithesis of the clear conflict required here. Plaintiff's complaints about reduced diplomatic leverage are even vaguer and without basis. This is a far cry from *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), where the Court found a clear conflict based on a concrete and well-defined federal foreign policy addressing the exact same subject as a California law employing the very means rejected by the federal government.

In addition to asserting conflict preemption, Plaintiff asserts a new "obstacle preemption" claim based on congressional delegation of authority to the President, primarily in the Global Climate Protection Act of 1987. This new statutory preemption claim, which has not been properly raised, fails because Plaintiff is unable to show that linkage interferes with the Act's objectives. Moreover, Plaintiff cannot establish preemption based upon criticisms of the President's actions by state officials, especially statements not directly connected to the linkage that Plaintiff seeks to invalidate.

Finally, Plaintiff argues for field preemption. Under the Foreign Affairs doctrine, however, field preemption is very narrow and applies only where a State cannot seriously claim to be addressing a traditional state responsibility. That is plainly not the case here. The linkage directly advances California's goal of reducing emissions cost effectively and thus is plainly an appropriate exercise of the state's traditional police power. Indeed, in resolving Plaintiff's Compact Clause claim, the Court ruled that California's linkage with Quebec was an exercise of its traditional state powers because "[i]t is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." ECF No. 91 at 30. This ruling, which Plaintiff simply ignores, is by itself fatal to Plaintiff's field preemption claim, which also fails because Plaintiff cannot show any intrusion upon foreign affairs powers reserved exclusively for the federal government.

BACKGROUND

I. RELEVANT ASPECTS OF THE FEDERAL GOVERNMENT'S REGULATION OF AIR POLLUTION AND ITS CLIMATE CHANGE POLICY

A. The Clean Air Act

Although air pollution is an area traditionally regulated by the States, *see, e.g.*, *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000), beginning in the 1950's "Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984). Particularly in the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, Congress has expanded federal authority and responsibility in this area. *Chevron*, 467 U.S. at 845-46. In doing so, however, Congress has

continued to recognize that "pollution control at its source is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), and the Clean Air Act therefore expressly preserves the authority of States to adopt air pollution standards—which include greenhouse gas (GHG) emissions (*Massachusetts v. EPA*, 549 U.S. 497, 532 (2007))—that go beyond the federal government's, 42 U.S.C. § 7416.

B. The Global Climate Protection Act

In 1987, Congress passed the Global Climate Protection Act (GCPA), Pub. L. No. 100-204, 101 Stat. 1407 (codified as a note to 15 U.S.C. § 2901). Noting evidence that greenhouse gas emissions may be producing a substantial, long-term temperature increase and that more research is crucial to developing an effective response, Congress enacted the statute to "increase worldwide understanding" of the problem, to "foster cooperation among nations" on scientific research, to "identify technologies and activities to limit mankind's adverse effect on the global climate," and to "work toward multilateral agreements." *Id.* §§ 1102, 1103(a).

The GCPA tasked the President, through the Environmental Protection Agency (EPA), with developing a coordinated national policy on climate change and proposing that policy to Congress. *Id.* § 1103(b). It also directed the Secretary of State to coordinate aspects of the United States policy requiring multilateral diplomacy, working, through the President, with EPA and other federal agencies engaged in environmental protection, in the formulation of policy. *Id.* § 1103(c). The Secretary of State and EPA were to submit a report to Congress within 24 months, including a strategy for seeking further international cooperation to limit climate change. *Id.* § 1104.

The State Department and EPA submitted their report to Congress in February 1991. Second Declaration of Michael S. Dorsi (Second Dorsi Decl.), Exh. 18. The report stated that much remained unknown about global climate change, including whether such changes had been detected, but indicated that any efforts to address such changes should include "the development and implementation of feasible and cost-effective policies and practices." *Id.* at 1; *see also id.* at 17 ("Policies to limit climate change should be designed to ensure that they are both efficacious

and cost-beneficial."). The report also stated that "negotiations on [an international] framework climate change convention should be initiated." *Id.* at 62.

C. The UNFCCC

The framework convention referenced in the GCPA report—the United Nations Framework Convention on Climate Change (UNFCCC)—was ratified in 1992. Plaintiff's Statement of Undisputed Facts (ECF No. 102-1), Fact 1. Having received the consent of the Senate, this treaty is "the law of the land." Plaintiff's Motion for Summary Judgment (ECF No. 102) (Pl. MSJ) at 6:2. The UNFCCC's "ultimate objective" is "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Iacangelo Decl., Exh. 1 (UNFCCC), Art. 2. In addition the treaty recognizes that measures taken to accomplish this objective "should be cost-effective so as to ensure global benefits at the lowest possible cost." *Id.*, Art. 3, ¶ 3.

Developed country Parties, including the United States, committed, among other things, to adopt policies and take measures to mitigate climate change, including limiting greenhouse gas emissions. *Id.*, Art. 4, ¶ 2(a). Those Parties further agreed to report "detailed information on [their] policies and measures." *Id.*, Art. 4, ¶ 2(b); *see also* Art. 12, ¶ 2(a). Since ratification of the UNFCCC, "the federal and state governments have sought to combat greenhouse gas emissions in a variety of ways, including through the enactment of cap-and-trade programs." Memorandum and Order Re: Cross-Motions for Summary Judgment (ECF No. 91) (MSJ Order) at 3:19-22.

II. CALIFORNIA'S CAP-AND-TRADE PROGRAM AND LINKAGE WITH QUEBEC

A. The California Global Warming Solutions Act of 2006

In 2006, in the Global Warming Solutions Act of 2006, the California Legislature found that climate change "poses a serious threat to the economic well-being, public health, natural resources, and the environment of California." Cal. Health & Safety Code § 38501(a); *see also id.* § 38501(b) (finding, *inter alia*, risks to water supplies and water quality, threats to public health, and impacts on "some of California's largest industries"). Recognizing that GHG emissions cause these climate change threats, the Legislature mandated reductions in statewide GHG emissions to 1990 levels by 2020. *Id.* § 38550. In 2016, the Legislature took the additional

step of mandating that statewide emissions be reduced to 40 percent below 1990 levels by the end of 2030. *Id.* § 38566.

The Legislature tasked CARB with developing a plan and promulgating regulations "to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions in furtherance of achieving the statewide greenhouse gas emissions limit." *Id.* § 38562; *see also id.* §§ 38560, 38561. The Legislature authorized CARB to design and adopt a cap-and-trade program as one such regulation. *Id.* § 38562(c)(2). As this Court has observed, cap-and-trade programs are "market-based approach[es]" to reducing emissions, under which regulated parties may buy and sell compliance instruments—essentially, permits that authorize the holder to emit a specific quantity of emissions. MSJ Order at 3:23-24, 33:4-13.

B. California's Cap-and-Trade Program

In 2011, as part of its broader efforts to achieve the statewide GHG emissions targets established by the Legislature, CARB adopted a cap-and-trade program. Declaration of Rajinder Sahota (Sahota Decl.) (ECF No. 49-1), ¶ 20; Declaration of Michael S. Dorsi (Dorsi Decl.) (ECF No. 49-2), Exh. 4. The program's compliance obligations for regulated sources began on January 1, 2013. Cal. Code Regs., tit. 17, § 95840(a). These regulated sources (called "covered entities") include major GHG emitters in the State, such as refineries, electric power plants, certain manufacturing or production plants, and suppliers of electricity and natural gas (including utilities). *Id.* § 95811.

CARB establishes yearly caps, called "budgets," for the total GHG emissions of all of these covered entities combined. *Id.* §§ 95841, 95802(a). These emission budgets decline each year in order to require emission reductions from covered entities. *See id.* § 95841. CARB issues allowances—"authorization[s] to emit up to one metric ton of carbon dioxide equivalent" GHGs—in quantities equal to the emissions budget for a given year. *Id.* §§ 95802(a), 95820.

Covered entities are required to acquire and surrender eligible compliance instruments—allowances and other instruments called offsets[1]—equivalent to the metric tons of GHGs they

[1] Covered entities may surrender "offsets" for a small portion (four to eight percent) of their compliance obligation. Cal. Code of Regs., tit. 17, §§ 95821, 95854. Like an allowance, an

emit. *Id.* §§ 95850(b), 95856(a). The majority of California allowances are made available through quarterly auctions, though some allowances are provided to regulated parties at no cost. *See* Cal. Code Regs., tit. 17, § 95910. Covered entities may buy and sell compliance instruments in the secondary "carbon market" and may also bank them for later use. MSJ Order at 4:12, 8:8-10, 8:23-24. Thus, covered entities have the flexibility to design and implement the lowest cost compliance strategies—the combinations of emissions reductions and instrument transactions—that best reflect their business needs and market conditions (including the price of compliance instruments). *See* Cal. Code Regs., tit. 17, § 95856(a); *see also* Dorsi Decl., Exh. 1 at 1-2.

C. The Linkage Framework Regulations

When it designed California's cap-and-trade program, CARB included several cost containment measures designed to minimize the costs of reducing GHG emissions. Second Dorsi Decl., Exh 23 at II-4.[2] Among the proposed measures was a framework for linking CARB's cap-and-trade program to another program, by accepting that program's compliance instruments as effectively equivalent to those issued by California. *Id.* at II-4 to II-6. Although CARB did not propose to link to any particular program at that time, it recognized that doing so in the future would permit regulated businesses to "seek out the lowest cost [emissions] reductions to be found" within any of the linked jurisdictions. *Id.* at II-40. "For this reason," CARB stated, "linkage allows for increased cost-containment by reducing the aggregate cost of meeting the cap." *Id.*

During the public comment period for that first cap-and-trade rulemaking, the public, including businesses that would be regulated under the program, supported adoption of the cost

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"offset" authorizes a metric ton of emissions, but, unlike an allowance, an offset corresponds to emissions reductions by a source not covered by the program. *See* Cal. Code Regs., tit. 17, § 95802(a). In essence, an offset is a mechanism that allows a covered entity to pay a non-covered entity to reduce or remove emissions. Because the use of offsets is limited under California's program, and for purposes of brevity and simplicity, the discussion here focuses on allowances.

[2] Initial Statements of Reasons, like this one, are required by the California Administrative Procedure Act to formally initiate a proposed regulatory action (e.g., a new rule or amendment to an existing rule). Cal. Gov. Code § 11346.2(b). They are somewhat analogous to Notices of Proposed Rulemakings in federal administrative law. Final Statements of Reasons, cited elsewhere in this brief, are likewise part of the State's rulemaking process and are loosely analogous to preambles to final rules and responses to comments produced in federal rulemaking proceedings.

containment measures, including the linkage framework regulations. Many urged CARB to link to other programs as soon as possible so that they could realize the benefits of increased compliance flexibility. For example, the Western States Petroleum Association supported linkage as a way to "achieve cost effective reductions without significant economic impacts." Dorsi Decl., Exh. 5 at 167 (CARB paraphrasing). Others supported linkage because it "would provide greater market liquidity while encouraging the realization of the most cost-effective reduction opportunities for GHG emissions." *Id.* at 191 (CARB paraphrasing); *see also id.* at 191-193. CARB adopted the cap-and-trade regulation in 2011 with the regulatory provisions for future linkage, recognizing that linking to other programs in the future would "provide an additional cost containment mechanism." *Id.* at 193.[3]

The adopted framework anticipated that linkage would consist of two elements: (1) CARB's acceptance of instruments issued by the other program as essentially equivalent to CARB-issued instruments, and (2) the ability to conduct joint allowance auctions with the linked jurisdiction. Cal. Code Regs., tit. 17, §§ 95940, 95942(a), (e), 95911(a)(5)); *see also* MSJ Order at 9:19-24. These elements—particularly the effective equivalency of the instruments issued by either program—result in expanded markets for the compliance instruments, with parties regulated under either program able to trade with each other. Sahota Decl., ¶ 61. Linking, however, would not "substantively alter each individual jurisdiction's cap-and-trade program" in any other way. MSJ Order at 9:24-25; *see also* Sahota Decl., ¶ 25.

California operated its cap-and-trade program for two years before linking to another program. Second Dorsi Decl., Ex. 24 at 20. During that period, CARB auctioned allowances it issued independently of any other jurisdiction. *Id.*

[3] CARB has recognized that the adoption of cap-and-trade programs in other jurisdictions, and linkage with those programs, could have other benefits as well. *Id.* at 193. Because "each linked partner jurisdiction" reduces its own emissions, "an expanded linked Program can result in greater emissions reductions" than California's program can. Second Dorsi Decl., Exh. 25 at 532. In any event, the direct effect of linkage—of "[e]xpanding the number of sources that are able to trade allowances"—is to "reduce[] the overall cost of achieving emission reductions and improve[] the efficiency of the allowance market." *Id.*

D. Linkage with Quebec

On April 19, 2013, CARB amended its cap-and-trade regulation to link to a similar program adopted by Quebec. Sahota Decl., ¶¶ 33-34, 40; Dorsi Decl., Exh. 6; *see also* Cal. Code Regs., tit. 17, § 95943(a)(1).[4] CARB found the linkage would provide greater flexibility for California businesses and greater market liquidity, and could benefit the California economy. Sahota Decl., ¶ 32. By operation of these regulatory amendments ("the linkage regulations"), linkage with Quebec took effect January 1, 2014. Cal. Code Regs., tit. 17, § 95943(a)(1). As a result, for the last six years, CARB has accepted Quebec-issued compliance instruments, alongside those issued by CARB, as a form of compliance with CARB's cap-and-trade program. *Id.* Businesses regulated under either program may participate in the joint auctions and may trade with each other in the secondary market. *See id.*; *see also* Sahota Decl., ¶ 61.[5] The California and Quebec programs are otherwise unaltered. Sahota Decl., ¶¶ 42-43; MSJ Order at 9:24-25. For example, linkage did not change emissions limits in either jurisdiction. Sahota Decl., ¶¶ 42-43.

In September 2013, approximately five months after it adopted the linkage regulations, CARB and California's Governor signed an agreement with Quebec, reflecting both jurisdictions' intentions to continue coordinating with regard to their respective cap-and-trade programs. *See* Am. Compl., ¶ 57; *see also* Dorsi Decl., Exh. 8. Coordination helps ensure that each jurisdiction understands what program changes are being considered by the other and whether those changes might have indirect effects on one or both programs. Sahota Decl. ¶ 49. But, as the agreement expressly recognized, each jurisdiction's program continues to be governed by its own regulations and its "sovereign right and authority to adopt, maintain, modify, or repeal any of their respective program regulations…." Dorsi Decl., Exh. 8 (14th WHEREAS clause); *see also id.,* Arts. 6, 7, 8). Indeed, the greenhouse gas emission requirements in the two jurisdictions are not identical: while Quebec set a province-wide greenhouse gas emissions target for 2020 requiring reductions

[4] As discussed in prior briefing, the Governor made several, required findings about this linkage prior to CARB finalizing the linkage regulations. *See* ECF No. 49 at 7:1-23.

[5] The auctions are conducted jointly in the sense that California and Quebec make their respective allowances available at the same time, and in the same auction venue, and conform their bidding and winning parameters. Sahota Decl., ¶ 52.

to 20 percent below 1990 levels, Sahota Decl., ¶ 35; MSJ Order 10:7-9, California's statewide emissions limit for 2020 requires reductions only to 1990 levels, *see, supra*, at 4.

The 2013 agreement was replaced in 2017 with a new agreement that for a short period of time included Ontario as well as California and Quebec. In July 2017, CARB adopted regulatory amendments to link its cap-and-trade program with Ontario's, with that linkage becoming operational on January 1, 2018. Sahota Decl., ¶¶ 62-64; Dorsi Decl., Exh. 9; *see also* Cal. Code Regs., tit. 17, § 95943(a)(2). In September 2017, the governments of California, Quebec, and Ontario signed an agreement, replacing the 2013 agreement. Am. Compl., Attachment B (ECF No. 7-2) (2017 agreement) at 3. Like its predecessor, the 2017 agreement was intended to facilitate continued consultations, Sahota Decl. ¶ 49, and it expressly acknowledged that each program would continue to be governed by each party's respective regulations, pursuant to each party's sovereign authorities. 2017 agreement at 2, Arts. 6, 7, 9, 14.

In 2018, Ontario revoked its cap-and-trade regulations. Sahota Decl., ¶¶ 74, 75. As reflected in CARB's regulations, the link with Ontario was effective from January 1, 2018 through June 15, 2018. Cal. Code Regs., tit. 17, § 95943(a)(2). The linkage between California's and Quebec's programs remains in effect. *Id.* § 95943(a)(1).

III. THE UNITED STATES' NATIONAL COMMUNICATIONS UNDER THE UNFCCC

As noted above, the UNFCCC requires the United States to regularly report "detailed information on its policies and measures" implementing its commitments under the treaty to limit GHG emissions and mitigate climate change. UNFCCC, Art. 4, ¶¶ 2(a), (b), Art. 12, ¶ 2(a). Since ratification in 1992, there have been seven rounds of these reports, called "National Communications." *See* Defendants' Request for Judicial Notice (RJN), ¶ 1. Beginning with its Third National Communication in 2002, the United States has reported its "policies and measures" in two broad categories—those adopted by the federal government and those adopted by others, primarily States and local governments. Second Dorsi Decl., Exh. 22 (2014 report) at 34; Exh. 21 (2010) at iii; Exh. 20 (2007) at 37-38, 50-53; Exh. 19 (2002) at 61.

Through multiple Presidential administrations, these communications have consistently remarked on the importance of state and local action to reduce greenhouse gas emissions. For

example the National Communication submitted under President George W. Bush reported that "state and local governments" "are addressing global climate change in numerous ways" and that "non-federal climate change activities can be an important factor in the success of emission reduction policies." *Id.*, Exh. 20 at 37, 50. Likewise, the 2010 National Communication submitted under President Obama described "regional, state, and local initiatives" as "supplement[ing] the federal effort to reduce GHG emissions." *Id.*, Exh. 19 at 61. That report also stated:

> the results of and feedback from state and local climate protection efforts will play an integral role in the development of the federal actions to address climate change. In addition, some of these actions serve as a model for countries that are beginning to formulate their response to climate change because they can be tailored to local and regional conditions, are often scalable, and can create economic opportunities and job growth through the promotion of clean energy.

Id.; see also id., Exh. 22 (2014) at 131 (identifying several U.S. cities as "global leaders").

California's efforts to inventory and reduce its GHG emissions were listed in the "non-federal" category of climate actions in the 2002, 2007, 2010, and 2014 reports submitted by the United States. *Id.*, Exh. 19 (2002) at 62, Exh. 20 (2007) at 52, Exh. 21 (2010) at 63, Exh. 22 (2014) at 129. California's commitment to a statewide limit on greenhouse gas emissions was specifically included in all three reports submitted by the United States since 2006 when that statewide limit was adopted. *Id.*, Exh. 20 (2007) at 52 (listing California as the only State with a "Statewide GHG Emission Cap"); Exh. 21 (2010) at 61-62, Exh. 22 (2014) at 129. And California's cap-and-trade program was specifically listed in the Sixth National Communication, the only one submitted after CARB's adoption of the regulation in 2011. *Id.*, Exh. 22 (2014) at 129. At the time of that submission in 2014, CARB had already linked its program with Quebec's, signed the 2013 agreement with Quebec, and begun operating its program with linkage in place. *See, supra*, at 7-8.

The United States has not submitted its Seventh National Communication, which was due January 1, 2018. RJN, ¶ 2.

IV. THE PARIS AGREEMENT

In 2016, a number of Parties to the UNFCCC, including the United States, entered into the Paris Agreement, aiming to "strengthen the global response to the threat of climate change" by holding down the increase in the global average temperature to specific targets. Iacangelo Decl., Exh. 3 (Paris Agreement), Art. 2, ¶ 1; *see also* MSJ Order at 11-12. Among other things, the Paris Agreement requires the Parties to establish "nationally determined contributions" that they intend to achieve and to pursue mitigation measures to meet those objectives. Paris Agreement, Art. 4, ¶ 2.

On June 1, 2017, President Trump announced that the United States intended to withdraw from the Paris Agreement, stating that the Agreement put the United States at an economic disadvantage relative to other countries such as China and India. Iacangelo Decl., Exh. 5 at 3-4. The United States submitted formal notification of its withdrawal on November 4, 2019, and, under the terms of the Paris Agreement, withdrawal will take effect on November 4, 2020. *Id.*, Exh. 6.

V. PRIOR PROCEEDINGS

Plaintiff sued Defendants on October 23, 2019 seeking a declaration that the 2017 agreement, an agreement between CARB and Western Climate Initiative, Inc. (WCI, Inc.), and "supporting California law as applied" are unconstitutional as well as an injunction against their operation and implementation. ECF No. 1 at ¶¶ 85, 89, 93, 102, 110, 112. After amending its complaint on November 19, 2019 to add various allegations, ECF No. 7, Plaintiff filed a pre-answer motion for summary judgment on its causes of action under the Treaty and Compact Clauses of Article II of the U.S. Constitution. ECF No. 12. Defendants cross-moved for summary judgment on the same causes of action. At oral argument, after noting that Plaintiff had raised arguments concerning the Compact Clause that overlapped with the Foreign Affairs preemption claim not yet before it, the Court warned that its ruling on the initial summary judgment motion might affect that claim. *See* Tr. at 48:18-23. Plaintiff elected to proceed. On March 12, 2020, this Court denied Plaintiff's motion and granted Defendants' cross-motion. ECF No. 91; *see also* ECF No. 79 (dismissing Defendants Lipper and Bloom).

Shortly after the summary judgment order, Plaintiff informed State Defendants that it planned to seek leave to amend its complaint to remove its dormant Foreign Commerce Clause cause of action and add a statutory preemption cause of action under the Clean Air Act. *See* ECF No. 99 at 2:21-23. Plaintiff subsequently decided, however, not to add the statutory preemption claim or otherwise seek to amend its complaint. *See* ECF No. 102 at 4 n.2. Instead, it sought to dismiss its dormant Foreign Commerce Clause claim and moved for summary judgment on its remaining Foreign Affairs preemption cause of action. ECF No. 102.

STANDARD FOR SUMMARY JUDGMENT

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), as "determined by the substantive law governing the claim or defense." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In ruling on summary judgment, the court will view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003). But "[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). In addition, where, as here, the "parties submit cross-motions for summary judgment, each motion must be considered on its own merits," with the Court considering "the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134, 1136 (9th Cir. 2001) (internal quotation marks omitted).

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ARGUMENT

I. PLAINTIFF'S CONFLICT PREEMPTION CLAIM FAILS AS A MATTER OF LAW

Although conflict preemption requires an analysis of the effects of the challenged state law, there is no such analysis in Plaintiff's motion.[6] Plaintiff nonetheless contends that California's 2017 agreement and its linkage regulations conflict with foreign policy concerning greenhouse gas emissions. Notably, however, it does not argue that the 2017 agreement or the linkage regulations conflict with the UNFCCC, the treaty expressing the foreign policy approved by both the Executive and Legislative branches. Instead, Plaintiff argues that there is a conflict with the President's unilateral decision to withdraw from the Paris Agreement and his desire to negotiate a better deal. These arguments fail to establish the clear conflict needed to trigger conflict preemption under the Foreign Affairs doctrine.

A. Plaintiff Must Show a Clear Conflict with an Express Foreign Policy

No doubt recognizing the weakness of its conflict preemption claim, Plaintiff tries to lower the bar by arguing that the threshold for establishing a "clear conflict" is "low." Pl. MSJ at 17:5-9. That is wrong. The "clear conflict" requirement is demanding, especially where, as here, a State has acted within an area of traditional state responsibility.

The Supreme Court held long ago that a state law is not preempted merely because it has "some incidental or indirect effect in foreign countries." *Clark v. Allen*, 331 U.S. 503, 517 (1947); *see also Garamendi*, 539 U.S. at 420 (preemption requires "the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy"). Accordingly, as the Supreme Court held in *Garamendi*, foreign affairs preemption requires "evidence of clear conflict" between state law and the foreign policy adopted by the federal government. *Garamendi*, 539 U.S. at 421; *see also id.* at 420 (finding "a sufficiently clear conflict to require finding preemption here"). To establish a clear conflict, there must be a federal

[6] Indeed, the motion's only discussion of the 2017 agreement and linkage regulations is in a footnote. *See* Pl. MSJ at 35 n.15. The motion also fails to identify what exactly it challenges, referring vaguely to "Arrangements" that it defines only as "preparatory and implementing activities." Pl. MSJ at 2 n.1. As the Court ruled in connection with Plaintiff's first motion that the Amended Complaint only challenges the 2017 agreement and the regulations linking to Quebec's program, ECF No. 91 at 25 n. 12 (construing the Amended Complaint), State Defendants focus on the 2017 agreement and those regulations.

foreign policy that is both "express" and definite. *See id.* at 420, 422-24; *see also Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 13 (1st Cir. 2010) (noting that "an express foreign policy" must be "clear and definite"); *Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206, 1211 (11th Cir. 2010) (rejecting claim where plaintiff failed to show a conflict with "definite substantive foreign policy position").[7] Thus, "a party asserting preemption on the ground of foreign policy preemption … must show what the policy of the United States is and precisely how" state law conflicts with that policy. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007), *as corrected* (Mar. 26, 2008).

The strength and clarity of the conflict required to establish preemption increases where a state law deals with an area of traditional state competence. *See Garamendi*, 539 U.S. at 420; *see also id.* 419 n.11; *Winn*, 616 F.3d at 1211-12. Our Constitution creates a "system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Consequently, not every "exercise of state power that touches on foreign relations must yield to the National Government's policy," *Garamendi*, 539 U.S. at 413, and the President's foreign affairs powers cannot "reach[] deep into the heart of the State's police powers" and compel courts to "set aside neutrally applicable state laws," *Medellin v. Texas*, 552 U.S. 491, 532 (2008); *see also Arizona v. United States*, 567 U.S. 387, 400 (2012) ("In [statutory] preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress.") (internal quotation omitted). Accordingly, in applying preemption, courts "consider the strength of the state interest, judged by standards of traditional practice," and require a conflict "of a clarity or substantiality" varying "with the strength or the traditional importance of the state concern asserted." *Garamendi*, 539 U.S. at 419 & n.11, 420.

A conflict of heightened clarity or substantiality is required here because both the 2017 agreement and linkage regulations fall within a traditional area of state interest: the regulation of

[7] This level of specificity is similarly necessary to enable the analysis of alleged conflicts in statutory preemption cases. *E.g.*, *Serv. Eng'g Co. v. Emery*, 100 F.3d 659, 661 (9th Cir. 1996) (statutory conflict preemption occurs "where there is a *specific conflict* between state and federal law") (emphasis added).

air pollution. The courts have long recognized that air pollution control is an area of traditional state regulation. *See, e.g.*, *Am. Fuel & Petroleum Mfts v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018); *Exxon Mobil Corp.*, 217 F.3d at 1255. In addition, while Congress has enacted federal legislation concerning air pollution, in the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, it expressly acknowledged that "air pollution prevention … and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also id* § 7416 (preserving state authority to establish and enforce air pollution standards beyond those of the federal government).

The 2017 agreement and linkage regulations fall within this well-established area of primary state responsibility. It is "well settled" that the States' traditional police powers to control air pollution extend to greenhouse gas emissions. *O'Keeffe*, 903 F.3d at 913. As California's cap-and-trade program seeks to reduce those emissions, it is plainly an exercise of traditional state police power and responsibility. The part of that program Plaintiff challenges—the decision to accept Quebec-issued compliance instruments—makes those reductions more cost-effective by expanding the market for trading instruments; therefore, it likewise falls within this area of traditional state responsibility. *See City & Cty. of San Francisco v. Mkt. St. Ry. Co.*, 98 F.2d 628, 632 (9th Cir. 1938) (holding that the state's police power encompasses the "[c]hoice of the means, by which … those ends are to be attained"); *see also Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 105-107 (2d Cir. 2017) (upholding Connecticut's police power authority to decide which instruments to accept as compliance with state law).

Moreover, this Court expressly recognized that the 2017 agreement and linkage regulations are an exercise of traditional state power. In applying the Compact Clause and in particular determining whether the 2017 agreement and linkage regulations impermissibly encroach on the supremacy of the federal government, this Court considered whether the 2017 agreement and linkage regulations allow California to exercise any powers that it otherwise could not. MSJ Order at 29-30. This Court concluded that the 2017 agreement and linkage regulations did not reflect any new powers because legislation regulating air pollution "'clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police

power,'" and therefore "[i]t is well within California's police powers to enact legislation to regulate greenhouse gas emission and air pollution." *Id*. at 30 (quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)). Thus, the 2017 agreement and linkage regulations are exercises of the most traditional state police power, and Plaintiff must establish a particularly clear and substantial conflict with the 2017 agreement and linkage regulations to trigger foreign affairs preemption. *See Garamendi*, 539 U.S. at 420; *see also id.* 419 n.11; *Winn*, 616 F.3d at 1211.

B. Neither the 2017 Agreement Nor the Linkage Regulations Conflict with the UNFCCC, the Primary Expression of United States Foreign Policy on Greenhouse Gas Emissions

The primary expression of this country's foreign policy concerning greenhouse gas emissions is in the UNFCCC, a treaty negotiated by the President and ratified by the Senate that is, as Plaintiff recognizes, "the law of the land." Pl. MSJ at 6: 1-3. Although Plaintiff references this treaty several times, *see* Pl. MSJ 17: 22, 20:4-6, it does not—and cannot—assert that the 2017 agreement and linkage regulations conflict with the treaty because, in fact, they are entirely consistent with the UNFCCC.

The expressly stated "ultimate objective" of the UNFCCC "is to achieve… stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." UNFCCC, Art. 2. This objective is to be achieved through, *inter alia*, policies and measures adopted by parties such as the United States to limit greenhouse gas emissions that are "cost-effective so as to ensure global benefits at the lowest possible cost." UNFCCC, Art. 3 ¶ 3; *see also id.* at Art 4, ¶ 1(f) (expressing interest in "minimizing adverse effects on the economy [among other things] of projects or measures undertaken … to mitigate or adapt to climate change").

The 2017 agreement, the linkage regulations, and the cap-and-trade program of which the regulations are a part further the UNFCCC's ultimate objective using the very means the treaty contemplates. California's cap-and-trade program is designed to fulfill the State's mandate to reduce greenhouse gas emissions to 1990 levels by this year and to 40 percent below those levels by 2030. Cal. Health & Safety Code §§ 38550, 38566. Thus, the program plainly furthers the

UNFCCC's ultimate objective of stabilizing greenhouse gas emissions and preventing adverse human impact on the climate. In addition, because the cap-and-trade program is a market-based mechanism designed to enable cost-effective emission reductions, MSJ Order at 7-8, the program is also fully consistent with the UNFCCC's promotion of cost-effectiveness, UNFCCC, Art. 3, ¶ 3.[8] Linkage expands compliance options for the cap-and-trade program, which creates further opportunities for cost reduction by expanding the markets for compliance instruments. *See id*. at 8-9; *see also* ECF No. 27 at 7:3-4, *supra,* at 7. Thus, far from conflicting with the UNFCCC, linkage serves the treaty's ultimate objective of reducing greenhouse gas emissions through the means it urges, namely, cost-effective policies and measures.

Indeed, the United States has acknowledged that California's cap-and-trade program is entirely consistent with the UNFCCC. The treaty requires parties to report on the policies and measures adopted to further its objectives. UNFCCC, Art. 4 ¶ 2(b). In 2014, the United States reported on "state measures" that "complement federal efforts to reduce GHG Emissions," Second Dorsi Decl., Exh. 22 at 127, and it identified the "cap-and-trade program" in California as one of those measures, *id*. at 129. Moreover, as the report contains no caveat concerning California's linkage with Quebec, which was established in 2013 and began operating before the report was submitted, this inclusion belies any suggestion that the linkage conflicts with the UNFCCC.

Plaintiff's inability to establish any conflict with the UNFCCC is telling, as any unilateral Executive Branch action must itself be consistent with the UNFCCC. This is so because, under the "familiar tripartite framework" for "considering claims of Presidential power," executive actions "incompatible with the express or implied will of Congress" require that "the President's asserted power" is "both exclusive and conclusive on the issue." *Zivotofsky v. Kerry*, 576 U.S. 1, 135 S. Ct. 2076, 2083-2084 (2015) (internal quotation marks omitted). No such exclusive or conclusive power exists here, by Plaintiff's own admission. Pl MSJ at 4:16-17 ("*Congress* first

[8] This Court has already recognized the role of cap-and-trade programs within the UNFCCC international framework, noting that, following the commitments in the UNFCCC, the federal and state governments have sought to combat greenhouse gas emissions, including "through the enactment of cap-and-trade programs." MSJ Order at 3:19-22.

addressed the United States' foreign policy in this area in the Global Climate Protection Act of 1987.") (emphasis added). Accordingly, any executive action on which Plaintiff relies here must be compatible with "the express … will of Congress," including the UNFCCC. *See Zivotofksky*, 135 S. Ct. at 2084. Put simply, in order to prevail on its conflict preemption theory here, Plaintiff has to establish a clear conflict between a state policy and an executive foreign policy, both of which, in turn, must be consistent with the UNFCCC. Because Plaintiff cannot establish this clear conflict, as shown below, its conflict preemption claim fails.

C. The 2017 Agreement and Linkage Regulations Do Not Conflict, Much Less Clearly Conflict, with the Withdrawal from the Paris Agreement

Rather than relying on the express foreign policy of the United States to which both Congress and the Executive assented in the UNFCCC, Plaintiff bases its conflict preemption claim on the President's decision to withdraw from the Paris Agreement.[9] Not all executive actions have preemptive effect, even in the foreign policy arena. *See Medellin*, 522 U.S. at 530 (holding that Presidential memorandum interpreting a treaty could not "establish binding rules of decision that preempt contrary state law"). And, as shown above, any allegedly preemptive executive action here must be consistent with the UNFCCC and other acts of Congress. It is not necessary, however, to reach such questions here because Plaintiff is unable to show that the 2017 agreement and linkage regulations conflict, much less clearly conflict, with either the President's decision to withdraw from the Paris Agreement or the rationales offered for doing so. Moreover, while Plaintiff complains that linkage facilitates Canada's participation in the Paris Agreement, it is unable to identify any United States foreign policy against the participation of other countries in the Paris Agreement or any conflict—let alone a clear one—between such a policy and the 2017 agreement and linkage regulations.

1. Although Plaintiff asserts that "California's actions undercut the United States' ability to sever itself from the international Paris Accord . . .," Pl. MSJ at 22:5-6, it does not explain how

[9] Plaintiff also mentions an Executive Order concerning how federal agencies should "monetize[e] the value of changes in greenhouse gas emissions resulting from regulations." Pl MSJ. at 9:11-12. Plaintiff never attempts to establish that this guidance for federal agency rulemakings constitutes a foreign policy, let alone one conflicting with the 2017 agreement or linkage regulations.

either the 2017 agreement or linkage regulations could do so when Plaintiff itself states that the withdrawal from the Paris Agreement "*will* become effective on November 4, 2020." Pl. MSJ at 11:13-15 (emphasis added). Indeed, it is hard to imagine that the 2017 agreement or linkage regulations could have undercut the United States' ability to withdraw from the Paris Agreement in any meaningful way, given the sequence of events: the President announced that the United States would withdraw from the Paris Agreement in June 2017, six years after California adopted a regulatory framework to enable future linkages and more than three years after California linked its program to Quebec's. Further, the United States submitted formal notification of its withdrawal from the Paris Agreement in November 2019, more than two years after the 2017 agreement was signed. Noticeably absent from Plaintiff's brief is any evidence that, or even explanation of how, California's earlier actions undercut the United States' withdrawal.[10] Thus, far from establishing any clear conflict, Plaintiff has failed to show any conflict at all with withdrawal from the Paris Agreement.

2. Plaintiff also asserts that "California's international emissions trading regime … advances cross-border emissions mitigation strategies that the United States has rejected." Pl. MSJ at 19:13-14, 16-17. But, far from establishing any clear conflict with an express foreign policy, Plaintiff fails to identify either the mitigation strategies that the United States has rejected or the ones California has advanced. Plaintiff does make a conclusory statement, elsewhere in its brief, that "California's contemplated 'REDD plans'"—for Reducing Emissions from Deforestation and Degradation—bear "a close resemblance to the dynamics of the [Paris Agreement's] Green Climate Fund." Pl. MSJ at 12:13-22. But Plaintiff identifies no REDD plan California is purportedly contemplating and, indeed, acknowledges that no such plan is linked to California's cap-and-trade program. Pl. MSJ at 14 n.7 (CARB "has yet to formally link with a REDD plan."). That CARB may have signed non-binding memoranda of understanding related to forests with several American, Brazilian and Indonesian states, *id.*, is hardly unusual, given the

[10] While Plaintiff asserts that a State cannot pursue an "affirmative policy" if the United States "chooses to put a particular area of foreign policy on 'pause,'" Pl. MSJ at 1, it provides no legal authority for this proposition and, indeed, fails to identify the area that has supposedly been put on pause. Certainly, there has been no "pause" in the foreign policy manifest in the UNFCCC, to which the United States remains a party.

multitude of such understandings subnational governments reach. ECF No. 54 at 9-13. And neither those non-binding memoranda nor the CARB white paper to which Plaintiff cites—none of which are even mentioned in Plaintiff's complaint—could possibly establish conflict with the President's objections to the Green Climate Fund. Indeed, the white paper indicates only that "further work would be needed to determine how a REDD program could fit within the rigorous … Cap-and-Trade Program." Third Iacangelo Decl., Exh. 15 at viii.[11]

3. Plaintiff also points to the economic concerns advanced in connection with the United States' withdrawal from the Paris Agreement: namely, the "'draconian financial and economic burdens [of] the agreement'" and "'the burdens specific to the United States that other countries do not face.'" Pl. MSJ at 20: 7-8 (quoting Statement on Paris Accord) (bold and italics omitted); Pl. MSJ at 20 n. 8 (quoting *Nominations of Hon. Mike Pompeo to be Secretary of State Before the S. Comm. on Foreign Relations*, 115th Cong. S. HRG. 15-339, at 216 (2018)); *see also* Pl. MSJ at 9:25-12:7 (discussing statements from the President and Secretary of State). But Plaintiff does not—and cannot—explain how either the 2017 agreement or the linkage regulations conflict with those concerns. California's cap-and-trade regulation establishes a market-based program designed to reduce emissions cost-effectively, and linkage expands the compliance instrument market, providing even greater opportunities for cost reduction. Indeed, Plaintiff contends that the linkage largely functions to California's economic advantage, so that in effect "California is selling greenhouse gas emissions" to Canada. Pl. MSJ at 21:26:22-1. If, as Plaintiff claims, the net result of linkage is that Quebec businesses purchase more allowances or offsets from California businesses than vice versa, then far from imposing any draconian financial or economic burdens on the United States, linkage *benefits* the Nation.

[11] Moreover, Plaintiff does not even attempt to establish that the President's objections to the Green Climate Fund—that it would "likely obligate the United States to commit potentially tens of billions of dollars … including funds raided out of America's budget for the war on terrorism."—apply to any hypothetical REDD plan California might contemplate in the future. *See* Iacangelo Decl. Exh. 5 at 5-6. In fact, any future CARB approval of REDD plans would only result in *private businesses* in California having a choice to purchase certain offsets. *See* Cal. Code Regs., tit. 17, § 95993. It would not involve the transfer of any public funds from California, let alone the United States.

4. Plaintiff's final withdrawal theory is that the 2017 agreement and linkage regulations facilitate Canada's participation in the Paris Agreement "by reducing Canada's cost of complying with that agreement." Pl. MSJ at 20:18-19. This is not the theory that Plaintiff advanced in its amended complaint: there, Plaintiff alleged that linkage might undermine or complicate U.S. relations with Canada if a dispute were to arise between California and Quebec over compliance instruments. Am. Compl., ¶¶ 176-177. Plaintiff's new theory is also entirely unsupported: Plaintiff fails to identify any United States foreign policy against Canada's participation in the Paris Agreement, much less to explain how the 2017 agreement and linkage regulations clearly conflict with such a policy.

To begin, Plaintiff's facilitation theory fails because it does not identify any clear and definite foreign policy on which it is based. Ninth Circuit as well as Supreme Court decisions require conflict with such a policy to trigger foreign affairs preemption. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 720 (9th Cir. 2014) (hereinafter "*Von Saher II*") (quoting *Garamendi*, 539 U.S.at 420). While Plaintiff suggests that Canada's continued participation in the Paris Agreement creates a conflict with United States foreign policy, Plaintiff falls short of asserting that there is in fact any foreign policy, much less an express one, of undermining the participation of other Parties to the Paris Agreement. Indeed, at times the President has mused about the possibility of rejoining the Paris Agreement on different terms.[12] Nor does Plaintiff explain how such a policy could be reconciled with the UNFCCC, which, as previously noted, is the law of the land with which any Executive foreign policy must conform. Far from calling for the United States to undermine other countries' participation in the Paris Agreement, which was reached under its framework, the UNFCCC provides that Parties "may assist other Parties in contributing to the achievement of the objective of the Convention." Art. 4, ¶ 2(a). Finally, while Plaintiff asserts that "actions and agreements of the President" and even formal positions taken by senior federal officials may constitute foreign policy for preemption purposes, Pl. MSJ at 17:20-18:18, Plaintiff makes no attempt to show how policies *not* expressly

[12] See RJN, at ¶ 4. Plaintiff offers no reason for encouraging Canada to pull out of an agreement that the President has said the United States might itself rejoin.

stated by the President or any official—like a supposed policy of undermining Canada's participation in the Paris Agreement—can be sufficiently clear and definite to qualify as an express foreign policy and given preemptive effect.

Even more fundamentally, Plaintiff has failed to show how the 2017 agreement and linkage regulations clearly conflict with any foreign policy (if there were one) against Canadian participation in the Paris Agreement. As shown above, to establish preemption, Plaintiff must show more than "some incidental or indirect effect in foreign countries." *Clark*, 331 U.S. at 517; *see also Garamendi*, 539 U.S. at 420 (requiring a likelihood of "something more than incidental effect in conflict with express foreign policy"). Plaintiff's facilitation theory, however, asserts an effect that is far from direct. According to Plaintiff, the 2017 agreement and linkage regulations (1) allow entities covered by Quebec's cap-and-trade program to purchase allowances from California businesses, which (2) Canada is interested in using as internationally transferred mitigation outcomes, or ITMOs, (3) to satisfy its Nationally Determined Contribution under the Paris Agreement, which (4) might lower the cost of meeting its goals with the Paris Agreement enough that (5) Canada would be less interested in leaving the Paris Agreement or supporting United States efforts to negotiate a different deal. It is hard to imagine a less direct, more extended connection, and notably absent from Plaintiff's brief is any attempt to explain how such an attenuated connection can create a clear conflict.

The chain of events asserted by Plaintiff is also far too speculative to establish the requisite clear conflict because it is based on multiple layers of unsupported conjecture. *McSherry v. City of Long Beach*, 584 F.3d 1129, 1138 (9th Cir. 2009) ("Summary judgment requires facts, not simply unsupported denials or rank speculation.").[13] For example, although the cap-and-trade programs in California and Quebec have now been linked for more than six years, Plaintiff offers no evidence of how many California allowances are purchased by Quebec entities, much less how large those purchases are expected to be in the future. Even more importantly, while Plaintiff

[13] Likewise, in statutory preemption cases, courts do not "seek[] out conflicts … where none clearly exists," the conflict must be actual and not merely hypothetical. *Barber v. State of Hawai'i*, 42 F.3d 1185, 1189 (9th Cir. 1994). Plaintiff offers no support for the proposition that hypothetical, speculative conflicts should suffice here, and, indeed, the Supreme Court found conflict in *Garamendi* based on "evidence of clear conflict." 530 U.S. at 421.

contends that Canada has expressed interest in using allowances purchased from California as ITMOs, Pl. MSJ at 21:6-7, its evidence is scant and far from clear. The 2016 report cited by Plaintiff merely states that "Canada *will consider* internationally transferred mitigation outcomes as a short-to-medium term complement to reducing emissions at home" and that "Canada *intends* to take into account internationally transferred mitigation outcomes arising from cross-border subnational emission trading as part of its international contribution to addressing climate change." Third Iacangelo Decl., Exh. 6 at 11 (emphasis added). And, far from clearly referring to California's linkage with Quebec, these statements appear in a different paragraph from the one that discusses the linked cap-and-trade programs. *Id.*

It is also unclear when or even whether Canada could use California-issued instruments as ITMOs. The guidelines for the use of ITMOs under the Paris Agreement have not been finalized by the Parties to that Agreement, and, thus, Canada's potential use of ITMOs has been delayed. Second Dorsi Decl., Exh., 27 at 9; RJN, ¶ 3. In addition, Plaintiff has not established that parties to the Paris Agreement may use ITMOs from a non-party, which the United States will be when its withdrawal is finalized in November 2020. *See* Paris Agreement, Art. 6, ¶ 3 ("The use of internationally transferred mitigation outcomes to achieve nationally determined contributions under this Agreement shall be voluntary and authorized by participating Parties.").

It is unclear, as well, whether Canada would seek to use California-issued instruments as ITMOs, even if it were able to do so. Canada has indicated that it intends to achieve its Nationally Determined Contribution (i.e., its self-imposed goal under the Paris Agreement) by the year 2030 and stated, in 2019, that it "would explore the use of internationally transferred mitigation outcomes (ITMOs) in the overall effort to achieve its *2030* NDC target." Second Dorsi Decl., Exh. 28 at 7 (emphasis added). And Canada's exploration of possible ITMOs is covering the globe. *See, e.g.*, Second Dorsi Decl., Exh. 26 at 1, 6 (describing arrangements with Chile concerning its waste management sector as "a concrete example to explore options for the exchange of mitigation outcomes"); Exh. 29 at 33-34 (proposal by provincial government of Saskatchewan whereby Saskatchewan would generate ITMOs by helping "reduce emissions in China" and elsewhere); Exh. 27 at 52 (recommendation to Canadian legislature to generate

ITMOs through emissions reductions in Eastern Europe's petroleum industry). Thus, Canada is years away from needing to make any decision as to which ITMOs, if any, it will seek to employ in furtherance of its national goal and, at that point, will likely have a wide array of ITMO options to choose from. Consequently, Plaintiff's assertion that Canada will seek to use instruments purchased under the linkage regulations as ITMOs to satisfy its 2030 goal under the Paris Agreement is based on layers upon layers of speculation.

Plaintiff's assertion that the prospect of using California instruments as ITMOs will dictate Canada's continued participation in the Paris Agreement adds yet another layer of speculation. In addition to failing to present any evidence of how large the use of ITMOs might be, Plaintiff offers no evidence of the impact these ITMOs would have on Canada's ability to satisfy its non-binding goals under the Paris Agreement, much less any evidence that any such impact would materially alter Canada's incentive to continue under that Agreement or to support United States' efforts to negotiate a better deal. In sum, far from showing any clear conflict, Plaintiff's suggestion that the 2017 agreement and linkage regulations could frustrate United States foreign policy is built on layers of unsupported speculation.[14]

Plaintiff's suggestion that linkage might place the United States in a "diplomatic Catch-22" in which the United States would have to decide whether to grant Canada's request to use California allowances as ITMOs under the Paris Agreement (Pl. MSJ at 23:7-19) is even more attenuated and speculative. As noted above, Plaintiff has not pointed to any evidence that Canada will be able to use such allowances as ITMOs if the United States is a non-party to the Paris Agreement, which it will become on November 4, 2020. And, as described above, there appear to be other opportunities in Chile and other locations that Canada may ultimately decide to pursue as ITMOs.

[14] Plaintiff's assertion that other States might "sell their emissions" to foreign nations, thereby "reducing the costs" to those nations of implementating the Paris Agreement (Pl. MSJ at 22:8-15) simply adds additional layers of speculation because Plaintiff presents no evidence that other governments are planning to do anything of the sort.

Thus, contrary to Plaintiff's assertion, it has *not* shown that the 2017 agreement and linkage regulations create "a direct and clear conflict" with any foreign policy arising out of withdrawal from the Paris Agreement. Pl. MSJ at 23:18-19.

D. Plaintiff's Negotiating Leverage Theory Fails

In addition to contending that the 2017 agreement and linkage regulations are preempted by the withdrawal from the Paris Agreement, Plaintiff argues that the agreement and regulations are preempted because they undermine the federal government's ability to negotiate a new "international mitigation arrangement." Pl. MSJ at 19:19-21. This argument fails for two reasons.

First, as noted above, the decisions of the Ninth Circuit and the Supreme Court require an express foreign policy to trigger conflict preemption. The mere assertion, in a legal brief, that the 2017 agreement and linkage regulations undermine the federal government's ability to negotiate, in entirely unspecified ways, cannot satisfy this requirement. As noted above, courts apply conflict preemption only where there is an express and definite foreign policy, such as concrete and specific objectives and an identified strategy by which those objectives should be achieved. *E.g., Garamendi*, 539 U.S. at 421; *see also Von Saher II*, 754 F.3d at 716; *Seger-Thomschitz*, 623 F.3d at 13; *Winn*, 616 F.3d at 1211. In other words, the conflict "must be with a policy, not simply with the means of negotiating a policy." *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1186–87. Plaintiff's leverage theory fails to identify the requisite objectives or to provide any details about the negotiations at issue. Consequently, what Plaintiff characterizes as United States policy "is more accurately described as a strategy; that is, a means to achieve an acceptable policy but not the policy itself." *See id.* at 1186.[15] That is insufficient to establish conflict preemption. *Id*. at 1186-87. Indeed, with no policy objectives or preferred means to achieve those objectives, there is no way to begin an assessment of conflict; and, to allow vague allusions to hypothetical

[15] Although the Supreme Court found statutory preemption in *Crosby*, based, in part, on interference with a congressionally directed strategy, 530 U.S. at 373-74, that strategy was both concrete and an integral part of the foreign policy established by Congress. Specifically, Congress had itself imposed sanctions on Burma, related to human rights abuses, directed the President to attempt to end the abuses through negotiations, and authorized the President to employ, under certain conditions, further sanctions as part of those negotiations. *Id.* at 368-69. Plaintiff points to no such concrete strategy or objectives here.

and unspecified negotiations for a "better deal" to preempt state law would grant the Executive enormous power to preempt any state law in any policy area, simply by saying the President intends to seek such a deal. That is not the law.

Second, Plaintiff fails to show that the 2017 agreement and linkage regulations undercut the Executive Branch's negotiating leverage, much less create the clear conflict needed to trigger preemption. Plaintiff asserts that California's actions undercut the ability of the United States to "exert international pressure that will achieve meaningful reductions from all major-emissions nations." Pl. MSJ at 22:6-7; *see also* Pl. MSJ at 11:20-12:7. But Plaintiff does not even begin to explain how an arrangement with Quebec that lowers the cost of emission reductions discourages either Canada or other major emitters from agreeing to reduce their emissions. *See* ECF No. 65-1 at 4:20-5:3 ("Plaintiff's argument has it exactly backwards: in our experience as climate negotiators, state and local efforts to reduce emissions *enhanced* our effectiveness by increasing the credibility of the United States as a negotiating partner genuinely determined to address climate change."). Plaintiff's vague assertions cannot establish a clear conflict.

E. *Garamendi* Does Not Support Plaintiff's Conflict Preemption Claim

Although Plaintiff relies on *Garamendi* in asserting conflict preemption, this case could not be more different.

First, the foreign policy considered in *Garamendi* was far more concrete and formally expressed than the policies asserted here.[16] In *Garamendi*, the Supreme Court relied on a "consistent Presidential foreign policy" "expressed unmistakably" in multiple executive agreements. 539 U.S. at 421-423. That policy was to encourage voluntary settlement of Holocaust-era insurance claims through an international insurance commission without resort to litigation or coercive sanctions. *Id.* By contrast, in this case, Plaintiff does not rely on any consistent or concrete foreign policy or, indeed, any executive agreement. Instead, as discussed above, Plaintiff relies on the President's withdrawal from the Paris Agreement and rationales

[16] Indeed, *Garamendi* and most other cases cited by Plaintiff involved concrete policies implicating executive power not at issue here—namely, "the authority of the President to settle foreign claims pursuant to an executive agreement." *Medellin*, 552 U.S. at 530.

offered for that withdrawal; the rejection of unidentified mitigation strategies; an unarticulated, implicit interest in making Canada's continued participation in the Paris Agreement more difficult; and a general interest in negotiating leverage untethered to any objective.

Second, the state interest in *Garamendi* was much weaker than it is here. *Garamendi* considered the Holocaust Victims Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807, which required insurers doing business in California to disclose details concerning a broad range of insurance policies issued by the insurers and any affiliates "to persons in Europe[and] in effect between 1920 and 1945." *Id*. § 13804(a). Although HVIRA regulated insurance, a traditional area of state responsibility, it was not a law of general application; quite the contrary, the statute applied to "only policies issued by European companies, in Europe, to European residents, at least 55 years ago," 539 U.S. at 425-426, which raised "great doubt" that the Act was concerned with the reliability of insurance currently available in California, *id*. at 426. In addition, while its disclosure requirements may have benefited the several thousand survivors living in California, the vast majority of those benefited by HVIRA's disclosure requirements were outside the State. *Id*. at 426. The Supreme Court therefore found that HVIRA was intended to vindicate the interests of Holocaust survivors in general and that California's interest in doing so was "weak[]." *Id.* at 425.

By contrast, the State's interest here is much stronger and more clearly focused on California. As the Court has already recognized, MSJ Order at 30, the regulation of air pollution and greenhouse gas emissions in particular falls well within traditional state police power. As noted above, California's cap-and-trade program is a market-based program for reducing such emissions in a cost-effective manner. Linkage directly advances the goals of this program and the State's interest in reducing emissions cost-effectively by expanding the markets for compliance instruments and thereby providing access to more cost-reduction opportunities. Moreover, neither the 2017 agreement nor the linkage regulations dictate the level of emissions reductions in Quebec, which, as this Court has recognized, has different emissions targets than California. MSJ Order at 10. Indeed, both the 2017 agreement and linkage regulations recognize that each jurisdiction retains all of its sovereign authority to amend or even repeal its program, resulting in

the programs differing in numerous other ways as well. *Id*. at 10-11 & n.6, 27. Thus, far from addressing primarily international issues, linkage is focused on increasing compliance flexibility and reducing compliance costs for *California businesses* subject to *California* law, which makes the State's interest here much stronger than its interest in the statute considered in *Garamendi*.

Third, the conflict in *Garamendi* was much clearer than the any conflict asserted here. As noted above, the Supreme Court found that the United States' policy of encouraging voluntary settlements and working through an international insurance commission represented a careful "calibration of force," which balanced competing national interests in maintaining amicable relationship with European allies, providing Holocaust survivors a prompt but fair resolution of their claims, and recognizing the interest of insurers in avoiding litigation and securing "legal peace." 539 U.S. at 422-423, 425. Addressing the very same matter, HVIRA took a "different tack of providing regulatory sanctions to compel disclosure and payment"—suspension of a company's license to do business in the State—"supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." *Id*. at 423. By seeking to "use an iron fist where the President has consistently chosen kid gloves," this statute "undercut[] the President's diplomatic discretion and the choice he has made exercising it," as well as reducing the President's ability to bargain with a nationally applicable approach. *Id*. at 423-424, 427.

There is no such clear conflict here. As shown above, it is unclear how the 2017 agreement and linkage regulations possibly could have undercut the United States' ability to withdraw from the Paris Agreement when it has taken the necessary steps to do so. *See, supra,* at 19. And far from conflicting with the economic concerns offered to justify the withdrawal, the 2017 agreement and linkage regulations are directly aligned with those concerns because, as shown above, they reduce the cost of emissions reductions and, according to Plaintiff, allow American businesses to obtain funds from Canadian businesses to subsidize emission reductions in the United States. *See, supra,* at 20; *see also* Pl. MSJ at 3:6-7, 21:26-22:2. Moreover, while Plaintiff asserts a conflict with rejected mitigation strategies and that linkage will facilitate Canada's continued participation in the Paris Agreement, the former is unsupported by any explanation and the latter is based on multiple layers of speculation. Finally, in sharp contrast to the well-defined

negotiating strategy that *Garamendi* found the HVIRA undermined, Plaintiff refers to leverage only in the abstract, pointing to no specific strategy and identifying no way in which any part of California's economy is unavailable as diplomatic leverage. *See, supra,* at 25-26.

In short, *Garamendi* offers no support to Plaintiff's conflict preemption claim, which fails as a matter of law.[17]

II. PLAINTIFF'S OBSTACLE PREEMPTION CLAIM ALSO FAILS AS A MATTER OF LAW

Relying almost entirely on *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) and the Global Climate Protection Act of 1987 (GCPA), Plaintiff also asserts that the 2017 agreement and linkage regulations are preempted because they create an obstacle to congressional delegations of authority to the President. Pl. MSJ at 23:20-28:6.[18] This claim was not properly raised and, in any event, is without merit.

Plaintiff did not plead a statutory preemption claim, or reference the GCPA, in its Amended Complaint. As a consequence, Defendants received no notice of this claim. Plaintiff should not be permitted summary judgment based on preemption under a statute never referenced in the pleadings. *See Rent Information Tech., Inc. v. Home Depot USA, Inc.*, 268 Fed. Appx. 555, 558 (9th Cir. 2008) ("[Plaintiff] cannot bootstrap its new promissory estoppel argument onto its fraudulent misrepresentation claim because [it] failed to allege in the complaint particular facts supporting the new theory.").

In any event, Plaintiff's new statutory preemption claim fails as a matter of law because Plaintiff does not and cannot identify any objectives or other aspects of the GCPA with which the 2017 agreement and linkage regulations interfere. The goals of the GCPA are to increase worldwide understanding of climate change, to foster cooperation on scientific research, to

[17] *United States v. Belmont*, 301 U.S. 324, 330 (1937) and *United States v. Pink*, 315 U.S. 203 (1942) likewise do not aid Plaintiff. Both involved an international compact recognizing the Soviet Union, establishing diplomatic relations, and assigning claims to the United States. The Court's indication that state laws conflicting with these foreign policies would be preempted does nothing to establish preemption where, as here, Plaintiff cannot establish any conflict at all.

[18] Plaintiff also references the UNFCCC but identifies no congressional delegation therein, Pl. MSJ at 26:4-12, and, in any event, Plaintiff has not argued, and cannot establish, that the 2017 agreement or linkage regulations conflict with, or pose an obstacle to, the achievement of, the UNFCCC. *See, supra*, Sec. II.B. The other statutes Plaintiff identifies in a string citation in a footnote, Pl. MSJ at 25 n.12, concern research and studies and likewise cannot support obstacle preemption of linkage. Plaintiff offers no argument that they could.

identify means by which emissions can be reduced, and to work toward multilateral agreements. Pub. L. 100-204, § 1103(a). Plaintiff never mentions these, let alone explains how reducing emissions more cost-effectively through linkage could form an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 373 (internal quotation marks omitted). This failure is remarkable given that assessment of obstacle preemption claims require "examining the federal statute as a whole and identifying its purpose and intended effects." *Id*.

Instead of addressing Congress' explicit goals, Plaintiff asserts that the GCPA granted the President and the EPA responsibility for developing "a coordinated national policy on global climate change" and makes the Secretary of State responsible for coordinating those aspects of United States policy "requiring action through the channels of multilateral diplomacy." Pl. MSJ at 25:2-10 (quoting Pub. L. 100-204, §§ 1103(b), (c)). The 2017 agreement and linkage regulations, Plaintiff contends, pose an obstacle to these provisions because they undermine the President's economic and diplomatic leverage. Pl. MSJ 27:8-20. Plaintiff, however, never explains how the agreement and regulations do this.

Instead, Plaintiff offers conclusory assertions that, as the world's largest emitter of greenhouse gases, the United States has "significant leverage in climate negotiations," that Canada is a natural ally in such negotiations, and that this opportunity will be "compromised to the extent that California is permitted to slice off parts of Canada through its own side deals." Pl. MSJ at 27:11-17. But Plaintiff offers no clue as to what "parts of Canada" California has been able to "slice off," much less how that affects the United States' unexplained leverage. To the extent Plaintiff refers to emissions in Quebec, suggesting that emissions reductions made there are somehow sliced off from Canada, it is Quebec, not California, that wielded the knife. Neither the 2017 agreement nor the linkage regulations have curbed or constrained Quebec's authority to establish its own emissions limits, and, indeed, Quebec has exercised this authority to set province-wide emissions limits different than the statewide emissions limits California has set for itself. MSJ Order 10:7-10; Sahota Decl., ¶ 35. Plaintiff's suggestion that California has "fenced off willy-nilly" enclaves of the national economy (Pl. MSJ at 27:24-28:1) is equally unfounded;

indeed, Plaintiff fails to explain how *linkage* fences off anything. *See also* ECF No. 65-1 at 5:3-4 ("For *amici* whose time as climate negotiators overlapped with California's linkage policy, that policy never interfered with our work under the UNFCCC."). Thus, just as Plaintiff layered speculation on speculation in asserting conflict preemption, it stacks vagary upon vagary in asserting obstacle preemption.

In addition, Plaintiff's attempted analogy to *Crosby* fails because neither the federal statute nor the state action in *Crosby* bears the slightest resemblance to those here. *First, Crosby* involved dueling sanction regimes. In June 1996, Massachusetts adopted a law barring, with only minor exceptions, state entities from buying goods or services from any company doing business in Burma. 530 U.S. at 366-367. Three months later, Congress likewise passed a statute imposing sanctions "to bring democracy to and improve human rights practices and the quality of life in Burma." *Id.* at 368-369. But rather than automatically barring all investment in Burma, Congress chose a much more restrained strategy, giving the President authority to bar investment in Burma if certain conditions were triggered and, equally important, to waive those sanctions if they were determined to be contrary to national security interests. *Id*. at 369-370. The Supreme Court found that Massachusetts' law created an obstacle to the accomplishment of Congress' objectives because the law's "unyielding application" of sanctions undermined "the President's intended statutory authority by making it impossible for him to restrain fully the coercive power of the national economy when he chose to take the discretionary action open to him," *id*. at 377, and also undercut "the congressional calibration of force," which was "manifestly intended to limit economic pressure against the Burmese Government to a specific range," *id*. at 377-380. And the Massachusetts law undermined the President's "intended authority to speak for the United States" concerning Burma because "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Id*. at 380-381.

This case could not be more different. The GCPA set up no regime at all, let alone one for which the 2017 agreement or linkage regulations form an obstacle. Indeed, the primary concrete task Congress assigned to the Executive in the GCPA was submission of a report to Congress

describing, *inter alia*, the United States' strategy for seeking international cooperation to limit climate change. Pub. L. 100-204, § 1104.[19] That task was completed in 1991, and the report identified the later-ratified UNFCCC as the United States' strategy. There is no claim, akin to the one in *Crosby*, that linkage has created an obstacle to the specific assignments delegated by the GCPA to the Executive; indeed, that work was completed years before California adopted its cap-and-trade program or linked it to Quebec's. Moreover, as shown above, the 2017 agreement and linkage regulations are entirely consistent with the UNFCCC. *See, supra*, at 16-18.

Second, while Plaintiff quotes snippets from *Crosby*, it ignores the differences in presidential delegations between the statute at issue in that case and the GCPA. The statute in *Crosby* did not merely give the President control over a broad subject, as Plaintiff asserts. Pl. MSJ at 24:12-13. As shown above, it entrusted him with executing a carefully calibrated diplomatic strategy in a "deliberate effort to steer a middle path." 530 U.S. at 377-380 (quotation omitted). No such "singular" role is afforded the President under the GCPA (Pl MSJ at 26:14). *See* Pub. L. 101-204, § 1104 (requiring Secretary of State and EPA to provide Congress with a description of the international strategy). Moreover, *Crosby* did not suggest that a State "obscures" the President's voice on foreign policy any time that the State expresses disagreement on foreign policy. *See* Pl. MSJ at 26:13-15. Quite the opposite: *Crosby* held that "Congress' express command to the President to take the initiative for the United States" in employing a prescribed strategy with respect to Burma "belie[d] any suggestion that Congress intended the President's effective voice to be obscured by state or local action." *Crosby*, 530 U.S. at 381.

And, *third*, when *Crosby* spoke of "enclaves fenced off willy-nilly by inconsistent tactics," it was referring to the Massachusetts law imposing an immediate and perpetual bar to state contracts based on investment in Burma. *See id*. at 376-377. In contrast, no portion of California's economy is fenced off by the linkage between California and Quebec. Plaintiff offers no argument, let alone evidence, to the contrary.

[19] The GCPA also directed the Secretary of State to "undertake all necessary steps to promote … the early designation of an International Year of Global Climate Protection." *Id.* § 1105.

Plaintiff also points to meetings taken and statements made by California's former governor after President Trump announced the United States' intended withdrawal from the Paris Agreement in 2017. Pl. MSJ at 26:23-27:7. But these events occurred long after linkage and do not concern it. Plaintiff does not even attempt to explain how state law could be preempted based on statements and meetings occurring many years later. Moreover, it is well-settled in this circuit that state officials may constitutionally express objections to the federal government's foreign policy decisions. *Gingery v. City of Glendale*, 831 F.3d 1222, 1230 (9th Cir. 2016) ("[C]ities, counties, and states have a long tradition of issuing pronouncements, proclamations, and statements of principle on a wide range of matters of public interest, including other matters subject to preemption, such as foreign policy and immigration.") (internal quotation marks omitted).[20]

In addition, Plaintiff's assertion that California's statute establishing statewide emissions targets or its linkage between California's and Quebec's separate cap-and-trade programs somehow poses an obstacle to the climate change policy announced in the GCPA (Pl. MSJ at 26:16-20) is belied by the National Communications submitted under the UNFCCC. In these, the United States has identified both California's statutory targets and its linked cap-and-trade program as "measures [that] *complement* federal efforts to reduce GHG emissions." Second Dorsi Decl., Exh. 22 at 127, 129; *see also id.*, Exh. 21 at 61 (referring to California's statute); Exh. 20 at 52 (same).

Like its conflict preemption claim, Plaintiff's obstacle preemption claim fails as a matter of law.

III. PLAINTIFF'S RESORT TO FIELD PREEMPTION FAILS AS A MATTER OF LAW

Plaintiff's final line of attack is field preemption. But field preemption is an exceptionally narrow, "rarely invoked" aspect of the already narrow foreign affairs doctrine. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012). A state law is subject to foreign

[20] Likewise, Plaintiff's oblique references to a statute setting targets for *statewide* emissions reductions and the discussions among States and provinces regarding design *recommendations* for cap-and-trade programs (Pl. MSJ at 26:16-22) do not establish conflict with the objectives of the GCPA. Nor does Plaintiff even attempt to explain how they could.

affairs field preemption only if it "(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Id*. at 1074. A plaintiff must show both elements are satisfied to prevail. Here, Plaintiff can show neither.

A. As This Court Already Has Ruled, the 2017 Agreement and Linkage Regulations Both Address Traditional State Responsibilities.

Plaintiff's field preemption fails at the outset because, as noted earlier, this Court already has ruled that the 2017 agreement and linkage regulations are an exercise of traditional state power to regulate greenhouse gas emissions. In rejecting Plaintiff's argument that the 2017 agreement and linkage regulations violated the Compact Clause, this Court found that the 2017 agreement does not allow California to exercise any power it would not normally have, because "[i]t is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." MSJ Order at 30:18-19; *see also id*. at 25 n.12 (construing the "supporting California law" Plaintiff challenged to refer to the linkage regulations). This finding follows directly from Ninth Circuit law. *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 945-46 (9th Cir. 2019); *O'Keeffe*, 903 F.3d at 913. Indeed, as the Court noted, the regulation of air pollution "'clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.'" MSJ Order at 30:12-16 (quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)). In arguing California "has no serious claim to be addressing a traditional state responsibility," Pl. MSJ at 29:2-3, and "greenhouse gas regulation is not a traditional area of state responsibility," *id.* at 32:18-19, Plaintiff ignores this Court's plain ruling to the contrary and the "well settled" law it cited. *O'Keeffe*, 903 F.3d at 913. Nor can Plaintiff escape this controlling law by mischaracterizing California's linkage with Quebec as "[r]egulating greenhouse gas emissions *to address global climate change*" or "reducing greenhouse gas emissions *in foreign jurisdictions*." Pl. MSJ at 29:8-10 (emphasis added). In ruling on the prior summary judgment motion, this Court considered the same program imposing the same regulations on greenhouse gas emissions at issue here, and far from finding that the linkage reduces emissions in Canada, the Court found that linkage "does not substantively alter each individual jurisdiction's cap-and-trade program"; Quebec and California

regulate their own GHG emissions under their own cap-and-trade regulations, not through linkage. MSJ Order at 9:24-25, 10:5-14. Because, as made exceedingly clear by the Court's prior ruling, the 2017 agreement and linkage regulations are an exercise of traditional state police power, Plaintiff's field preemption claim must fail.

In any event, Plaintiff's arguments are meritless. Repurposing many of the same materials it cited in support of its Compact Clause claim, Plaintiff contends that California's "real purpose" in entering into the linkage with Quebec was to "pursue an alternative climate foreign policy." Pl. MSJ at 29, 33. That is wrong. The undisputed evidence, of the kind courts accept to show "real purpose," indicates the purpose of linkage is to increase California businesses' compliance flexibility and cost-reduction opportunities under the State's emissions cap. Moreover, the tour that Plaintiff takes through press statements and environmental agreements having little to do with cap-and-trade, and nothing at all to do with linkage, is neither relevant nor persuasive. Plaintiff's field preemption claim thus fails on the first element because the state law here addresses a traditional state responsibility.

1. The Text and History of Linkage Shows Its Real Purpose Is to Expand How California Businesses May Comply with California Environmental Law.

To determine the "real purpose" of a challenged law, courts look beyond the general subject matter being regulated and examine the "text and legislative history" of the law itself. *Movsesian*, 670 F.3d at 1075; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010) (*Von Saher I*). Here, both the text and the history of the linkage regulations make clear that the purpose of linkage is to expand the compliance options of California businesses under California's cap-and-trade regulation—a matter firmly within traditional state police powers.

As this Court recognized, under the linkage regulations, once a linkage is approved, "covered entities can use compliance instruments acquired through linked jurisdictions to satisfy their compliance obligations in California, and vice versa," and linked jurisdictions can offer their compliance instruments alongside California's in joint allowance auctions. MSJ Order at 9:19-24

(citing Cal. Code Regs., tit. 17, §§ 95942(d)-(e) & 95911(a)(5)).[21] By their terms, the linkage regulations add Quebec-issued allowances to the forms of compliance instruments CARB will accept under its own regulation:

> covered or opt-in covered entities may use compliance instruments issued by the following programs to meet their compliance obligation under this article:
>
> (1) Government of Quebec (effective January 1, 2014).

Cal. Code Regs., tit. 17, § 95943(a); *see also id.*, § 95940 (linkage framework). The referenced compliance obligation applies only to "covered entities," *i.e.*, regulated California businesses, and applies only to their California emissions, pursuant to the Legislature's limit on "statewide emissions." *Id.* §§ 95811, 95841; Cal. Health & Safety Code §§ 38550-51. Thus, the text makes clear the linkage regulations' "real purpose" is to provide these businesses greater flexibility in complying with the cap-and-trade regulation.

The regulatory history confirms this conclusion. In 2010, when it proposed the linkage framework, CARB identified the prospect of future linkage as one of several "cost-containment" features of its new program. Second Dorsi Decl., Exh 23 at II-4, II-6; *see also* MSJ Order at 8:20-9:1 (linkage is one of several features CARB adopted "[t]o help regulated businesses mitigate their compliance costs") (citing Sahota Decl. ¶ 24). For this reason, many California businesses facing regulation under the cap-and-trade program supported linkage and urged CARB to link to other jurisdictions as soon as possible. Dorsi Decl., Exh. 5 at 167, 191-193. When it proposed to link to Quebec's program specifically, CARB reiterated, "linking provides California businesses with more opportunities on how best to comply." Second Dorsi Decl., Exh. 30 at 8. In discussing the proposed linkage with Ontario, CARB found linkage would "provide additional

[21] Although Plaintiff does not discuss joint auctions—the other main feature of linkage—that too concerns a traditional state function: how the State distributes its regulatory instruments, whether licenses, permits, or here, allowances. A State acts pursuant to its police powers when it decides to allocate such allowances directly to its businesses, auction those allowances itself, or jointly auction allowances with linked jurisdictions. *See Cleveland v. United States*, 531 U.S. 12, 23 (2000) (holding Louisiana's rights of "allocation … and control" over licenses are "no less than Louisiana's sovereign power to regulate" and "paradigmatic exercises of the States' traditional police powers"). Plaintiff should not be permitted to challenge the joint auctions in its later briefs, having failed to do so in its moving papers. But California reserves the right to further defend its joint auctions, should Plaintiff do so.

options for lower cost abatement, reduce concerns related to market power, reduce volatility in the allowance market, and increase market liquidity." Second Dorsi Decl., Exh. 31 at 10; *see also* MSJ Order at 8:28-9:1 (linkage increases "market liquidity").

Because it is within California's traditional state responsibility to adopt greenhouse gas regulations such as its cap-and-trade program, *see*, *supra* at 15-16, it follows that California was likewise addressing a traditional state responsibility in setting the terms by which businesses in the State comply with that regulation. *Cf. Ziffrin v. Reeves*, 308 U.S. 132, 138 (1939) (Kentucky's "power absolutely to prohibit" alcohol manufacture likewise empowered it to set out "definitely prescribed conditions" for allowing the activity, since "[t]he greater power includes the less"), *abrogated on other grounds*, *Granholm v. Heald*, 544 U.S. 460, 493 (2005); *see also Nixon v. Missouri Muni. League*, 541 U.S. 125, 140 (2004) (Federal preemption "threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power… ."). By adding to the list of instruments CARB will accept for compliance with its own regulation, California exercises nothing more or less than a "chosen disposition of its own power." *Nixon*, 541 U.S. at 140; *see also Allco*, 861 F.3d at 105.

The sole "foreign" or "global" aspect of linkage (Pl. MSJ at 31:11) occurs when CARB accepts instruments issued by a foreign province, rather than instruments issued by a sister State. But this fact does not push California's choice outside its traditional state responsibility to set the terms of compliance in the first place. Neither does the 2017 agreement. MSJ Order at 30:22-23. As the Supreme Court has recognized, a State exercises only its own, traditional powers when it coordinates on matters of "uniformity and compatibility" of laws across jurisdictions, to improve the functioning of its own laws, as California does under the 2017 agreement. *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 456, 473 (1978); *see* ECF No. 7-2, art. 1, 14.[22]

[22] In *U.S. Steel*, coordination on what accounting and tax methods a group of States would adopt, under their own respective tax powers, did not "authorize the member States to exercise any powers they could not exercise in its absence," and the improved effectiveness of their tax systems was attributable, not to the compact, but to each State's "freedom to select, within constitutional limits, the method it prefers." *U.S. Steel*, 434 U.S. at 473, 475. Similarly, here, this Court has held "the Agreement does not allow California to exercise any power it would not

CARB did express the hope that a successful California cap-and-trade program would encourage other jurisdictions to adopt similar programs and link into a regional system. Dorsi Decl., Ex. 4 at 1; Second Dorsi Decl., Exh. 30 at 9, 16, 73; *see* Dorsi Decl., Exh. 5 at 192 (comments of businesses urging linkage with New Mexico and other WCI member States). If a successful California program prompted other jurisdictions to adopt programs to reduce their own emissions, that would reduce overall GHG emissions to the benefit of everyone, including California and its residents.[23] This may be "leadership," in the sense of leading by example; but it is not, as Plaintiff contends, "global climate diplomacy." Pl. Br. at 3:25, 31:11. There is nothing untraditional about a State modeling an innovative program, within its police powers, which other jurisdictions can imitate, adjust, reject, or ignore: on the contrary, the federal system empowers States to serve as "laboratories" and try "novel social and economic experiments" through state lawmaking. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The text and history thus confirm the linkage regulations' and 2017 agreement's "real purpose" are within a traditional state responsibility, and Plaintiff's field preemption claim fails on the first prong.

2. The "Evidence" Plaintiff Relies on for Its Purpose Arguments Is Irrelevant and Misleading.

Remarkably, Plaintiff avoids discussing the text or history of the linkage regulations, the 2017 agreement, and the cap-and-trade regulation altogether. Plaintiff relies instead on former Governors' criticisms of the President's decision to withdraw from the Paris Agreement; CARB's statements that acknowledge the scientific fact that climate change is a global, as well as local, problem; and other "extrinsic evidence" to claim linkage's real purpose is to "pursue a foreign policy of its own" on international greenhouse gas regulation. Pl. MSJ at 31-34, 35-36. To call this "extrinsic evidence" (Pl. MSJ at 33:16) is too generous. None of these statements concern linkage; indeed, many were made years after the linkage with Quebec's program occurred.

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normally have." MSJ Order at 30:21-23.

[23] Those GHG-reduction benefits would occur through the other jurisdiction's adoption and enforcement of its own program, however; linkage itself would not compel any reductions.

Plaintiff mainly points to the statements of California's Governors and their "displeasure" with the President's withdrawal from the Paris Agreement. Pl. MSJ at 33-34, 35-36. These statements, however, do not mention the linkage of California and Quebec's cap-and-trade programs, which occurred in 2013, more than three years before the Paris Agreement was signed.[24] Moreover, as noted earlier, the Ninth Circuit made clear in *Gingery* that state and local elected officials act well within their traditional responsibility when they communicate their "views and values" to the citizenry. 831 F.3d at 1230.[25] Indeed, it would be astonishing to use the narrow field preemption sub-doctrine to preclude an elected official from voicing objection to a President's conduct of foreign affairs.

Plaintiff's other "extrinsic" evidence is similarly irrelevant. Plaintiff makes no attempt to connect, for example, the United States Climate Alliance—a collection of *U.S. States* formed in *2017*—to the linkage with Quebec in *2013*. Pl. MSJ at 33:14. Nor does Plaintiff attempt to show that any of the "seventy-two active bilateral and multilateral agreements" on "environmental policy" relate to the Quebec linkage. *Id.* at 33:7-8 (emphasis omitted). To take one example: the June 14, 2016 memorandum of understanding with Baja California calls for the two state governments to "carry out cooperative activities and exchange information in the areas of animal health, plant health, and food safety," including "promotion of … ecological and economic sustainability." Iacangelo Decl., Ex. 8, at 9. While this may "strengthen the global response to the threat of climate change," it hardly represents an attempt to "act against the President's foreign policy" on international greenhouse gas regulation. Pl. MSJ at 33:6, 11-12. More importantly, it has nothing to do with linking cap-and-trade programs or the purposes of doing so.

[24] Of these, only Governor Newsom's statement mentions even California's cap-and-trade program generally, and then only as a model for similar policies elsewhere. Pl. MSJ at 36:7-10. This statement does not relate to linkage, the aspect of the program Plaintiff challenges here.

[25] Plaintiff attempts to sidestep *Gingery* by changing the subject, switching between Governors' statements and the linkage regulation, and simply asserting the two are related. Pl. MSJ at 35 & n.15. Thus, when Plaintiff wishes to show "declared opposition to the foreign policy of the United States," it cites statements about the Paris Agreement, which is factually unrelated to linkage; but when Plaintiff wishes to show something more than "mere expressions of policy," the brief turns to the linkage regulation, which says nothing about the foreign policy of the United States or the Paris Agreement. *Id.* Plaintiff cannot have it both ways.

Plaintiff also quotes a 2017 CARB environmental analysis and CARB's summary of two uncontroversial scientific facts: that GHGs are "global pollutants" and no single emitter of GHGs is solely responsible for climate change. Pl. MSJ at 32:22-27.[26] Plaintiff's emphasis on these facts, and its characterization of CARB's summary as somehow an admission, reveals the extreme nature of its field preemption argument. Plaintiff wants this Court to rule that, because climate change is a global problem, which California cannot solve on its own, *any* climate change program is outside the State's traditional area of responsibility. Pl. MSJ at 31-33. The rulings of the Supreme Court, Ninth Circuit, and this Court do not allow for such an aggressive expansion of foreign affairs field preemption, which, if accepted, would have grave implications for the federalist balance the Constitution establishes. The COVID-19 pandemic is likewise a global problem that California cannot completely solve on its own, but California can act within its traditional powers to help the sick and reduce transmission of the virus within its borders. The fact that California's actions contribute to solving a global *problem* does not make those *actions* global, let alone unconstitutional. Just so, the fact that California's efforts to reduce its own GHG emissions in a cost-effective manner contribute to solving a global problem does not remove these actions from the realm of the State's traditional authority.

In any event, none of the Supreme Court or Ninth Circuit field preemption cases cited by Plaintiff judged "real purpose" according to the hodgepodge of unrelated statements and irrelevant documents that Plaintiff cherry-picks here. *See* Pl. MSJ at 16:22, 33:18 (citing *Movsesian* and *Von Saher I* to claim the Court should examine the "totality of evidence"). In *Movsesian*, the Ninth Circuit found the challenged statute's "real purpose" was to "send a political message," as Plaintiff points out. 670 F.3d at 1076, 1077; Pl. MSJ at 30:19-20. The court did so based not on "extrinsic" evidence, but on the law's targeted scope: although the statute regulated insurance, a traditional state responsibility, it applied "only to a certain class of insurance policies" relevant to the Armenian Genocide, and it expressly identified "Armenian

[26] The document is the final environmental analysis to CARB's November 2017 Climate Change Scoping Plan. Pl. MSJ at 32-33; Iacangelo Decl., Exh. 16. Although the document does discuss California's then-planned linkage to Ontario, Plaintiff has chosen not to quote from these sections.

Genocide victims and their heirs" as the law's "intended beneficiaries." 670 F.3d at 1075. In *Von Saher I*, the court conducted the same analysis: the challenged statute, which purported to regulate property torts, by its terms did "not apply to all claims of stolen art, or even all claims of art looted in war"; rather, "the statute addresse[d] only the claims of Holocaust victims and their heirs." 592 F.3d at 964. And in *Zschernig v. Miller*, 389 U.S. 429 (1968) (which predates the Ninth Circuit's "real purpose" cases), far from relying on "extrinsic" evidence of unrelated statements and actions, the Supreme Court examined the "history and operation" of the Oregon alien inheritance law being challenged, and found "the statute as construed"—in particular, the provision requiring foreign heirs to show they could receive money "without confiscation" by their governments—"seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Zschernig*, 389 U.S. at 432, 440. These cases stand for the unsurprising principle that courts judge a law's "real purpose" according the law itself.

Plaintiff uses *Von Saher I* to justify its resort to "extrinsic evidence," Pl. MSJ at 33:16-18; but in that case, the Ninth Circuit considered a Governor's Office bill report *on the challenged statute*, which was a part of the bill's legislative history—not, as Plaintiff cites here, public statements made years later on a different policy. 592 F.3d at 965. *Movsesian* similarly cited a legislative finding in the statute at issue declaring "the specific intent of the Legislature" was "to ensure that Armenian Genocide victims and their heirs be permitted to have an expeditious, inexpensive, and fair forum in which to resolve their claims." 670 F.3d at 1075-76; *see also Zschernig*, 389 U.S. at 432 (reviewing amendment history of Oregon inheritance law).

Here, the linkage regulations are expressly targeted at—because they "appl[y] only to"—California businesses, and how they comply with California's regulation. *Movsesian*, 670 F.3d at 1075; Cal. Code Regs., tit. 17, §§ 95940, 95943(a). Because this purpose lies within the State's traditional area of responsibility, Plaintiff's field preemption argument fails on the first prong of the field preemption test and the Court should grant summary judgment to California on this basis alone.

B. Neither the 2017 Agreement Nor the Linkage Regulations Intrude on the Federal Foreign Affairs Power

Because linkage lies within one of California's traditional areas of responsibility, Plaintiff's field preemption claim fails as a matter of law and the Court need not inquire further. But if the Court decides to address field preemption's second prong, Plaintiff's argument fares no better there. For field preemption to invalidate a state law, not only must the law stray *outside* the States' traditional competence; it must also intrude *into* "the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432. Here, California's regulation of its own businesses' emissions and compliance options does not even approach the field of exclusive federal powers.

State actions that implicate foreign affairs "indirectly or incidentally" are not an "intrusion" justifying preemption. *Movsesian*, 670 F.3d at 1072 (citing *Zschernig*, 389 U.S. at 432, 434). Accordingly, courts have rejected preemption challenges to monuments to foreign victims of war atrocities,[27] state wage and hour laws applied to a foreign exchange program,[28] and state bans on funding travel to specific countries.[29] The U.S. Department of State similarly opined that state and local divestment laws protesting South African apartheid were not preempted.[30] States and cities likewise have concluded thousands of agreements with foreign jurisdictions, such as "Sister City" agreements, without legal challenge or negative federal attention.[31] As these and myriad other non-intrusive state actions and laws demonstrate, it is simply not the case, as Plaintiff appears to contend, that any interaction with a foreign jurisdiction is constitutionally off-limits to States.

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[27] *Gingery*, 831 F.3d at 1230-31.

[28] *Capron v. Office of Attorney General of Massachusetts*, 944 F.3d 9, 25 (1st Cir. 2019).

[29] *Winn*, 616 F.3d at 1211.

[30] Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. O.L.C. 49, 62 (Apr. 9, 1986) ("Cooper Memo.").

[31] *See* Michael Glennon & Robert Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* 60 (2016) (Dorsi Decl., Ex. 15); William H. Taft, IV, Legal Adviser of the U.S. Dept. of State, "Memorandum," in *Digest of United States Practice of International Law* 184 (Sally J. Cummins & David P. Stewart, eds., 2001) ("Taft Memo") (Dorsi Decl., Exh. 13).

Intrusion occurs only when a State enters the "field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432. This field includes Congress's Article I powers to declare war, punish international crimes, and maintain an army and navy, along with the President's Article II powers to conduct war, negotiate treaties, and appoint ambassadors. U.S. Const., art. I, § 8; *id.*, art. II, § 2; *see also Zivotofsky*, 135 S.Ct. at 2084-87 (discussing the President's power to recognize foreign nations). All of the Supreme Court and Ninth Circuit field preemption cases concerned intrusions into these core federal powers used to manage the sensitive work of international relations. *See Deutsch v. Turner Corp.*, 324 F.3d 692, 711 (9th Cir. 2003) ("Of the eleven clauses … granting foreign affairs powers to the President and Congress, … seven concern preparing for war, declaring war, waging war, or settling war. … Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war."). Thus, *Zschernig* concerned the exclusive federal power to judge the legitimacy of other nations' governments and laws. 389 U.S. at 441 (finding Oregon law intruded into Cold War relations).[32] At the Ninth Circuit, *Deutsch* and *Von Saher I* concerned the settlement of wartime claims, while *Movsesian* concerned redress to Armenian Genocide victims. *Movsesian*, 670 F.3d at 1076; *Von Saher I*, 592 F.3d at 966; *Deutsch*, 324 F.3d at 711.

The California cap-and-trade program's linkage with Quebec's program is firmly outside the zone of these exclusive federal foreign affairs powers. Linkage involves nothing like settling wartime claims, *Deutsch*, 324 F.3d at 711, or genocide reparations, *Movsesian*, 670 F.3d at 1076, or judging the legitimacy of foreign governments or laws, *Zschernig*, 389 U.S. at 440. Unlike the laws struck down in these cases, the linkage regulations and the 2017 agreement do not subject foreign governments' citizens or corporations to civil judgments or sanctions, critique other

[32] Although *Hines v. Davidowitz* was decided on statutory preemption grounds, the Court's remark that the Pennsylvania alien registration act "provoke[d] questions in the field of international affairs" was similarly premised on the potential for foreign offenses and hostilities such a law carried: "Experience has shown that that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." 312 U.S. 52, 64 (1941); *see also United States v. Pink*, 315 U.S. 203, 232 (1942) ("The nation as a whole would be held to answer if a State created difficulties with a foreign power.").

countries' governments, or seek to vindicate victims of atrocities. Linkage simply means CARB will accept Quebec-issued allowances from California covered entities under California law. This does not implicate federal powers over foreign relations, even incidentally.

Plaintiff argues to the contrary that by "expressly advancing" linkage and "other policies" in "declared opposition to the foreign policy of the United States," California has intruded into an exclusively federal field of "[i]nternational relations relating to climate change"—or, as Plaintiff describes it later, "the field of global climate regulation and greenhouse gas emissions." Pl. MSJ at 35:3, 37:4. Plaintiff's argument rests on three fundamental errors. *First*, Plaintiff again relies on Governors' statements that are factually unrelated to linkage, and, thus, do not remotely show California "advancing" linkage in "declared opposition" to any federal policy. Pl. MSJ at 35-36; *see, supra*, at 39. *Second*, neither the 2017 agreement nor the linkage regulations enter "the field of global climate regulation and greenhouse gas emissions" at all. As discussed earlier, the agreement and regulations do not limit emissions *anywhere* (not even in California); Quebec, not California, sets its own limits for its businesses' emissions. *See, supra*, at 34-35.

Third, Plaintiff cites no authority for the proposition that "global climate regulation and greenhouse gas emissions" (Pl. MSJ at 37:4) is among the exclusive federal powers "concern[ing] war … [or] design[ed] to prevent war," such that field preemption would be triggered. *Deutsch*, 324 F.3d at 711. In so arguing, Plaintiff again disregards the States' traditional responsibility for air pollution control and greenhouse gas regulation. *See, supra*, at 34. Most disturbingly, in insisting "[o]ur country must speak 'with one voice,'" Pl. MSJ at 39:5-6, Plaintiff entirely disregards the voice Congress has in shaping federal climate change policy, including foreign policy, and the role Congress has reserved for the States. "It is not for the President alone to determine the whole content of the Nation's foreign policy." *Zivotosfsky*, 135 S.Ct. at 2090; *see also id.* ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."). And Congress has not been silent here. Congress consented to the UNFCCC, passed the Global Climate Protection Act and the Clean Air Act, and established the National Climate Program. Pub. L. 95-367, § 5, 92 Stat. 601 (1978) (National Climate Act, codified at 15 U.S.C. § 2904). All these actions, not least Clean Air Act section

116, leave room for state action either in concert with federal action, or beyond it. 42 U.S.C. § 7416 (preserving States' authority to adopt more stringent air pollution regulations); 15 U.S.C. § 2904(d)(7) (grants to state agencies for climate-related studies and services); *see also*, *supra*, at 10 (federal government describes state GHG laws and programs as contributing to U.S. participation under the UNFCCC). Congress could have preempted state action on GHG emissions if it so chose, but it has adopted exactly the opposite approach. *See* 42 U.S.C. § 7416. This confirms this is not an appropriate field to invoke *against* States' efforts. *Cf. Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) ("[C]ourts must be careful not to confuse the congressionally designed interplay between state and federal regulation … for impermissible tension that requires preemption under the Supremacy Clause.") (internal quotation marks omitted).

Because the 2017 agreement and linkage regulations do not intrude even incidentally on the federal foreign affairs powers, Plaintiff's field preemption theory fails, as a matter of law, on the second prong as well.

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court deny Plaintiff's motion for summary judgment and grant summary judgment for Defendants on Plaintiff's Foreign Affairs preemption cause of action.

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Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL P. CAYABAN
Supervising Deputy Attorney General

/s/ M. Elaine Meckenstock
M. ELAINE MECKENSTOCK
Deputy Attorney General
Attorneys for State Defendants