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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 the Governor of the State of California ; THE CALIFORNIA AIR RESOURCES BOARD ; MARY D. NICHOLS, in her official capacities as Chair of the California Air Resources Board and a board member of the Western Climate Initiative, Inc. ; WESTERN CLIMATE INITIATIVE, INC. ; JARED BLUMENFELD, in his official capacities as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.;

Defendants.

Case No. 2:19-cv-02142-WBS-EFB

[PROPOSED] *AMICUS CURIAE* BRIEF OF THE NATURE CONSERVANCY IN SUPPORT OF DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Motion Hearing Date: June 15, 2020
Time: 1:30 PM
MSJ Hearing Date: June 29, 2020
Time: 1:30 PM
Judge: Hon. William B. Shubb
Action Filed: Oct. 23, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES AND EXECUTIVE MATERIALS

STATE STATUTES, REGULATIONS AND ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION & INTEREST OF *AMICI CURIAE*

Since 2006, the State of California has been working with businesses, industry, and environmental stakeholders to establish a comprehensive and multifaceted regulatory regime that will reduce the impacts of climate change on the state, and to address the accompanying difficult scientific and technical questions. One approach is a cap-and-trade program, which caps the annual amount of greenhouse gases that can be emitted statewide. Covered businesses in the state must reduce their emissions in the aggregate below certain limits and are required to submit "compliance instruments," each representing one ton of pollutants, for each ton of pollutants they emit. One aspect of the cap-and-trade program is the Linkage,[1] pursuant to which the State elected to amend its domestic regulations to recognize compliance instruments issued by Quebec; Quebec regulators did the same with respect to California instruments. The Linkage is thus a limited act in support of the State's environmental objective to lessen the harm of climate change to California; it is not a statement of foreign policy, nor does it conflict with any official foreign policy of the United States, including the withdrawal from the Paris Agreement. Indeed, the Linkage predates the announcement of that Agreement, let alone the decision to exit from it, by four years.

Unwilling and unable to show how the Linkage conflicts with or impedes U.S. foreign policy, the United States cites other initiatives California has undertaken to protect itself from climate change, particularly the Tropical Forest Standard. CARB, California Tropical Forest Standard: *Criteria for Assessing Jurisdiction-Scale Programs that Reduce Emissions*

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[1] Specifically, the Linkage is effectuated by each of California's and Quebec's respective regulations. The administrative procedures associated with California's and Quebec's administration of their respective regulations are memorialized by an *Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions*, originally negotiated in 2013 and restated in 2017. *See Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions*, ECF No. 7-2.

from Tropical Deforestation (Sept. 19, 2019), https://ww3.arb.ca.gov/cc/ghgsectors/tropicalforests/ca_tropical_forest_standard_english.pdf (hereinafter "Standard"). The Standard—which the United States does not mention in its complaint or request for relief—publishes criteria and metrics for confirming that efforts to protect tropical forests actually result in quantifiable, permanent, enforceable, and verifiable reductions in greenhouse gases ("GHGs"). The Standard is an important scientific achievement after years of coordination between the California Air Resources Board's ("CARB") scientists, nongovernmental organizations ("NGOs"), businesses, and subnational jurisdictions to establish a credible framework for the quantification of GHG reductions resulting from avoided deforestation and degradation of tropical forests.

Contrary to the United States' arguments, CARB's endorsement of the Standard does *not* create an additional international dimension to the California's cap-and-trade program: offsets from tropical forest countries *cannot* be used by California covered entities and play no role in the State's pursuit of its emission reduction goals at this time. Rather, the Standard is an open source model for how to account for emission reductions from protecting tropical forests. CARB's application of its technical expertise and its coordination with academics, NGOs, and other jurisdictions to establish such a model does not conflict with U.S. foreign policy. Nor does the Standard hinder the accomplishment of the goals of the United States. On the contrary, it is completely complementary.

As courts have previously found, U.S. climate policy has space to accommodate state efforts, particularly those of California, to reduce GHG emissions into the atmosphere. Indeed, U.S. foreign policy has explicitly promoted subnational initiatives. Unlike some other fields, in which the United States' choice of strategy—for example, with regard to diplomatic pressure towards another country—necessarily cannot involve a differing approach, the U.S.' goals are not undercut by California's attempts to address a problem affecting its health and welfare.

Plaintiff's arguments to the contrary rely on speculation, mischaracterizations of the status quo, and statements and programs that the U.S. elected not to challenge and are therefore not properly before this Court. In particular, Canada is *not* using reductions stemming from the Linkage to satisfy its obligations under the Paris Agreement, and California's recent decision to endorse the Tropical Forest Standard does *not* require the State (nor any covered entity under the cap-and-trade program) to invest foreign capital in developing countries.

Nor is the Linkage preempted on the theory that the United States has occupied the field of international action with respect to climate change. This theory is faulty because, as this Court has previously found, the Linkage and the cap-and-trade program it supports are a legitimate exercise of California's police powers to protect its citizens. Moreover, the theory the U.S. adopts *is dangerous* because it implies *any* non-federal GHG initiative—including even the mere type of scientific coordination that culminated in endorsement of the Standard—would undermine the ability of the United States to "speak with one voice" on the subject, or reduce the ability of the federal government to negotiate a "better deal" for international cooperation on GHG mitigation. *See* Pl.'s Notice, Second Mot. Summ. J., and Mot. to Dismiss Claim, and Br. in Supp. Thereof 3, 39, ECF No. 102 (hereinafter, "U.S. Br."). If the United States has indeed "cho[sen] to put [climate policy] on 'pause' while it rethinks its options," U.S. Br. 1, then any progress on combating this existential threat would be foreclosed indefinitely. The Constitution does not limit the ability of states to protect their citizens from such a threat.

As described in its earlier *amicus* brief in this case, The Nature Conservancy ("TNC") is committed to countering climate change at all levels. The Nature Conservancy's [Proposed] *Amicus Curiae* Br. in Supp. of Defs.' Mot. Summ. J., ECF No. 59-1 (hereinafter "TNC Br."). It has participated in international efforts to curb GHG, including attending the Conference of the Parties meetings pursuant to the United Nations Framework Convention on Climate Change ("UNFCCC"). It has assisted the federal government's own climate initiatives. It has helped develop and implement California's cap-and-trade program, particularly its offsets program. And it has promoted forest health around the world as an indispensable solution to the

climate crisis, including through the Reducing Emissions from Deforestation and forest Degradation (REDD) initiative, and the development and endorsement of the Tropical Forest Standard by California. TNC is thus uniquely positioned to educate the Court about these issues; to correct the U.S.' mischaracterization of California's efforts; and to explain the subnational experimentation and technical advancement to address the universal problem of climate change.

BACKGROUND

I. California's efforts to counter the State's harm from climate change, including the Linkage and the Tropical Forest Standard.

In 2006, California enacted the Global Warming Solutions Act, also referred to as AB 32, to protect California and its citizens from the harmful effects of global warming. *See* Cal. Health & Safety Code § 38500 *et seq*. Because climate change presents "a challenge of unprecedented scale and scope," the State recognized that a "coordinated set of strategies to reduce emissions throughout the economy," as well as "comprehensive tracking [and] reporting" of greenhouse gas emissions, would be necessary. CARB, *Climate Change Scoping Plan* ES-2, ES-7 (Dec. 2008), https://ww3.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf (hereinafter, "CARB, Scoping Plan").

One mechanism contemplated by AB32 is California's cap-and-trade program. As discussed in TNC's prior brief, the program is a market-based mechanism to reduce pollution. *See* TNC Br. 3-7, ECF No. 59-1. The program creates an incentive for covered entities to reduce their emissions as much as possible, through the most efficient means possible, thereby enabling the State to achieve its GHG reduction targets at the lowest cost to businesses and consumers. One feature of the cap-and-trade system is the offsets program. Offsets are reductions in emissions from activities not covered by the cap-and-trade program. An entity subject to the cap may contract for the right to use a verified emission reduction from a project (e.g., from the destruction of methane emissions from livestock) to "offset" a portion of its own emissions. *See generally* 17 C.C.R. § 95970 *et seq*. Offset markets have the potential

to create environmental benefits in addition to reducing GHG levels, and provide covered entities with flexible options to meet regulatory demands as cheaply as possible.

California elected to link its cap-and-trade system with a similar system administered by Quebec. Expanding the market of compliance instruments and offsets further reduced the cost to covered entities in the state. The Linkage, however, supplemented an already functional domestic cap-and-trade program; the Linkage was thus not indispensable to the operation of California's program, nor did it seek to promote any goal besides more effectively achieving the in-state benefits of the California cap-and-trade system.

California has also worked to encourage GHG emissions through another important initiative, the Tropical Forest Standard. The Standard recognizes that forest health is "the single largest nature-based climate mitigation opportunity," and provides secondary environmental benefits such as cleaner water, cleaner air, flood control, and more to affected environments. The Nature Conservancy, *Playbook for Climate Action* 15 (2019), https://www.nature.org/en-us/what-we-do/our-insights/perspectives/playbook-for-climate-action/. Indeed, "[e]missions from tropical deforestation and forest degradation are estimated to account for between 11% and 14% of global GHG emissions." CARB, Staff White Paper: *Scoping Next Steps for Evaluating the Potential Role of Sector-Based Offset Credits under the California Cap-and-Trade Program, Including from Jurisdictional "Reducing Emissions From Deforestation and Forest Degradation" Programs* vii (Oct. 19, 2015), https://ww3.arb.ca.gov/cc/capandtrade/sectorbasedoffsets/arb%20staff%20white%20paper%20sector-based%20offset%20credits.pdf (hereinafter, "CARB, White Paper"). Given the scale of emissions from tropical deforestation and forest degradation, "robust climate efforts *must* include mechanisms to reduce these emissions." CARB, Proposed Endorsement of California Tropical Forest Standard: *Final Environmental Analysis* 9 (Nov. 9, 2018),

https://ww3.arb.ca.gov/cc/ghgsectors/tropicalforests/final_ea_ca_tropical_forest_standard.pdf (hereinafter "CARB, Final EA") (emphasis added).[2] Research shows forest health affects the impacts of climate change in the state: tropical forests "affect . . . precipitation in California" and their loss "could even reduce Sierra Nevada snowpack" and increase water supply costs in the state, which the California legislature specifically identified as a harm justifying AB 32. CARB, California Tropical Forest Standard: *Resolution 19-21* 2 (Sept. 19, 2019), https://ww3.arb.ca.gov/board/res/2019/res19-21.pdf?_ga=2.34170785.1825212294.1590165520-567109972.1590165520 (hereinafter "CARB, Resolution 19-21"); *see also generally* David Medvigy, Simulated Changes in Northwest U.S. Climate in Response to Amazon Deforestation (Oct. 29, 2013), https://journals.ametsoc.org/doi/10.1175/JCLI-D-12-00775.1 (projecting that deforestation of the Amazon could cut the snowpack in the Sierra Nevada mountains in half, diminishing a critical water supply for the state).

Numerous and complex technical, scientific and policy issues complicate forest health efforts, however. To be truly beneficial, an initiative must result in "real, measurable, and long-term emission reductions [that] would occur in addition to" those in the status quo. CARB, White Paper at 24. This implicates difficult technical and scientific questions of how to set forest carbon stock baselines; create tools for the accounting of carbon stocks through monitoring, measuring, reporting, and third-party verification; and track those stocks and reductions over time. *Id.* at 18. An ideal forest mitigation project results in permanent change, so that removed carbon will not quickly return to the atmosphere. Thus, an effective program should address the causes of deforestation and create a path to sustainability that improves local livelihoods.

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[2] *See also* CARB, Final EA at 10 (noting forests provide "one of the only opportunities (1) to simultaneously reduce a substantial amount of carbon dioxide (CO2) being emitted to the atmosphere . . . and (2) to actively remove CO2 from the atmosphere").

California developed the Tropical Forest Standard to address these technical, scientific and policy issues. Reliable measures of forest health can be meaningfully put to use in climate efforts, including potentially through offset programs. Specifically, the Standard sets transparent criteria for assessing jurisdiction-wide programs that reduce emissions from tropical deforestation. When a jurisdiction wishes to create a forest mitigation program, the criteria enable other states, international entities, businesses, and nonprofits to judge the viability and success of that program. *See* CARB, Resolution 19-21 at 2 (standard "will increase rigor in . . . programs by establishing a model for demonstrating real, quantifiable, permanent, additional, enforceable, and verifiable efforts to address deforestation."). The Standard thus serves as a model that any jurisdiction can adopt to include protection of tropical forests as part of its climate mitigation strategy. *See* CARB, Final EA at 12 (Standard "is anticipated to serve as a robust, replicable model for other GHG emissions mitigation programs such as the International Civil Aviation Organization's (ICAO) Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) and other emerging programs.").

The Standard is a considerable accomplishment, and the result of over a decade of work by California and dozens of other state, nonprofit, academic, business and scientific entities.[3] *See, e.g.*, CARB, Resolution 19-21 at 1 (noting California's decision to join Governors' Climate and Forests Task Force in 2008). "Dozens of environmental and indigenous organizations and 118 scientists from around the world stand in support of the California Tropical Forest Standard . . . includ[ing] lead authors of the IPCC (Intergovernmental Panel on Climate Change) report; members of the U.S. National Academy of Sciences; fellows from the California Academy of Sciences; and directors from the Center for International

[3] The Tropical Forest Standard is an example of a broader strategy to reduce emissions from deforestation and forest degradation—or REDD. The term "REDD" was first coined in connection with UNFCCC negotiations in 2005, and the Conferences of the Parties since have adopted several decisions and a rulebook related to REDD in the decade that followed. *See generally* CARB, White Paper at 4-6. REDD "continues to receive backing from national jurisdictions, such as the United States." *Id.* at viii.

Forestry Research." Conservation International, *Environmental and Indigenous Organizations and Leading Scientists Support California Tropical Forest Standard* (Sept. 18, 2019), https://www.conservation.org/press-releases/2019/09/18/environmental-and-indigenous-organizations-and-leading-scientists-support-california-tropical-forest-standard. Because California has no tropical forests, development of the Standard necessarily included interaction with scientists, NGOs, and national and subnational entities outside the United States. Indeed, throughout this process, "ARB has coordinated with the U.S. Department of State on issues related to [forest health]," which has "welcomed ARB's engagement with subnational jurisdictions . . . and has helped facilitate discussions with national governments, including those of Brazil and Mexico, upon request." CARB, White Paper at 20.

CARB endorsed the Standard on September 19, 2019.[4] However, CARB's endorsement went no further than a formal recognition of the soundness of the criteria and methods contained within. It did "not result in any linkage with any jurisdiction, nor [did] it allow any tropical forest offsets into the Cap-and-Trade Program." CARB, Final EA at 13; *see also* U.S. Br. at 14 n.7 (noting CARB "has yet to formally link with a REDD plan"). A "future regulatory amendment process," which has not yet begun, would be required before any offsets based in Tropical Forest Standard-compliant programs could be introduced into California's Cap-and-Trade Program. CARB, Final EA at 13.

ARGUMENT

The United States' overbroad interpretation of what constitutes its foreign policy on climate matters, and what is incompatible with it, undermines efforts by states, the scientific community, NGOs, businesses and other stakeholders to counter the harm of climate change. Indeed, this seems to be the aim of the United States: Although the case began as an effort to

[4] The United States erroneously claims that CARB "adopted . . . the 'Tropical Forest Standard'" in 2011. U.S. Br. at 13.

invalidate the Linkage, the U.S.' second motion for summary judgment also takes aim at the Tropical Forest Standard and AB 32 itself, to try to exaggerate the international dimensions of the Linkage.[5] The U.S. even goes so far to say that, because "GHGs are global pollutants," they are "outside 'the backdrop of traditional state legislative subject matter," foreclosing *any* non-federal effort to address them. U.S. Br. at 3 (emphasis omitted); *see also* U.S. Br. at 31-32 (claiming that "climate change is a global issue that exceeds the competence or capacities of individual states to resolve").

This position is untenable in fact and in law. The federal government's pursuit of solutions to climate change through diplomacy are not mutually exclusive with and are not undermined by state regulation. There is thus no conflict with any U.S. policy. And, as this Court has previously found, climate change regulation is squarely within the traditional police powers of California, and the State is not using that as a pretext to address some political issue. There is thus no issue of field preemption.

I. There is no conflict preemption because United States global climate policy respects the right of states to regulate and take action.

Although "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003), the bar for finding conflict preemption is high: State law must give way only where "there is evidence of *clear* conflict between the policies adopted by the two," *id.* at 421 (emphasis added); *see also Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (holding a "high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."). This is especially true where, as here, the policy protects

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[5] The United States claims repeatedly that the "Agreement and Arrangements" of California are "affirmative acts . . . [which] undermine United States foreign policy." U.S. Br. at 2. "Agreements and Arrangements" is explicitly defined to refer to the Linkage "together with its preparatory and implementing activities *starting with the Global Warming Solutions Act of 2006 ("AB 32")*." U.S. Br. at 2 n.1 (emphasis added).

the state's wellbeing: A court must "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Garamendi*, 539 U.S. at 420; *see also Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) ("We must be cautious about conflict preemption where a federal statute is urged to conflict with state law regulations within the traditional scope of the state's police powers.").

Plaintiff's arguments rely on official policy statements that either explicitly support state action or leave open the possibility that it will occur. There is also no conflict with the U.S.' decision to withdraw from the Paris Agreement: Neither the Linkage nor the Standard (which is not challenged in this action) facilitate Canada's participation in that regime. Nor is there any merit to the claim that the Linkage or the Standard replicates the structure of the Paris Agreement's "Green Climate Fund."

A. U.S. climate foreign policy preserves a role for state action.

Multiple courts considering whether California's efforts to regulate climate change conflict with U.S. efforts have concluded that "there is *absolutely nothing* . . . to support the contention that it is United States foreign policy to limit . . . the efforts of individual states in controlling greenhouse gas emissions." *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1187 (E.D. Cal. 2007) (emphasis added). Instead, "[a]lthough the United States has consistently called for international consensus and a comprehensive approach to global warming, it has never disapproved of domestic regulation of domestic GHG emissions. To the contrary. The United States has praised such efforts to the international community." *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007) (reviewing Global Climate Protection Act, UNFCCC, Kyoto Protocol).

This conclusion is self-evident from the "multiple federal statutes," executive orders, and treaties, U.S. Br. at 4, that the U.S. relies on to establish its foreign policy. The 1987 Global Climate Protection Act ("Act"), for example, outlines four goals: The United States should "increase worldwide understanding of the greenhouse effect"; "foster cooperation among

nations to develop more extensive and coordinated scientific research efforts" with respect to it; "identify technologies and activities" that mitigate human effect on global climate; and "work toward multilateral agreements" on the issue. Global Climate Protection Act of 1987, Pub. L. No. 100-204, § 1103, 101 Stat 1331 (1987) (printed in notes to 15 U.S.C. § 2901). The Linkage is consistent with, and indeed promotes, all of these goals. Nowhere in the Act does Congress dictate that the federal government should be the *sole* entity to pursue these, nor does the Act state that subnational efforts have the potential to disrupt the federal strategy that Congress was trying to promote—there is thus no "clear evidence" of conflict with a statute as required to find preemption. *See United States v. California*, 921 F.3d 865, 882 (9th Cir. 2019) ("In the absence of irreconcilability, there is no conflict preemption, as the district court correctly recognized.").

The Linkage is also fully consistent with the UNFCCC, which encourages the United States to, *inter alia*, "[p]romote and cooperate" the adoption of "practices and processes that control, reduce or prevent anthropogenic emissions." *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, 170. Indeed, the charter calls for "the widest possible cooperation." *Id.* 166. As the United States admits in its brief, U.S. Br. at 6, it is a "framework" agreement, setting out only "general obligations," and no binding emission reduction commitments. The U.S. does not identify any part or obligation of the UNFCCC that the Linkage is incompatible with, nor any position the U.S. has taken with respect to the UNFCCC that the Linkage is an obstacle to. And submissions the U.S. has made make clear that subnational regulation supports its global climate efforts: In its Second Biennial Report submitted pursuant to the UNFCCC (the most recent one submitted), it stated that "the federal government *supports state and local government actions to reduce GHG emissions*" and that "numerous state and local policies and measures *complement federal efforts to reduce GHG emissions*." U.S. Dep't of State, *Second Biennial Report of the United States of America Under the United Nations Framework Convention on Climate Change* 27 (2016),

https://unfccc.int/files/national_reports/biennial_reports_and_iar/submitted_biennial_reports/application/pdf/2016_second_biennial_report_of_the_united_states_.pdf.

The Trump Administration's climate policy is consistent with these principles. Although the administration has elected to withdraw from the Paris Agreement, that does not imply that all climate policy is foreclosed until further notice.[6] Indeed, the remarks of the President state that despite withdrawal, the United States "will continue to be the cleanest and most environmentally friendly country on Earth" and be "the world's leader on environmental issues."[7] *See* The White House, *Statement by President Trump on the Paris Climate Accord* (June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/. And the State Department's most recent remarks at UNFCCC COP25 reaffirm that the United States is "fully committed to . . . mitigat[ing] the impacts of climate change" through the use of "open markets"—precisely the aim of the Linkage. *See* U.S. State Dep't, *United States National Statement at UNFCCC COP25* (Dec. 11, 2019), https://www.state.gov/united-states-national-statement-at-unfccc-cop25/ (hereinafter "COP25 National Statement"). Executive Order 13,783, *see* U.S. Br. at 9, emphasizes "respecting the proper roles of the . . . States" in environmental matters. 82 Fed. Reg. 16,093 (Mar. 31, 2017).

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[6] This is also true as a matter of federal domestic environmental policy. The Environmental Protection Agency is imminently set to announce a proposed rule that would establish the country's first ever greenhouse gas regulations from aircraft. *See* Office of Information and Regulatory Affairs, Pending EO 12866 Regulatory Review of RIN 2060-AT26, Control of Air Pollution From Aircraft and Aircraft Engines: Proposed Greenhouse Gas (GHG) Emissions Standards and Test Procedures (May 13, 2020), https://www.reginfo.gov/public/do/eoDetails?rrid=130449. The Trump Administration is also currently defending against claims that greenhouse gas standards for tractor-trailer medium and heavy duty vehicles should be invalidated. *See* Initial Br. for Resp'ts, *Truck Trailer Mfrs. Ass'n v. EPA*, No. 16-1430 (D.C. Cir. 2020).

[7] These and other statements the United States relies on to establish the Trump Administration's climate policy are too general to create an express conflict. *See Lighthouse Res. Inc. v. Inslee*, No. 18-05005, 2019 WL 1436846, at *3 (W.D. Wash. Apr. 1, 2019) (holding "[t]he President's and his administration official's generalized remarks favoring the development of the coal industry and the export of coal are not in clear conflict with the State's decision" to deny a water quality certification).

State action may sometimes be preempted even when it is consistent with the ultimate goals of federal policy. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000); U.S. Br. at 24. But that is the case only when the implementation mechanisms chosen by the state and federal government conflict. *See Crosby*, 530 U.S. at 379 (holding a common end cannot neutralize "conflicting *means*" (emphasis added)). In *American Insurance Association v. Garamendi*, for example, U.S. diplomacy had determined that mediated settlement efforts through an established foundation should be "the exclusive mechanism" for resolving Holocaust era insurance claims. 539 U.S. at 406. *See also id.* at 422 (repeatedly noting forum was created to be an "exclusive" remedy). The foundation allowed participating companies "to abide by their own countries' domestic privacy laws," *id.* at 423, something that the challenged law, by requiring public disclosure of information, "undercut[]," *id.* at 425. Similarly, in *Crosby v. National Foreign Trade Council*, even though the shared goal of the federal and Massachusetts regimes was to apply pressure to Burma, the state regime "penaliz[ed] individuals and conduct that Congress has explicitly exempted or excluded from sanctions." 530 U.S. at 378. Here, the U.S. identifies no implementing mechanism of U.S. climate policy conflicting with the Linkage, and instead cites California efforts wholly irrelevant to the Linkage, such as the Standard, in its efforts to exaggerate the international dimensions of California's cap-and-trade program and insinuate a conflict that does not exist.

Thus, the sources evidencing U.S. foreign policy do not provide that the United States is the exclusive entity with a role in reducing emissions, and there is no admonition against state efforts that occupy the same space. There is thus no "clear" conflict as the law requires.

B. The Linkage and the Tropical Forest Standard do not undercut the U.S.' ability to negotiate a replacement to the Paris Agreement or otherwise conduct climate policy.

The United States mistakenly claims that the Linkage undermines amorphous U.S. efforts to "negotiate a new deal" that would replace the Paris Agreement. U.S. Br. at 10 (quoting remarks of President Trump). The alleged result of cross-border emissions trading

under the Linkage is that the U.S. will not be able to "leverag[e] a better deal for . . . its workers and economy as a whole." *Id.* at 22.

This argument fails because the United States presents no evidence that California's activities have actually harmed the bargaining power of the United States, or even any evidence that negotiations to replace the Paris Agreement are active and ongoing. *Cf. Massachusetts v. EPA*¸ 549 U.S. 497, 533 (2007) (disregarding EPA's argument that it should not regulate climate change as it "might impair the President's ability to negotiate" with other countries). Despite the fact that the Linkage has existed since 2013, and the U.S. announced its intent to leave the Paris Agreement almost three years ago, the U.S.' statement of material facts contains not one piece of evidence of the federal government's current negotiating posture or status. The U.S. is merely speculating that such a conflict could exist, without offering proof of the actual conflict required to find preemption.

In contrast, in *Garamendi*, the Under Secretary of State (and later Deputy Treasury Secretary) issued California an "ultimatum," 539 U.S. at 412, that the challenged law was "damaging the one effective means" to resolve the issue of Holocaust reparations, and "would possibly derail" the process, *id.* at 411, leading the Court to conclude that California had "in fact placed the government at a disadvantage," *id.* at 424. Similarly, in *Crosby*, the Court relied on the fact that "a number of this country's allies and trading partners filed formal protests with the National Government" over the challenged Massachusetts sanctions. 530 U.S. at 383; *see also Gingery v. City of Glendale*, 831 F.3d 1222, 1231 (9th Cir. 2016) (dismissing action in part because "Plaintiffs ha[d] not further alleged that this disapproval has in any way affected relations between the United States and Japan" and had not "allege[d] that the federal government has expressed any view on the monument—much less complained of interference with its diplomatic agenda").

Evidence of an actual impact on U.S. foreign policy is particularly necessary to find preemption in the climate space, because subnational efforts can actually assist international negotiations:

> There is absolutely no reason in logic for any presumption that the efforts of California or any other state to reduce greenhouse gas emissions would interfere with efforts by the Executive Branch to negotiate agreements with other nations to do the same. Plaintiffs offer no evidentiary basis for the proposition that the United State[s] would get farther in its efforts to negotiate agreements with other nations by withholding efforts to limit greenhouse gas emissions than by leading the way by example.

Goldstene, 529 F. Supp. at 1187.[8] Because the relationship between state and federal climate efforts is, even in the light most favorable to the U.S., complex, the U.S. must do more than merely *assert* that a conflict exists. It has not carried this burden.

The United States also repackages many of these same claims into an obstacle preemption argument, claiming that California's actions will at some unspecified "future" time frustrate the U.S.' goals of "obtain[ing] better and more equitable deals on climate mitigation for the American People." U.S. Br. at 23.

This argument is even more speculative, and fails for the same reasons that the Linkage does not harm the efforts of the U.S. to negotiate reentry into the Paris Agreement. *See City of Los Angeles v. AECOM Servs., Inc.*, 854 F.3d 1149, 1156 (9th Cir. 2017) (noting "obstacle preemption . . . is a subset of conflict preemption"), *amended sub nom. City of Los Angeles by & through Dep't of Airports v. AECOM Servs., Inc.*, 864 F.3d 1010 (9th Cir. 2017). The U.S. has no evidence that the Linkage or any other action California has taken has or will undercut its efforts. Indeed, the U.S. does not even say what those efforts will be, other than

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[8] Indeed, the *amici* group of foreign U.S. diplomats, who have worked "to shape U.S. foreign and climate policy over many decades" firmly state that the U.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." *See* Former U.S. Diplomats and Government Officials Br. of Amici Curiae in Supp. of State Defs.' Opp'n to Pl.'s Mot. Summ. J. and State Defs.' Cross-Mot. Summ. J. 1, 4-5, ECF No. 65-1; *see also Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 Harv. L. Rev. 1877, 1891 (2006) ("[S]tate GHG reductions may make developing nations more willing to agree to emission cuts. . . . [I]t may be that what is holding up developing nations is in part a perception that the United States is not serious about addressing climate change.")

that they will be "better," or when the conflict will occur, besides in the "future." Here, "what [the United States] contend[s] is . . . 'policy' is more accurately described as a strategy; that is, a means to achieve an acceptable policy but not the policy itself," which cannot sustain an obstacle preemption argument. *Goldstene*, 529 F. Supp. 2d at 1186-87. More is required, as demonstrated by *Crosby*, on which the U.S. relies. There, the Court found that the Massachusetts law conflicted with an existing, specific, sanctions regime that Congress had enacted into law for the President to administer.[9] *See* 530 U.S. at 368-69. A conflict existed as soon as the law was passed, because Massachusetts had implemented "immediate . . . and perpetual" sanctions, *id.* at 376-77, which was contrary to Congress' aim, declared at the outset and enshrined in the law, that the sanctions regime administered by the United States have the "flexibility to respond to change," *id.* at 375. No such conflict exists here.

C. The Linkage does not facilitate Canada's participation in the Paris Agreement, and is not an "Internationally Traded Mitigation Outcome" for the Purposes of Article 6 of that Agreement.

Grasping to manufacture some other conflict, the United States argues that the Linkage "facilitates Canada's participation" in the Paris Agreement. U.S. Br. at 20. Specifically, it claims the Linkage provides an avenue through which Canada can acquire emissions credits from California to fulfill its international obligations. In the parlance of the Paris Agreement, according to the U.S., Canada will acquire Internationally Transferred Mitigation Outcomes ("ITMOs") from California pursuant to Article 6 of the Agreement, which Canada will use to satisfy its Nationally Determined Contribution ("NDC"). U.S. Br. at 20-21.

Even if this were true, there would be no clear conflict with U.S. policy. The President's decision to withdraw the United States from the Paris Agreement, or even a desire to

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[9] The U.S. claims the Global Climate Protection Act delegates similar authority to the President as the federal statute at issue in *Crosby*, yet specifies no actual provision of the GCPA that California's actions conflict with or undermine. As discussed *supra* Section I.A, the GCPA merely announces general goals relating to understanding and mitigating climate change that are consistent with the Linkage, the Cap-and-Trade Program, and the Standard.

renegotiate entry on better terms, does not amount to a declaration that the Paris Agreement should not exist, or that Canada should not be attempting in the meantime to fulfill its obligations under that agreement with the goal of keeping warming to under two degrees Celsius. Again, the only "clear" statement the U.S. has made with respect to the Paris Agreement is that the United States' membership is detrimental to American interests, and that developing countries are inappropriately excused from emissions reductions. *See* U.S. Br. at 9-10.

More fundamentally, the Paris Agreement currently does not allow what the United States claims Canada might do: The parties to it have agreed to no mechanism for the transfer of ITMOs. As the U.S. states in its brief, ITMOs are governed by Article 6 of the Paris Agreement. U.S. Br. at 20. However, as of the most recent round of negotiations in December 2019, the parties were unable to reach agreement on an implementing set of rules to effectuate Article 6. *See* CarbonBrief, *Cop25: Key outcomes agreed at the UN climate talks in Madrid* (Dec. 15, 2019), https://www.carbonbrief.org/cop25-key-outcomes-agreed-at-the-un-climate-talks-in-madrid (noting "talks were unable to reach consensus in many areas" and that Article 6 was "punted into 2020"). Lack of an Article 6 implementing mechanism has been a serious roadblock: "Countries have tried and failed to agree [on] the rules governing is mechanism" for years, and "negotiators have been unable to overcome some major sticking points." Climate Change News, *What is Article 6? The issue climate negotiators cannot agree* (Dec. 2, 2019), https://www.climatechangenews.com/2019/12/02/article-6-issue-climate-negotiators-cannot-agree. The United States' only evidence to the contrary is a 2016 long-term strategy document in which Canada states that it will "consider" ITMOs as a "complement to reducing emissions at home." Government of Canada, *Canada's Mid-Century Long-Term Low-Greenhouse Gas Development Strategy* 11 (2016), https://unfccc.int/files/focus/long-term_strategies/application/pdf/canadas_mid-century_long-term_strategy.pdf. Canada's document does not say that such a strategy was viable in 2016, and after four more years of negotiations, it still is not.

The U.S. repeatedly insists that "California is selling greenhouse gas emissions *of the United States*," U.S. Br. at 21-22, implying that the Linkage allows the state to deal away something that rightfully belongs to the federal government, and that the U.S. currently needs for some purpose. Neither is true: The compliance instruments and offsets that can be traded are the private property of covered entities to be sold to other market participants.[10] Because the sales are not coerced, fundamental economic principles dictate that they are *for the benefit* of covered California businesses that choose to engage in such transactions. And, in the aftermath of its withdrawal from the Paris Agreement, the United States has identified no other international obligations these compliance instruments should be used to fulfill instead.

D. The Linkage and Tropical Forest Standard are not binding commitments for nothing in return, and bear no resemblance to the Paris Agreement's "Green Climate Fund."

The United States also argues that the Linkage and the Tropical Forest Standard contravene established policy, allegedly dating back to the Kyoto Protocol, that the U.S. should not be committed to "actions . . . that produce burdens specific to the United States that other countries do not face." U.S. Br. at 11 (quoting remarks of Secretary Pompeo). As one recent example, the U.S. focuses on the Green Climate Fund, which is an international financial body established by the UNFCCC through which developed countries contribute funds to be used for climate adaptation and mitigation projects in developing countries.

But the Linkage neither burdens the United States nor bears an even passing resemblance to the Green Climate Fund. As discussed in TNC's prior brief, the Linkage does not impose new obligations on any private party, modify the total cap on emissions, or alter the number and initial allocation of compliance instruments for California companies. *See* TNC Br.

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[10] *See Cal. Chamber of Commerce v. St. Air Resources Bd.*, 10 Cal. App. 5th 604, 614, 634 (Cal. Ct. App. 2017) (holding that, "the purchase of emissions allowances, whether directly from [CARB] or on the secondary market, is a business-driven decision, not a governmentally compelled decision," and because, "once purchased, either from [CARB] or the secondary market, the allowances are valuable, tradable commodities," the Cap-and-Trade Regulations do not constitute a tax in violation of California's Proposition 13).

at 7-8. All those features are dictated by California's cap-and-trade program, which the United States does not challenge here, nor could it. Indeed, because the cap-and-trade program existed in full before the Linkage came into effect, the Linkage's sole impact is to increase the market for compliance instruments and the flexibility available to covered entities. And the Linkage (and the cap-and-trade system it is associated with) is easily distinguishable from the Green Climate Fund. As the U.S. describes, President Trump ended contributions of federal funds on the belief that the U.S. was subject to a requirement that developing countries were excused from, and that the U.S. was receiving no return on its investment. *See* U.S. Br. at 12 (developing nations, the world's "top polluters," were excused, while developed nations "pay the concentrated costs" yet "enjoy only a slice" of the benefits). By contrast, the Linkage allows for private, not public, flows of capital that provide companies with a discrete, tangible benefit: A compliance instrument which allows a company to more cost-effectively discharge its regulatory obligation to reduce emissions.

The Tropical Forest Standard is also not a type of uneven deal that U.S. policy seeks to avoid. CARB's endorsement of the Standard did not permit California entities to invest in tropical forest offset credits or otherwise alter the cap-and-trade program: Further regulatory action by California, which it has not yet initiated, is necessary. *See* 17 C.C.R. § 95992 (noting CARB "may approve a sector-based crediting program . . . in accordance with the Administrative Procedure Act" and such approval shall be "set forth in this article"); *cf. id.* § 95943 (specifying that compliance instruments from Quebec can be used). No such action has been proposed to date.

Even if investment in projects meeting the requirements of the Tropical Forest Standard were approved, however, California's actions still would not run afoul of U.S. policy. First, any investment into a tropical forest mitigation project would not involve any use of state funds and would be purely voluntary, and reflect the benefits to private entities described above. Second, the Standard does not permit developing countries to receive any benefits without considerable investment of their own: A jurisdiction cannot satisfy the Standard unless it has

shown it has already reduced deforestation levels more than 10 percent below its average rate over the past decade. *See* CARB, California Tropical Forest Standard: *Criteria for Assessing Jurisdiction-Scale Programs that Reduce Emissions from Tropical Deforestation*, Chapter 6: *Crediting Baseline* 15 (Sept. 19, 2019), https://ww3.arb.ca.gov/cc/ghgsectors/tropicalforests/ca_tropical_forest_standard_english.pdf ("Implementing jurisdictions must establish a crediting baseline that begins at least 10% below the reference level . . . ."). Third, notwithstanding the Administration's criticism of the Green Climate Fund in particular, the U.S. still supports foreign investment to promote forest health: In a 2019 statement to the UNFCCC Conference of the Parties, the United States noted its withdrawal from the Paris Agreement but highlighted that it remains a leader on climate issues because "[s]ince 2017, the U.S. Congress has appropriated $372 million [] in foreign assistance to preserve and restore forests and other lands that help many of the countries represented in this room build resilience and reduce carbon emissions." COP25 National Statement. And, in his 2020 State of the Union Address, the President declared that "[t]o protect the environment . . . the United States will join the One Trillion Trees Initiative, an ambitious effort to bring together government and the private sector to plant new trees in America and all around the world." 166 Cong. Rec. H758, at H761 (daily ed. Feb. 4, 2020).

II. There is no field preemption because California's efforts to regulate greenhouse gas emissions and air pollution are a legitimate exercise of its police power.

California's efforts to counter harm within the State from GHG emissions, including through the Linkage, are a legitimate exercise of its regulatory authority and do not impermissibly intrude on the federal government's foreign affairs power. Thus, there is no issue of field preemption.

Field preemption, most often associated with *Zschernig v. Miller*, 389 U.S. 429 (1968), has been "applied sparingly," and is "rarely invoked by the courts," a recognition of the fact that state action may have "some incidental or indirect effect in foreign countries." *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003) (quoting *Clark v. Allen*, 331 U.S. 503, 517

(1947)); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (observing Supreme Court's "increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption"). That reluctance to conclude that the federal government has forbidden state action—even in the absence of any such statement of intent—should be especially strong in the field of climate change. "Limiting global warming . . . require[s] rapid, far-reaching and unprecedented changes in all aspects of society," meaning the law and the federal government must make space for the complementary efforts of other actors. Intergovernmental Panel on Climate Change, *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments* (Oct. 8, 2018), https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/Approved by Governments (Oct. 8, 2018); UNFCCC Global Climate Action, About, https://climateaction.unfccc.int/views/about.html (last accessed May 19, 2020) ("[A]ddressing climate change will take ambitious, broad-based action from all segments of society, public and private."). Thus, the government should be held to a higher standard, and required to speak especially clearly, to "occupy" such a large field. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 69-70 (2002) (requiring "clear and manifest" intent to occupy a field).

Field preemption can only occur when "a state law (1) has *no serious claim* to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013) (emphasis added) (citation omitted). The Linkage satisfies neither.

First, as this Court concluded earlier this year, "[i]t is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." Mem. and Order Re: Cross-Mots. for Summ. J. 30, ECF No. 91 (citing *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). The Linkage is one element of the state's efforts to protect the health and welfare of its citizens, and is therefore addressing a fundamental area of traditional state responsibility and cannot be said to be intruding in federal foreign

affairs. *See Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 945-46 (9th Cir. 2019) ("[W]hatever else may be said of the revolutionary colonists who framed our Constitution, it cannot be doubted that they respected the rights of individual states to pass laws that protected human welfare . . . and recognized their broad police powers to accomplish this goal."). This clear holding of the Court should not be revisited. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("[A] court is generally precluded from reconsidering an issue that has already been decided . . . .'" (citations omitted)).

Analyzing the "real purpose" of the law, *see Movsesian v. Victoria Verischerung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012); U.S. Br. at 29-31, does not change the conclusion that addressing climate change falls squarely within California's traditional state powers. As previously discussed in detail, the Linkage exists to reduce costs for regulated California businesses subject to the cap-and-trade program and promote the success of the regulatory effort. *See* TNC Br. at 9-10; CARB, Scoping Plan at ES-9 (identifying costs that California businesses would bear if climate change continued). Importantly, California established the cap-and-trade program, and entered into the Linkage *before* the Paris Agreement was drafted and *before* President Trump was elected. The purpose of the Linkage is thus not to "send a political message," U.S. Br. at 30 (quoting *Movsesian*, 670 F.3d at 1076-77), but to address harm from greenhouse gases more cost effectively.

The United States' arguments to the contrary are fatally flawed. Despite the characterization of the U.S., state action "designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *cf.* U.S. Br. at 31. And the State of California has long led the fight against air pollution, a fact that is enshrined in the federal Clean Air Act. *See Oxygenated Fuels Ass'n, Inc. v. Davis*, 163 F. Supp. 2d 1182, 1184 (E.D. Cal. 2001) (noting the Clean Air Act "permits California, as a state that regulated automotive emissions *before Congress entered the field*" to regulate fuel used in motor vehicles (emphasis added)); 42 U.S.C. § 7543(b) (permitting California, as the only state

to have "adopted standards . . . for the control of emissions . . . prior to March 30, 1966" to set emissions standards for new motor vehicles and engines). At the time California adopted AB 32, the official position of the federal EPA was that it should decline to regulate greenhouse gases on the ground that they were outside the scope of the authority vested to it by Congress, *see generally Massachusetts*, 549 U.S. at 511-512, hardly the type of "active[] regulat[ion]" in this space that the United States claims displaces any role for state efforts. U.S. Br. at 31.

Nor is it true that, because GHGs disperse throughout the atmosphere, or that actions besides those of California are required to fully mitigate the associated harms, climate change is an exclusively federal issue. *Cf.* U.S. Br. at 31-32. As the Supreme Court has held, the fact that "climate-change risks are 'widely shared' does not minimize [a particular state's] interest" in addressing them. 549 U.S. at 522. And the efforts of California are meaningfully contributing to climate progress. *Cf. id.* at 523-24 (rejecting the argument that a "small incremental step" would not have a "causal connection" with state specific consequences of climate change including loss of coastal property). California is the world's fifth largest economy, and has committed to reducing its emissions to 40 percent below 1990 levels by 2030. *See* Cal. Health & Safety Code § 38566. Because of the State's stature, "action taken by California to reduce emissions of greenhouse gases will have far-reaching effects," including by "encouraging other states, the federal government, and other countries to act." *Id.* § 38501(d).

Second, the Linkage does not have "more than [an] incidental effect on foreign affairs." *Garamendi*, 539 U.S. at 418. Indeed, it has no effect on U.S. foreign affairs. As discussed in greater detail *supra*, the Linkage is auxiliary to an already functioning domestic cap-and-trade program. It does not impose new obligations on California, Quebec, or any private party. *See Deutsch*, 324 F.3d at 708 (noting a state is "generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations"). It is an economic tool that promotes exchange of commerce, and addresses an issue, climate change, that is not limited to any one nation or group. *See Huron Portland Cement*, 362 U.S. at 442 (noting "in the exercise of [the police] power, states . . . may act, in many areas of interstate commerce and

maritime activities, concurrently with the federal government").[11] The Linkage thus does not intrude on the field of federal foreign relations. *See Crombie*, 508 F. Supp. 2d at 395 (rejecting the argument that "because international cooperation and coordination are necessary to combat global warming, and because plans for limiting GHG emissions are the subject of international dialogue" there is *Zschernig* preemption).

The cases the United States relies on are readily distinguishable because they concerned issues inseparable from international diplomacy—namely, effectuating compensation to war victims or announcing express disapproval of the actions of another state. In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009), *as amended by* 592 F.3d 954 (9th Cir. 2010), the court struck down a "statute for Holocaust-era artwork, [which] explicitly created a 'special rule that applied only to a newly defined class' of plaintiffs who had suffered wartime injuries," *Cassirer*, 737 F.3d at 618 (quoting *Von Saher*, 592 F.3d at 966) (alterations omitted). *Garamendi* also involved a statute which transparently existed on its face for the benefit of Holocaust victims: The challenged law, passed five decades after the end of the Second World War, required any insurer doing business in the state to "disclose information about all policies sold in Europe between 1920 and 1945." 539 U.S. at 401. In *Movsesian*, the statute at issue "'expressed a distinct political point of view on a specific matter of foreign policy' by labeling the actions of the Ottoman Empire 'genocide' and providing relief only for 'Armenian Genocide victims.'" *Cassirer*, 737 F.3d at 618 (quoting *Movsesian*, 670 F.3d at 1076) (alterations omitted). Likewise, *Zschernig* involved a statute that required Oregon probate courts to "make . . . judicial criticism" of "authoritarian" states, literally sitting in judgment and attaching consequences to the rights they provided or denied their citizens. 389 U.S. at 440; *see also Cruz v. United States*, 387 F. Supp. 2d 1057, 1076 (N.D. Cal. 2005)

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[11] These facts are also true of the Tropical Forest Standard, which does not amend the cap-and-trade program or create offset credits. It is a technical document reflecting the wisdom of many stakeholders on GHG accounting issues and matters of forest management policy.

(collecting cases and concluding "[m]ost of the cases . . . applying *Zschernig* involved state 'regulations which amount to embargoes or boycotts'" whose "mere existence articulated state condemnation of a foreign nation's conduct" (citations omitted)). In such areas, the need for a single, overarching approach is especially acute, and serious risk exists of creating diplomatic tension that the federal government would have to defuse. In contrast, the Linkage lends a cooperative approach to an environmental issue, where these same concerns are not in play.

CONCLUSION

To impugn the Linkage as unconstitutional, the United States mischaracterizes the international dynamics of California's efforts to reduce its harm from climate change. The United States fails to show how the Linkage itself conflicts with or obstructs the United States' foreign policy, and instead cites initiatives that bear no relationship to the Linkage, such as the Tropical Forest Standard. Neither the Standard, nor any other initiatives that the United States cites to distract from the narrow nature of the Linkage, undermine the policy of the United States. Thus, the United States' motion for summary judgment should be denied, and the State of California's motion should be granted.

Respectfully submitted,

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Dated: May 26, 2020

ATTORNEYS FOR *Amicus Curiae* The Nature Conservancy

CERTIFICATE OF SERVICE

I, Kevin Poloncarz, certify that, on May 26, 2020, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: May 26, 2020

/s/ Kevin Poloncarz

Kevin Poloncarz