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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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 capacities 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 capacities as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc., Defendants.	No. 2:19-cv-02142-WBS-EFB **PLAINTIFF UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF ITS SECOND MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' SECOND CROSS-MOTION FOR SUMMARY JUDGMENT** Judge: Hon. William B. Shubb

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INTRODUCTION

Throughout California's dozens of pages of briefing in opposition to the United States' Motion for Summary Judgment pursuant to the Foreign Affair Doctrine, it protests time and again that its Agreement and Arrangements with the Canadian Province of Quebec bear no relevance to U.S. foreign relations. But California makes a glaring omission. The Supreme Court has declared in bell-clear terms that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left ***entirely free from local interference***." *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (emphasis added). This is because "foreign affairs and international relations" are "matters which the Constitution entrusts ***solely*** to the Federal Government." *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (emphasis added). What cannot be compromised is "the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000). Yet California's brief does not cite a single case, nor could it, finding that a lone state may boldly strut onto the stage of foreign relations as if it were the equal of the federal sovereign and engage with other foreign nations or their subdivisions as California has done here.

For California did not merely pass an internal statute or regulation. It is not just regulating people and companies within its borders. Here, it directly engaged in foreign relations. It has formulated and negotiated its own agreement with a foreign power; and it aimed to and did, in fact, induce billions of dollars in trade flows across an international border. Hence, California cannot claim with any semblance of a straight face that its actions have only an "incidental, indirect effect" on U.S. foreign policy. This case is no small beer.

In other words, unlike every case the United States cites in the service of seeing California's activities held to be preempted under the Foreign Affairs Doctrine (with California countering at every turn that California and its actions are "different," California Memorandum at 13-16 (ECF No. 110)), California's conduct does not compare favorably

to situations where states or localities dipped their toe in international waters or impacted the conduct of federal foreign affairs in an ancillary way. No, California's conduct is far worse. Here, California made a beeline toward negotiating an agreement with several foreign powers. Indeed, in direct contravention of the Paris Agreement that the President has decided the United States must exit from and attempt to renegotiate, California's Agreement with Quebec (and previously including Ontario) has been specifically identified by Canada as a likely mechanism by which that foreign country will continue to participate in Paris and its implementation. In this way and in derogation of federal exclusivity, California has propelled itself forcefully into a field where the federal government is already fully engaged. California's actions with Quebec are not just a wolf in sheep's clothing. They are a wolf that comes as a wolf.

Moreover, California has not merely entered wrongfully into a field of foreign relations reserved to the President. California is also acting in a selfish fashion to benefit itself and its own view of proper climate policy at the expense of the citizens of other states and the nation as a whole. For, after a review of the various international climate agreements, including the Paris Agreement, the President clearly circumscribed the parameters of United States policy. The United States will ***not*** be a party to Paris. Doing so would sacrifice the nation's economic vitality and impose disproportionate burdens on the American people. As the President explained, "[n]ot only does this deal subject our citizens to harsh economic restrictions, ***it fails to live up to our environmental ideals*** … ***imposing no meaningful obligations on the world's leading polluters***. For example, under the agreement, China will be able to increase these emissions by a staggering number of years — 13. They can do whatever they want for 13 years." Statement by President Trump on the Paris Climate Accord, Jun. 1, 2017, ("Statement on Paris Accord") https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ (1st Iacangelo Decl., Exh. 5).

In addition to withdrawing the United States from Paris, the President further declared his policy—that is the United States' foreign policy. Under it, the country is to "begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers." *Id.* (SUF ¶ 10). The United States will pursue "a framework that is fair and where the burdens and responsibilities are equally shared among the many nations all around the world." *Id.*; *see also Nomination of Hon. Mike Pompeo to be Secretary of State Before the S. Comm. On Foreign Relations*, 115th Cong., S. Hrng. 115-339 at 216 (2018) (3d. Iacangelo Decl., Exh. 4) (*See* SUF ¶¶ 9-10, 12-13, 93-101).

So California's protestations that its action "advances the core purpose and principles of the [United Nations Framework Convention on Climate Change ("UNFCCC")]" do not hold up. ECF No. 110 at 1. California does not get to judge for itself such matters of treaty implementation under the UNFCCC. It is a sub-unit of the United States, subordinate to the central government. Through both statute and treaty, the President is delegated authority to determine and negotiate those international greenhouse gas ("GHG") arrangements in the economic and environmental interests of the United States. *See* UNFCCC, Mar. 21, 1994, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107; Global Climate Protection Act of 1987 ("GCPA"), Pub. L. No. 100–204, Title XI, §§ 1101–1106, 101 Stat. 1331, 1407, *as amended by* Pub. L. No. 103–199, Title VI, § 603, 107 Stat. 2317, 2327, *reprinted as note to* 15 U.S.C. § 2901 (SUF ¶¶ 72-78).[1] In this light, California's Agreement and Arrangements conflict with the President's clearly declared foreign policy. They stand as an obstacle to the Executive's execution of its delegated statutory and treaty powers. *Id.*

[1] In *Massachusetts v. E.P.A.*, the Supreme Court explained that, in the GCPA, "Congress … ordered the Secretary of State to work 'through the channels of multilateral diplomacy' and coordinate diplomatic efforts to combat global warming.'" 549 U.S. 497, 508 (2007) (quoting GCPA, Pub. L. No. 100-124, Title XI, §§ 1103(b), (c), 15 U.S.C. § 2901 note)).

The relevance of California's activities to the Paris Agreement is not speculation. ***Canada itself*** cited the Agreement between California and Quebec as an expected mechanism for its compliance with the Paris Agreement. *See Canada's Mid-Century, Long-Term, Low-Greenhouse Gas Development Strategy*, GOVERNMENT OF CANADA 11 (2016), https://unfccc.int/files/focus/long-term_strategies/application/pdf/canadas_mid-century_long-term_strategy.pdf ("For example, the province of Quebec has linked its emission trading system to California's through the Western Climate Initiative, ***with other subnational regions planning or considering doing the same***.") (3d. Iacangelo Decl., Exh. 6) (SUF ¶¶ 107-08) (emphasis added). So there is no genuine issue of material fact regarding the Agreement's "likelihood … [of causing] something more than incidental effect in conflict with express foreign policy.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 720 (9th Cir. 2014) (*Von Saher II*) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 42 (2003))

California's brief also now admits—which it had not before—that, long before California entered the field of GHG regulation, Congress delegated to the President and his Secretary of State the authority to "work toward multilateral agreements" to address such emissions. *See* ECF No. 110 at 3 (citing GCPA, Pub. L. No. 100-124, Title XI, §§ 1103(b), (c), 15 U.S.C. § 2901 note). In 1992, the Senate advised and consented to the United Nations Framework Convention on Climate Change. (1st Iacangelo Decl., Exh. 2) (SUF ¶ 2) (Senate Ratification). This made it the policy of the United States that its federal Executive would conduct such negotiations. U.S. CONST., art. II, § 2, cl. [2]; *id.* art. VI, § 2, cl [2]. These laws ***reinforce*** the constitutional baseline that the President sits as the fountainhead of the nation's policy on whether and what international agreements this country should pursue and accept or reject in the field of GHG emissions. *See, e.g., Palestine Info. Office v. Shultz*, 853 F.2d 932, 934 (D.C. Cir. 1988) ("The executive branch acted in this case in the precise realm in which the Constitution accords it greatest power. The authority of the executive branch, always great in the foreign policy field, ***is at its apex when it acts, as here, pursuant***

to an express congressional authorization.") (emphasis added) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring)). California does not and cannot present evidence to the contrary. It has conceded that it did not embark on international relations and regulation in this field until well ***after*** the UNFCCC.

So the dispute at the heart of this case does not involve a traditional area of state regulation. And California's new concessions plainly permit this Court to reconsider any contrary finding made earlier on an interlocutory basis (if, indeed, this Court intended to make one). For it cannot be ignored that California admits that "[c]limate change is a global problem. ***GHGs are global pollutants, unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.***" CALIFORNIA AIR RESOURCES BOARD ("CARB"), *Final Environmental Analysis for the Strategy for Achieving California's 2030 Greenhouse Gas Target*, Attach. A at 24–25 (Nov. 30, 2017), https://www3.arb.ca.gov/cc/scopingplan/2030sp_appf_finalea.pdf (emphasis added) (SUF ¶¶ 25-27).

Finally, Defendants cannot establish that the Agreement and Arrangements are solely cost-reduction measures. This and other stabs at selective reframing of the Agreement and Arrangements by California's counsel are not supported by the record. California's reasons for acting unambiguously included the reduction of ***global*** GHG emissions and its proud offer to other nations to engage in "global leadership." *Id.* So the evidence, admissions, and undisputed facts all entitle the United States to obtain summary judgment as a matter of law.

Indeed, this is a simple case to dispose of under foreign policy preemption. California is directly engaged in the exclusively federal field of international relations. It waded neck deep into the waters of multilateral agreements with foreign governments on a subject matter where Congress and a treaty delegate authority to the President, who already holds important powers in the area of foreign relations by constitutional assignment. And California is—worse yet—pursuing arrangements that lend support to an international agreement that the President specifically determined is contrary to United States interest and

policy. The implications of this for international relations are no more attenuated than the probate law in *Zschernig*. Its effects are no more incidental or speculative than the insurance policies in *Movsesian III*. And it is, in fact, far more direct than the conflict generated in either of those cases or in *Garamendi*. On every issue, California asks this Court to ignore the forest and focus on individual trees—or even to look myopically at the doctrinal leaves that have fallen from those trees. But the big picture here is obvious. California has plunged into the exclusive field of the federal government to conduct foreign relations on climate policies and programs, especially as to Paris, insisting that its own, contrary policy is better. That affront to the constitutional design for foreign affairs should meet with judicial rejection.

The United States respectfully requests that the Court grant its motion for summary judgment and so enter final judgment on its foreign affairs claim against Defendants.

ARGUMENT

I. California's Agreement and Arrangements with Quebec are in clear conflict with the express foreign policy of the United States and are therefore preempted.

The Foreign Affairs Doctrine is well known to this Court. "Under conflict preemption," the Ninth Circuit has held, "a state law must yield when it conflicts with an express federal foreign policy." *Movsesian v. Victoria Versicherung AG ("Movsesian III")*, 670 F.3d 1067, 1071 (9th Cir. 2012) (citing *Garamendi*, 539 U.S. at 421). Contrary to Defendants' protestations, the standard for establishing conflict in ***this*** context is low. For the review here is of California's unprecedented act of ***directly engaging in foreign relations*** in a field where the federal government is already engaged. "[F]oreign affairs and international relations" are "matters which the Constitution entrusts ***solely*** to the Federal Government." *Zschernig*, 389 U.S. at 436 (emphasis added). So logically, any articulable conflict between California's international Agreement and Arrangements as against the foreign policy of the United States is *ipso facto* sufficient to bar California's actions. Regardless, the conflict here is direct and clear.

A. Defendants' argument for a lesser standard of conflict preemption fails to account for its unprecedented engagement in international relations.

As the Ninth Circuit has emphasized, the mere "'likelihood ***that state legislation*** will produce something more than incidental effect in conflict with express foreign policy'" demands preemption. *Von Saher II*, 754 F.3d at 720 (quoting *Garamendi*, 539 U.S at 420) (emphasis added). So even when a state is acting only using purely inward-looking internal legislation or regulation, if the United States can establish an "express federal foreign policy" and a "likelihood" that California's Agreement and Arrangements with Quebec will cause "something more than incidental" interference with that policy, then that state law is preempted. Here, however, California is directly engaged in foreign relations. It is not even trying to color within the lines of its own state borders. California admits that it has entered into an international agreement to "coordinate" and consult whenever "program changes are being considered by the other and whether those changes might have indirect effects on one or both programs." ECF No. 110 at 8 (citing ECF No. 50-1 at 11 (Sahota Decl. ¶ 49)). So it cannot establish that the ensuing effects are merely incidental or indirect.

Recognizing that a mere "likelihood" of "something more than incidental" actually reflects a ***low*** tolerance for interference with the foreign policy of the United States, Defendants try to move the legal goal posts in their favor. California argues that it has a strong, internal interest in the international functions of its linkage with Quebec, and that its internal interest must be balanced against the United States' purportedly lacking interest in global climate policy. *See* ECF No. 110 at 13-16; IETA Opposition at 11 (ECF No. 105); EDF & NRDC Opposition at 28-31 (ECF No. 106). But Defendants misapprehend the standard. Under our Constitution, the strength of the states' interest is simply irrelevant to the question of whether a conflict exists in the field of foreign relations. What the several states really, fervently want is no part of the analysis in assessing preemptive conflict.

Even where the state action at issue is merely inward-focused domestic legislation, federal foreign policy preempts such state laws "where … there is evidence of clear conflict

between the policies adopted by the two." *Garamendi*, 539 U.S. at 421. Thus, the United States only needs to meet a minimal burden of establishing a "clear conflict" with an "express foreign policy." *Id.* The Ninth Circuit has not deviated from this light-touch standard. And it has never endorsed the newfangled balancing test that Defendants advocate. So even if this were merely a case of internal legislation by California—and it isn't—Defendants effort to turn this standard on its head must be rejected.

California cites dicta in *Garamendi* for the proposition that the "strength and clarity of the conflict required to establish preemption increases where a state law deals with an area of traditional state competence." ECF No. 110 at 14 (citing *Garamendi*, 539 U.S at 420). But California neglects to explain that this language explains, in effect, what is ***not*** the law. It comes from the Court's discussion of Justice Harlan's ***dissent*** in *Zschernig*, 389 U.S. at 429. In considering the contrasting views in *Zschernig*, the *Garamendi* Court noted that "it would be reasonable," were the Court to adopt Justice Harlan's view, "to consider the strength of the state interest." *Garamendi*, 539 U.S. at 420. Critically, though, the *Garamendi* Court did not apply this rule. Instead, as Judge Ishii subsequently noted in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, "[t]he *Garamendi* Court ***declined to directly decide*** whether Justice Harlan's view represents a competing theory of the extent of Executive Branch preemption in the area of foreign policy." 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007), as corrected (Mar. 26, 2008) (emphasis added). Instead, "[t]he ***express federal policy*** and the ***clear conflict*** raised by the state statute are ***alone*** enough to require state law to yield." *Garamendi*, 539 U.S. at 425 (emphasis added). And, where "any doubt about the clarity of the conflict remained, however, ***it would have to be resolved in the National Government's favor***, given the weakness of the State's interest, [set] against the backdrop of traditional state legislative subject matter." *Id.*

The *Garamendi* Court did not, as Defendants suggest, balance state and federal interests to determine whether the conflict was sufficiently "clear" and "substantial." At most, it expressed willingness to take the weight of the state's interest into account if the

conflict was unclear—which was not the case there and which is not the case here. *See also Movsesian III*, 670 F.3d at 1073 (explaining that Justice Harlan's views are relevant to ***field preemption*** analysis under the Foreign Affairs Doctrine). Whether a state law conflicts with an express federal policy in nowise depends on the strength of the state's interest. That is especially so here. California's act is direct engagement in international relations, rather than plain-and-simple internal legislation that happens to have effects that "leak" out of California.

In *Garamendi*, the Supreme Court found a "clear conflict" where California's statute "frustrate[d] the operation of the particular mechanism the President ha[d] chosen . . . ." 539 U.S. at 424. This minimal burden—a showing of ***some frustration***, even to the limited extent that a piece of internal state legislation affecting a small number of its citizens could qualify—was all that is required. But where California rushes headlong into the field of international relations so directly, the showing must be even less demanding. Even in analogous statutory conflict preemption cases, the burdens of the Supremacy Clause are not displaced because of a state's "historic police powers."

Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010) (per curiam), a case on which Defendants rely, is not to the contrary. Preliminarily, *Winn* involved a Florida statute, not a state agreement with a foreign power. That legislation restricted the use of state money for travel to countries that the federal government had listed as sponsors of terrorism. Upholding the statute against attack, the Eleventh Circuit noted an absence of the "kind of powerful evidence of a clear and express foreign policy" that was present in *Garamendi*. *Id.* at 1211.[2] Here, by contrast, the United States has provided clear evidence of conflict with express federal policy. That includes the Agreement itself, which

[2] *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 13-14 (1st Cir. 2010) is similarly inapposite. In *Seger-Thomschitz*, the First Circuit examined a Massachusetts statute of limitations, not a state agreement with a foreign power. Having already determined that there was no express federal policy, the First Circuit in dicta noted that *Garamendi* "indicated" that it would be appropriate to balance state and federal interests. This is a clear misreading of *Garamendi* and did not inform the First Circuit's holding.

is the *res ipsa loquitur* of an actual, express agreement with a foreign government, as well as the fact that the foreign country (Canada) cites the Agreement as a likely basis for its participation in international agreement contrary to U.S. interests and its policy.

In service of its novel burden-inflating exercise, California also selectively quotes *Medellin v. Texas*, 552 U.S. 491 (2008). It argues that "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.'" ECF No. 110 at 14 (citing *Medellin*, 552 U.S. at 532). Again, *Medellin* concerned a matter of Texas's domestic supervision of its citizens. It does not signal any approval of a state brazenly entering into cross-international-border relations and agreements with a foreign power. But, regardless, the Supreme Court never made such a sweeping declaration. *Medellin* involved the President's attempt to countermand state criminal proceedings in service of federal obligations under international law. The *Medellin* Court explained that one fault in the government's position in that case was that it could not identify a previous similar Presidential directive to state courts, "much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws." *Medellin*, 552 U.S. at 532. This case is about California's international relations. It does not involve Presidential directives to state courts or the reopening of final state-court criminal judgments. Nor does it, as explained below, involve a state legislating in an area of traditional state competence.

Adopting Defendants' error would do great damage to the Foreign Affairs Doctrine generally. In addition to subverting *Garamendi*, importing an analysis of the strength of the state's interest here would confuse "conflict" and "field" preemption. It would move them closer to a single standard where the state's interest and federal authority compete for superiority. To be sure, that is what California wants—to justify its foreign policy on the basis of a supposed local interest. But this is not what *Garamendi* intended or what the Constitution permits. *See Movsesian III*, 670 F.3d at 1071 ("The Constitution gives the

federal government ***the exclusive authority*** to administer foreign affairs."). Indeed, in this unprecedented context, any articulable conflict between state engagement or agreements in foreign relations and the "exclusive" federal field of foreign affairs should be held unlawful. Any other standard would mean that foreign affairs are not—as they have been for nearly 250 years—the "exclusive" constitutional domain of the federal government. *Id.* But the Court need not go that far. There is no genuine issue of material fact barring a holding that California's Agreement and Arrangements are in clear conflict with the express foreign policy of the United States.

B. The President's decision to withdraw from the Paris Agreement is the express foreign policy of the United States.

California's agreement with Quebec is specifically cited by Canada as an odds-on means of that country's participation in the Paris Agreement. *See Canada's Mid-Century, Long-Term, Low-Greenhouse Gas Development Strategy*, ("For example, the province of Quebec has linked its emission trading system to California's through the Western Climate Initiative, ***with other subnational regions planning or considering doing the same***.") (3d. Iacangelo Decl., Exh. 6) (SUF ¶¶ 107-08). But on June 1, 2017, the President of the United States clearly announced one core plank of his foreign policy in the area of international climate regulation. This is that the United States would withdraw from the Paris Agreement. The United States would then "begin negotiations to reenter either the Paris Accord or a really entirely new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers." Statement on Paris Accord.

The President explained why in detail. The Paris Agreement "punishes the United States … while imposing no meaningful obligations on the world's leading polluters." It "[allows] China … to increase these emissions [for] a staggering number of years—13," and "makes [India's] participation contingent on receiving billions and billions and billions of dollars in foreign aid from developed countries." *Id.* For although the United States had undertaken in its then-"nationally determined contribution" ("NDC") to reduce GHG

emissions "economy-wide" to 26% to 28% below its 2005 level by 2025,[3] other countries did not. China instead only undertook to "achieve the peaking of carbon dioxide emissions around 2030," making its "best efforts to peak early,"[4] and India had undertaken to reduce the amount of carbon emitted per unit of energy produced, a metric that does not require an absolute reduction.[5] India had also set forth "international climate finance needs" of "at least USD 2.5 trillion (at 2014-15 prices)" to meet its "climate change actions between now and 2030," meaning that it did not see itself as able to achieve its NDC without substantial financial assistance from other nations.

On November 4, 2019, shortly after this action was brought, the United States formally submitted its notification of withdrawal from the Paris Agreement. On that date, Secretary of State Pompeo continued to express the United States' international climate policy. Under this policy, he stated, the United States would engage foreign countries in international climate discussions with an eye toward making a deal that best reconciles environmental and economic concerns:

> As noted in his June 1, 2017 remarks, President Trump made the decision to withdraw from the Paris Agreement because of the unfair economic burden imposed on American workers, businesses, and taxpayers by U.S. pledges made under the Agreement . . . .
>
> ***In international climate discussions, we will continue to offer a realistic and pragmatic model—backed by a record of real world results—showing innovation and open markets lead to greater prosperity, fewer emissions, and more secure sources of energy.*** We will continue to work with our global partners to enhance resilience to the impacts of climate change and prepare for and respond to natural disasters. Just as we have in the past, the

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[3] *United States of America's First Nationally Determined Contribution*, UNFCCC 2 (2016), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf. (4th Iacangelo Decl., Exh. 1) (SUF ¶ 144)

[4] *China's First Nationally Determined Contribution*, UNFCCC 5 (2015) (unofficial translation), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/China%20First/China's%20First%20NDC%20Submission.pdf. (4th Iacangelo Decl., Exh. 2) (SUF ¶ 145)

[5] *India's First Nationally Determined Contribution*, UNFCCC 29 (2016), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf ("To reduce the emissions intensity of its GDP by 33 to 35 percent by 2030 from 2005 level.") (4th Iacangelo Decl., Exh. 3) (SUF ¶ 146).

> United States will continue to research, innovate, and grow our economy while reducing emissions and extending a helping hand to our friends and partners around the globe.

Press Statement from Secretary of State Michael R. Pompeo on the U.S. Withdrawal from the Paris Agreement, U.S. DEP'T OF STATE (Nov. 4, 2019), https://www.state.gov/on-the-u-s-withdrawal-fromthe-paris-agreement/ ("Secretary's Press Statement") (emphasis added). Under the Paris Agreement, the United States' withdrawal will become effective on November 4, 2020.

The United States' foreign policy could not, for this case, be expressed by more authoritative sources—the President of the United States and his Secretary of State. These statements of policy—now being enacted through the United States' Notification of Withdrawal from the Paris Agreement (1st Iacangelo Decl., Exh. 6) ("Notification of Withdrawal") (SUF ¶ 11)—are express, elaborate, and fully competent to define the foreign policy of the United States. As the Ninth Circuit has noted, "state laws [are] unconstitutional under the foreign affairs doctrine when the state law conflicts with a federal action such as a treaty, federal statute, or ***express executive branch policy***." *Von Saher v. Norton Simon Museum of Art at Pasadena ("Von Saher I")*, 592 F.3d 954, 960 (9th Cir. 2010), *as amended* (Jan. 14, 2010) (citing *Garamendi*, 539 U.S. at 421–22) (emphasis added).

California vaguely implies that only a federal policy specifically stated in a congressional statute can preempt state action. *See* ECF No. 110 at 1, 13 (ECF No. 110). They claim that "any executive action on which Plaintiff relies here must be compatible with the express will of Congress." ECF No. 110 at 18 (quotation omitted). No authority supports that proposition. Regardless, here it would be met.

Congress has repeatedly expressed its will to delegate international relations on climate to the President. *See* UNFCCC, Mar. 21, 1994, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107; GCPA, Pub. L. No. 100-124, Title XI, §§ 1103(b), (c), 15 U.S.C. § 2901 note; *see also Massachusetts v. EPA*, 549 U.S. 497, 507-10 (2007) (examining the long history of Acts of Congress directing the Executive Branch to study, address, and develop policy on

climate change). For instance, it enacted the Global Climate Protection Act of 1987 ("GCPA"). Pub. L. No. 100-124, Title XI, §§ 1103(b), (c), 15 U.S.C. § 2901 note.[6] This charged the President and the Environmental Protection Agency to devise a "coordinated national policy on global climate change." *Id.* In this same act, Congress directed the President and the Secretary of State to coordinate climate change policy "in the international arena" when that policy requires "action through the channels of multilateral diplomacy." *Id.* And the Senate provided advice and consent for the ratification of the UNFCCC, which establishes a Conference of the Parties and other bodies to facilitate communications in this area of foreign policy. Under the UNFCCC, "[e]ach of the Parties [*e.g.*, the government of the United States] shall … coordinate as appropriate with other such Parties, relevant economic and administrative instruments developed to achieve the objective of the Convention." *Id.*, art. 2(e).

And Congress has done more. It has made clear what it does ***not*** want in the area of climate policy. In its resolutions opposing the Kyoto Protocol, Congress has repeatedly expressed that the United States should ***not*** be a party to job-killing accords on climate. *See* S. Res. 98, 105th Cong. (1997) ("Byrd-Hagel Resolution of 1997") (SUF ¶ 81). By a resounding 95-0 vote, Congress made clear that the United States should not be a signatory to any international climate agreement that would harm the United States' economy and require the United States to limit its GHG emissions without also requiring similar restrictions of developing nations over the same compliance period. Congress also used

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[6] *See also* National Climate Program Act of 1978,15 U.S.C. §§ 2901, *et seq*; the Energy Security Act, Pub. L. No. 96–294, tit. VII, § 711, 94 Stat. 611, 774–75 (1980) (directing the study of the "projected impact, on the level of carbon dioxide in the atmosphere, of fossil fuel combustion, coal-conversion and related synthetic fuels activities"); Global Change Research Act of 1990,15 U.S.C. §§ 2931 *et seq* (directing the President to, among other things, establish a research program to "improve understanding of global change," and provide for scientific assessments every four years that "analyze[] current trends in global change"); Clean Air Act of 1963, 42 U.S.C. §§ 7403 *et seq* (directing EPA to conduct research on global climate change issues); Energy Policy Act, 42 U.S.C. §§ 13385 *et seq* (directing the Secretary of Energy to develop an inventory on the national aggregate emissions of GHGs).

subsequent appropriations bills to bar the use of any funds to implement Kyoto. *See* Pub. L. No. 105–276, 112 Stat. 2461, 2496 (1998) ("[N]one of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol"); Pub. L. No. 106–74, 113 Stat. 1047, 1080 (1999) (similar); Pub. L. No. 106–377, 114 Stat. 1441, 1441A–41 (2000) (similar) (SUF ¶ 82). In the aftermath of the Byrd-Hagel Resolution of 1997, President Clinton chose not to submit the Kyoto Protocol to the Senate for congressional approval, and the second President Bush ultimately abandoned it entirely.

Moreover—emphatic in its silence—no legislation requires the United States to remain a signatory to the Paris Agreement. The decision whether to remain thus rests entirely in the current President's hands—just as the decision to become a party in the first place was yielded to President Obama by inaction.[7]

Defendants try to claim that the President's announced policy to withdraw from the Paris Agreement to seek a better deal for the American people is too indefinite to support preemption. Citing *Goldstene*, Defendants strain to characterize the President's withdrawal from the Paris Agreement as mere "strategy." ECF No. 110 at 25; ECF No. 106 at 19. Defendants are dealing in mere buzzwords, not a legal or factual distinction with merit. This case is not even close to *Goldstene*, from which Defendants have pulled their buzzwords out of context. 529 F. Supp. 2d at 1186.

First and foremost, *Goldstene* concerned an internal state regulation argued to have international implications—not, as here, California's participation in actual foreign relations. On this basis alone, *Goldstene* has minimal relevance here. Here, California is directly engaged in the "exclusive" federal domain of foreign affairs and international

[7] In its opposition, California appears to suggest that its foreign policy is aligned with the UNFCCC, whereas this President's foreign policy is not. *See* ECF No. 110 at 17-18. By this impossible logic, not only ***could*** President Obama have made the United States a signatory to the Paris Agreement, but he ***had to***.

agreements. So any degree of articulable conflict with the foreign policy of the United States is sufficient to establish preemption here.

Second, in *Goldstene*, only a plaintiff company subject to California's regulations and purporting to channel the interests of the United States claimed that "the President's avowed intent to seek voluntary bilateral or multilateral agreements with foreign countries, including developing countries," operated as the "policy" that preempted California's regulations. *Id.* Here, by contrast, the Department of Justice ***directly represents*** the Executive Branch and the President's policy.

Third, the situation presented here is radically unlike the situation presented in *Goldstene*. Here, the President did not just make an expression of future intent. The Secretary of State ***is actually implementing the President's policy***, which the President is empowered to formulate under the UNFCCC and GCPA. On November 4, 2019, just after the United States filed this suit, the Secretary of State provided formal notice of withdrawal from the Paris Agreement. Notification of Withdrawal (1st Iacangelo Decl., Exh. 6) (SUF ¶ 11). The United States has thus taken specific, official action of legal significance under international law to implement a new "policy." So there are no genuine issues of material fact here that the United States has moved well beyond simply announcing a "strategy." Instead, the Executive Branch is actually implementing the President's unmistakably declared "policy." In addition, the reason Judge Ishii gave for not heeding the policies announced in the speech of the first President Bush (on which the plaintiffs in *Goldstene* relied) is inconsistent with the President's role as head of foreign policy. Judge Ishii reasoned that "the President's commitment to engage in negotiations that include developing nations does not set any particular goals or means." *Id.* This departs from well-settled principles of constitutional law. *See Palestine Info. Office*, 853 F.2d at 934 ("The executive branch acted in this case in the precise realm in which the Constitution accords it greatest power. The authority of the executive branch, always great in the foreign policy field, ***is at its apex when it acts, as here, pursuant to an express congressional***

authorization.") (emphasis added) (citing *Youngstown Sheet & Tube*, 343 U.S. at 635-36 (Jackson, J., concurring)).

C. The Agreement and Arrangements are in clear conflict with the President's policy to withdraw from the Paris Agreement.

The United States has engaged in foreign relations on climate change for over 30 years. California set the stage to enter this field only many years later, in the Global Warming Solutions Act of 2006. California's foreign relations with Quebec came even later. Yet California now claims the right to enter into its own international agreements advancing its own cap-and-trade system, purportedly in coexistence with the United States. Those efforts are preempted. California's Agreement and Arrangements with Quebec unmistakably conflict with the United States' decision to withdraw from the Paris Agreement and to seek to renegotiate a new international agreement requiring real concessions from the world's polluters.

First, Canada's declared desire to use compliance instruments bought from California to satisfy its obligations under the Paris Agreement would literally put the United States in the conflicting position of involuntarily maintaining and advancing that same agreement. ***Second***, the Agreement and Arrangements, if expanded as California clearly has in mind, would functionally continue the United States' support for the very agreement that the President has exited pending possible renegotiation or replacement.

1. Through the mechanism of "ITMO's," the Agreement and Arrangements undercut United States policy to pursue an effective international agreement.

The Agreement and Arrangements conflict with United States foreign policy by undercutting the leverage the United States wields to negotiate a superior international agreement for both the United States and the world's environment. This is because Canada has expressed it is intending to satisfy part of its NDC with compliance instruments

generated by California. This would put one state of the United States in the service of continuing the very agreement from which the nation as a whole is withdrawing.

As the United States has explained, Parties to the Paris Agreement can satisfy their NDCs with so-called "international transferred mitigation outcomes" or "ITMOs." *See* Paris Agreement, art. 6(2). A compliance instrument in the common market that California and Quebec have established—and that WCI stands ready to expand to other jurisdictions—is functionally identical to an ITMO. California concedes that its agreement can "facilitate Canada's continued participation in the Paris Agreement," but says this only occurs "through a convoluted chain of speculation." ECF No. 110 at 1. But Canada's own international statements are proof, not speculation. Again, the United States does not need to prove a direct, existing conflict—though it can and has.

Evidence raising a mere "'likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy'" requires preemption. *Von Saher II*, 754 F.3d at 720 (quoting *Garamendi*, 539 U.S at 420). Canada's statements are more than sufficient proof beyond mere speculation as to that "likelihood." Canada has specifically expressed the likelihood that it can use compliance instruments generated by California and its international relationship with Quebec to satisfy its obligations under the Paris Agreement. In its 2016 report to the UNFCCC, Canada noted that "the province of Quebec has linked its emission trading system to California's through the Western Climate Initiative, ***with other subnational regions planning or considering doing the same***."). *Canada's Mid-Century, Long-Term, Low-Greenhouse Gas Development Strategy* at 11. Canada has also explained that it would "consider internationally transferred mitigation outcomes as a short-to-medium term complement to reducing emissions at home." *Id.* The effect of this is unmistakable. If Canada can satisfy part of its NDC with ITMOs from California, then California is functionally involved in the implementation of the Paris Agreement—in conflict with United States foreign policy. California is, after all, selling

GHG emission reductions **of *the United States*** that Canada may use to satisfy its Paris Agreement obligations and sustain that international regime.

Given that the President's foreign policy is to withdraw the United States and its resources from the Paris Agreement, the Agreement and Arrangements present a "clear conflict." California's own foreign agreements undercut the President's foreign policy and reroute the state's GHG reductions to the service of a different sovereign, *i.e.*, Canada, ironically allowing that foreign nation to meet ***its*** Paris Agreement obligations. This could not be a clearer frustration of the President's desire to "pause" the Paris Agreement.

Defendants spill much ink claiming that the conflict is unexplained, unclear, or attenuated. But Defendants engage in willful blindness. If California and WCI succeed in their plans to bring other provinces of Canada and U.S. states into their common market, then even more of the United States would become functional participants in Paris. The logical extension of this is that entire United States would be generating ITMOs for the rest of the world. This would functionally be the same as the United States never having withdrawn from the Paris Agreement at all.[8] This Court should not ignore this predictable eventuality should California have its way.

Defendants assert that California's facilitation of Canada's participation in the Paris Agreement by reducing Canada's costs of compliance is a new and speculative theory. They claim that the United States must assert a policy against Canada's participation in the Paris Agreement in order to establish a "clear conflict" on those grounds. Defendants misinterpret

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[8] This point is all the more salient given California's expansionist ambitions. As discussed below, the "cap" in the California program is analogous to the Paris Agreement's "NDCs." As also noted below, California and Oregon are already considering a linkage, and Ontario already came and went from this arrangement. For all the "cost reduction" reasons Defendants assert, and the unstated policy goals Defendants ignore in their papers (*e.g.*, increased global emissions reductions), the WCI carbon market will likely expand to include additional jurisdictions, additional caps, and more trading across both state and national borders. But the United States has moved to withdraw from the Paris Agreement and the President has declared that these mitigation mechanisms are not in the interest of our nation. This Court should not allow California to implement interstate and international GHG policy in blatant opposition to the United States' foreign policy.

the import of Canada's use of California's compliance instruments. The key issue is that, through a sub-unit of Canada, California is itself participating in an international agreement that has been rejected by the United States, in part because that agreement fails to achieve meaningful emissions reductions.

And this is not a new theory. The United States raised this concern months ago, in the first round of summary judgment motions. *See* Reply and Opposition of the United States at 22-24 (ECF No. 102). But Defendants are right that part of the United States' express foreign policy is to seek a better deal with its negotiating partners, including Canada. The United States does not need to assert, as California alleges here, that California's policy is directed specifically at supporting Canada's compliance with the Paris Agreement. The United States clearly explained that Canada's interest in negotiating with the federal government is diminished if Canada may access one of the nation's largest state economies for its own benefits outside of renewed negotiations with the United States on a direct and exclusive nation-to-nation basis.

California complains that the United States has not provided evidence on the volume of trading between California and Quebec. ECF No. 110 at 22. California does not explain what that is relevant to or why it is necessary for the United States to make such a showing. California does not dispute that trading is an essential element of its cap-and-***trade*** program. Sahota Decl. ¶ 22. Regardless, although California's chosen metric—volume—is difficult for the United States to assess with certainty without discovery, that is not the only way to show that Quebec entities have and will continue to purchase a substantial number of California allowances. Using California's own accounting, the California and Quebec allowances sold at auction are blended so that a bidder receives a ratio of California and Quebec allowances that is proportional to each jurisdiction's contribution. *See* CARB, *Chapter 5: How Do I Buy, Sell, and Trade Compliance Instruments?* at 28 (2012), https://ww3.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf (1st Iacangelo Decl., Exh. 29) (SUF ¶ 61). For example, if California offers 60 million allowances and Quebec offers

10 million, bidders will receive six California allowances for each Quebec allowance in a successful bid. *Id.*; *see also* California Response to Plaintiff's Statement of Undisputed Facts (ECF 110-4) (admitting that "holders of allowances do not know the source (California or Quebec) of the allowances they hold."). California has thus conceded that Quebec regulated entities that participate in the joint auction actually purchase ***its*** allowances. Defendants' protests about "scant" evidence are specious in light of its own admissions.

In its opposition, California argues that its internal cap-and-trade program cannot conflict with federal policy at all. It says the United States described it as a "complement [to] federal efforts to reduce GHG Emissions" as recently as 2014. ECF No. 110 (quoting Second Dorsi Decl., Exh. 22 at 127). This argument overlooks two key facts. ***First***, California's internal program is not at issue in this case. ***Second***, that was then, and this is now. The foreign policy of the United States has changed and California seems to be in psychological denial (or perhaps open-and-defiant resistance) of that fact. Then the United States was negotiating to enter the Paris Agreement in 2014. Now the United States plans to exit it. These past citations to California's program are thus of no relevance.

California's actions expressly engaged in foreign relations conflict with the United States' foreign policy. All the United States needs to show—and has shown, and then some—is a mere "likelihood" that the Agreement and Arrangements "will produce something more than incidental effect in conflict with express foreign policy[.]'" *Von Saher II*, 754 F.3d at 720 (quoting *Garamendi*, 539 U.S at 420). As the facts described above demonstrate, California is effectively participating in an international agreement that the President of the United States decided this nation—made up of the individual states—should not be party to. This is an express conflict with the United States' foreign policy, is preempted, and must be enjoined.

2. The Agreement and Arrangements replicate those of the Paris Agreement and therefore conflict with United States' withdrawal.

Under the Agreement and Arrangements, California and Quebec are not just supporting the continuation of the Paris Agreement. Those entities have established a linkage that—logically spreading to other developed jurisdictions (as California wishes), or combined with REDD Plans[9] in the developing world—act as a functional analogue to Paris. In fact, this would be more restrictive than that Accord in certain respects. This would conflict with United States policy of declining to participate in an international agreement on climate change that gives a pass to some of the world's most prolific emitters of carbon and further undercut our country's leverage to obtain a new agreement.

i. The Agreement and Arrangements are analogous to and functionally interchangeable with the Paris Agreement.

Several key elements of the Paris Agreement are as follows. Under the agreement, Parties communicate "nationally determined contributions" ("NDCs") that describe their plans or targets for the reduction of GHG emissions. Paris Accord, Nov. 4, 2016, T.I.A.S. No. 16-1104, art. 4.2. NDCs can take many forms. A Party can, for example, adopt an economy-wide absolute target for reducing emissions, and, in fact, developed countries are encouraged to do so. *See id.* art. 4(4). (This was the United States' approach.) Or a Party is permitted to take a markedly softer approach, allowing its emissions to rise for a period of time, after which they would decline. (This is China's approach.) Similarly, a Party may undertake to reduce the amount of carbon emitted per unit of energy produced, a metric that can be met with cleaner sources of energy, but which does not require an absolute reduction. (This is India's approach.)

Internationally transferred mitigation outcomes ("ITMOs") are another key moving

[9] In a "REDD Plan," broadly speaking, entities in a developing nation would undertake to set aside a "sink" or "reservoir" for the absorption of GHGs that they would not otherwise set aside, and entities in developed jurisdictions would pay them to do so.

part of the agreement, and they are of particular relevance to this case. Under the Agreement, Parties may acquire ITMOs from other parties to achieve their NDCs. *See* Paris Agreement, art. 6(2). In simple terms, if a Party establishes a target to reduce emissions by a specific amount, it can meet that target not only by actually achieving that reduction within its borders. A Party may, in effect, pay another jurisdiction to achieve the same reduction for it. So countries may claim to achieve their NDCs by either actually reducing emissions, or by creating an "offset"—that is, an emissions reduction often created by setting aside a "sink" or "reservoir," such as a forest, that can absorb the stated volume of carbon dioxide from the atmosphere. *See id.* art. 5.

Paris has even more moving parts than this, of course. These are just two of its key components. The critical point is the unmistakable congruence of these moving parts with California's Agreement and Arrangements with Quebec. ***First***, California's Agreement and Arrangements with Quebec establish a bilateral relationship between the two jurisdictions. Each has its equivalent of an "NDC"—with the additional wrinkle, as the United States will note later in this Reply and Opposition, that this "NDC" is necessarily subject to control by the other party. ***Second***, as explained more fully above, California and Quebec have established a trading market for carbon allowances that is analogous to and functionally interchangeable with the Paris Agreement's mitigation trading scheme. ***Third***, WCI's readiness to expand the Agreement and Arrangements to include any other willing jurisdiction is the vehicle by which California seeks to make its bilateral relationship with Quebec multilateral, and even universal. ***Fourth***, California's readiness to establish REDD Plans with developing jurisdictions replicates the concept of "offsets," including "sinks and reservoirs," in Paris Article 5. The architecture for this universal expansion of California's linkage with Quebec is already in place. To put the matter in simple terms, if this Court should uphold California's Agreement and Arrangements with Quebec, nothing would prevent California and WCI from establishing a comparable relationship with ***every other***

jurisdiction in the world, either via a common market for compliance instruments or via a REDD Plan.[10]

Not only would such an occurrence be "likely" to have "something more than incidental effect" on the President's decision to withdraw from the Paris Agreement, it would be certain to do so. *Von Saher II*, 754 F.3d at 720 (quoting *Garamendi*, 539 U.S at 420). As James Madison once presciently observed in a different context, "***[t]he free [people] of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.***" MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 3 (1785).

ii. Defendants' responses to this "clear conflict" have no merit.

In response, Defendants argue that the United States cannot demonstrate a conflict between California's linkage with Quebec and its foreign policy because many aspects of the Agreements and Arrangements were in effect six years before the notice of withdrawal from the Paris Agreement. *See* ECF No. 110 at 19; ECF No. 105 at 6; ECF No. 106 at 36. But Defendants attack a straw man. It does not take a lot of complex analysis to conclude that the United States did not assert that the Agreement and Arrangements presented a conflict when the U.S. was joining and promoting the Paris Agreement. Instead, the United States argues, and has consistently argued, that California's linkage with Quebec, which it stands ready to expand to the rest of the world, is in direct conflict with the United States'

[10] Expansion of the WCI carbon market to "[m]aximize global GHG emission reductions through coordinated subnational efforts" is the second stated purpose of CARB's regulations implementing the linkage with Quebec. CARB Statement of Reasons (2d. Iacangelo Decl., Exh. 47 at 47) (SUF ¶148). The first purpose is to "[d]ecrease GHG emissions to achieve the AB 32 mandate." *Id.* In justifying the Quebec linkage, CARB explained that "[b]y not linking with Québec, California would miss an opportunity to enable a broader, more liquid and better functioning market, and greater GHG emissions reductions under a regional program with more covered entities." *Id.* at 73 (SUF ¶149). Other than the equivalency requirement to link to the California program, there is no limiting principle to such a viral-like expansion of California's own international climate policy.

current policy to withdraw from Paris and, if appropriate, pursue a new arrangement. It is California's ongoing and imminent actions that conflict with this nation's present foreign climate policy. *See* Plaintiff's Second Motion for Summary Judgment at 22-23 (ECF No. 102). And a mere "'likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy'" requires preemption. *Von Saher II*, 754 F.3d at 720 (quoting *Garamendi*, 539 U.S at 420).

Moreover, the evidence leaves no doubt that California is engaged in the field of international relations to posture itself as its own player in world affairs. As California's leadership has proclaimed, the state seeks to fill the perceived void left by the United States' departure from the Paris Agreement with California's policies, including an international cap-and-trade system. *See States React to Trump's Decision to Abandon Paris Climate Agreement* (2d. Iacangelo Decl., Exh. 35) (SUF ¶¶ 102-03) ("[I]t's not right and California will do everything it can to not only stay the course, but to [also] build more support—in other states, in other provinces, in other countries."). More specifically, the United States has explained that California's ongoing linkage with Quebec contributes those national resources subject to the governance of the Golden State to facilitate and hasten compliance with the Paris Agreement. *See* ECF No. 102 at 19.

Defendants retort that California has done nothing, and can do nothing, to prevent the United States' withdrawal from the Paris Agreement. That is irrelevant. The point, as in *Garamendi*, is that California's program ***interferes*** with the United States' accomplishment of its foreign policy. 539 U.S at 424-25. The United States need not show that California will completely prevent the United States from executing its withdrawal. California is certainly acting to blunt to some degree the effect of that withdrawal. For example, California's misadventures in *Garamendi* did not ***prevent*** the United States from executing its foreign policy. Yet, there, the Supreme Court explained that a "clear conflict" existed because California's insurance scheme "placed the Government at a disadvantage in obtaining practical results from persuading foreign governments and foreign companies

to participate voluntarily" in "the particular mechanism the President has chosen." *Id.* at 424 (internal quotations omitted).[11] The same is clearly true here. The President has declared Paris to be a failure and seeks a better deal. By using such disfavored, analogous means in a piecemeal fashion, California lends support and credibility to strategies that permit the world's largest carbon emitters to continue unabated.

Defendants also argue that the United States does not explain how the economic rationale for its withdrawal from the Paris Agreement conflicts with California's operation of its program. If anything, they claim, Plaintiff's allegations about the inflow of money from Quebec in exchange for California allowances ***benefits*** the nation in line with the President's rationale for supporting the economy of the nation. ECF No. 110 at 20. But what benefits California's treasury does not necessarily serve the nation as a whole. The President is delegated the authority to set United States foreign policy in this area. He has declared that it does not serve the interests of the United States to be engaged in Paris-entangled carbon trading schemes.

Lastly, Defendants suggest that California's foreign policy is aligned with the UNFCCC, while the President's foreign policy is not. California asserts that it is "telling" that Plaintiff does not argue that the Agreement and Arrangements conflict with the UNFCCC because the President's actions, *i.e.*, withdrawing from the Paris Agreement to seek a better bargain, "must [themselves] be consistent with the UNFCCC." ECF No. 110 at 17. These unfounded musings have no merit. The UNFCCC is and always has been a ***Framework Convention***. It establishes the broad goals and approaches applicable to negotiating further, substantive agreements with foreign nations. As successive Presidents take office, they are entitled to revisit the means by which the UNFCCC's broad goals, etc., are to be achieved. Within the UNFCCC framework, the President then acts pursuant to an

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[11] And though the United States has long had a role in Holocaust-era insurance claims, the underlying executive agreements and actions at issue in *Garamendi* were being developed and finalized throughout the course of that litigation. *See* 539 U.S. at 424 (detailing the then-recent negotiations leading to the executive agreements).

express congressional delegation under a duly ratified and consented treaty to determine U.S. policy. This is an exclusive bastion of federal authority. Moreover, notwithstanding California's claim that its actions are consistent with the UNFCCC, it nowhere explains why that bald assertion is relevant. Its posturing on the UNFCCC is certainly no defense to the established "likelihood" that the Agreement and Arrangements "will produce something more than incidental effect in conflict with express foreign policy." *Von Saher II*, 754 F.3d at 720 (internal quotation omitted).

California may believe that its "program plainly furthers the UNFCCC's ultimate objective of ***stabilizing greenhouse gas emissions*** and ***preventing adverse human impact on the climate***." ECF No. 110 at 17. As the United States explained in the first summary judgment proceedings, many provisions of the UNFCCC are facially parallel to those of the Agreement and Arrangements. ECF No. 78 at 18 (noting that, in many respects, the Agreement and Arrangements are far more substantive than the UNFCCC). But the UNFCCC is just the beginning of this nation's foreign policy on climate change. The President is the United States' delegated official to forge a path under it, not California. Notwithstanding this fact, California argues that its purported alignment with the UNFCCC's lofty goals is superior to the President's express federal policy on the subject-matter. This is incorrect as to means and to policy. Congress has expressly directed the President to occupy this field of international relations. *See supra* page 7-8, 17-18 and accompanying discussion. Likewise, Defendants' complaints about California's alleged alignment with the foreign policy of prior Administrations are irrelevant.[12] Defendants do

[12] California also provides no basis in law or fact to conclude that the United States' silence on the linkage in the UNFCCC reports it cites "belies any suggestion [it] conflicts" with the treaty. The generalized references in these reports provide little information about the functions and purposes of the state programs.

not deny that the United States' foreign policy has unequivocally changed.[13] Instead, Defendants suggest that a prior Administration's views, as Defendants interpret them, must bind this President or narrow his exclusive authority over foreign affairs. This is plainly wrong. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010).[14]

Under the UNFCCC, the President must speak with one voice for the nation. *See Garamendi*, 539 U.S. at 424; *Hines*, 312 U.S. at 63 (internal quotation marks omitted) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."). California's dissenting voice and pursuit of its own interest and foreign policy embody more than an incidental effect on this framework. As the President recognized, the Paris Agreement failed to rein in the world's largest GHG emitting nations. In navigating the hard realities of global diplomacy with China, India, and the developing world, the President must ensure that the United States is not disadvantaged relative to its international competitors. *See* Statement on Paris Accord (1st. Iacangelo Decl., Exh. 5). The President determined that Paris failed in these respects—it contained no meaningful restrictions on emissions and forced the United States to shoulder more than its fair share of reductions. The President found it untenable to do anything other than seek a better deal. To that end, the President has "paused" foreign climate policy and marshalled the resources of the federal government to

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[13] Defendants have repeatedly complained about the United States' shift in foreign climate policy. (SUF ¶¶ 13-15, 102-03). This is, ontologically and unmistakably, to concede that such a change has occurred—that United States carbon foreign policy in 2020 is not United States carbon policy in 2014 or 2016.

[14] As the Supreme Court explained in a different context: "Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment. The President can always choose to restrain himself.... He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own." *Free Enter. Fund.*, 561 U.S. at 497 (citations and internal quotation marks omitted).

pursue an alternative. Defendants should not be permitted to carry on with the Agreement and Arrangements in patent opposition to and conflict with the national government's policies.

II. The Agreement and Arrangements are an obstacle to the express foreign policy of the United States.

As the Ninth Circuit has explained, even where there is no likelihood of more than incidental interference with foreign policy—although here the conflict is clear—state law is preempted "'where under the circumstances of [a] particular case, [the challenged state law] ***stands as an obstacle*** to the accomplishment and execution of the full purposes and objectives of' federal policy." *Von Saher II*, 754 F.3d at 720 (quoting *Crosby*, 530 U.S. at 373 (emphasis added; brackets original)). Thus, even if the United States could not establish the "likelihood" of a "clear conflict"—which is not the case—it would still be entitled to relief if it could demonstrate that the Agreement and Arrangements represent a cognizable obstacle to the "full purposes and objectives" of the United States' foreign policy. Here, Defendants' Agreement and Arrangements are self-evident hurdles, hindrances, and hang-ups.

In its opening brief, the United States explained that "Congress has, at many times, in many ways, and with no less force than in *Crosby*, delegated authority to the Executive Branch to develop and advance this nation's international policy and relations." ECF No. 102 at 24. Under the UNFCCC, for example, the federal government—with the President as its head—is expected to "coordinate as appropriate with other such Parties, relevant economic and administrative instruments developed to achieve the objective of the Convention." *Id.*, art. 2(e). Similarly, in the GCPA, Congress directed the President and various senior officials to set international climate change policy for the nation. These authorities enable the President to speak with a singular and "effective voice." As *Crosby* instructs, the states may not obstruct this congressional authority "to take the initiative for the United States among the international community." 530 U.S. at 381.

In response, Defendants mischaracterize Plaintiff's points and authorities as an attempt to assert a statutory preemption claim. Defendants argue that the United States did not refer to the Global Climate Protection Act in its Amended Complaint, so it should not be permitted to move for summary judgment on that basis. Defendants are incorrect.

A. The United States' has not asserted a new preemption claim.

Isolating Plaintiff's reliance on *Crosby*, Defendants claim that the United States' obstacle-preemption theory under the Foreign Affairs Doctrine is a statutory preemption claim in camouflage. In Defendants' view, *Crosby* is irrelevant to a conflicts analysis under the Foreign Affairs Doctrine because that case was decided on statutory preemption grounds. So, even though the *Crosby* Court discussed, at length, the import of congressional actions on the President's foreign affairs powers, the United States' reliance on *Crosby* is misplaced.

But this is not a new claim by the United States.[15] As explained in its Motion, state law is preempted under the Foreign Affairs Doctrine "'where under the circumstances of [a] particular case, [the challenged state law] ***stands as an obstacle*** to the accomplishment and execution of the full purposes and objectives of' federal policy." *Von Saher II*, 754 F.3d at 720 (quoting *Crosby*, 530 U.S. at 373 (emphasis added; brackets original)).

Thus, the Ninth Circuit has plainly held that Foreign Affairs Doctrine preempts state action that serves as an "obstacle" to federal policy. Defendants attempt to manufacture a supposed wall between foreign affairs and statutory preemption, but there is none. Plaintiffs ignore that these doctrines are closely related as they both find their source in the Supremacy Clause. And the UNFCCC—ratified by the President with advice and consent of the Senate—is as much the "Law of the Land" as a statute. U.S. CONST. art. VI, cl. 2.

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[15] In its Amended Complaint, the United States pleaded that "Defendants' actions individually and collectively interfere with the United States' foreign policy on greenhouse gas regulation, ***including but not limited to the United States' participation in UNFCCC*** and announcement of its intention to withdraw from the Accord, and are therefore preempted." ECF No. 7 ¶ 178 at 30. The United States thus presented a proper claim for sub-constitutional preemption in its Amended Complaint.

Defendants also ignore that the interplay between statutory (and no doubt treaty) law and the Constitution can amplify the President's freestanding constitutional powers, as Justice Jackson noted in *Youngstown Sheet & Tube*. 343 U.S. at 635-36 (Jackson, J., concurring).

Under the Foreign Affairs Doctrine, the Constitution allocates to "the federal government the exclusive authority to administer foreign affairs." *Movsesian III*, 670 F.3d at 1071 (citing *United States v. Pink*, 315 U.S. 203, 233 (1942), and *Hines*, 312 U.S. at 63 (1941)). So federal policy preempts state law that is an obstacle. Indeed, *Garamendi* itself cited *Crosby* numerous times in its analysis of foreign affairs preemption and relied on its guidance in deciding the case. For example, after examining the United States' foreign policy, the Supreme Court noted that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment," and then proceeded to analogize *Garamendi's* facts to the obstacles presented in *Crosby*. *Garamendi*, 539 U.S. at 423-24. In finding the California law preempted, the Supreme Court found that "*Crosby's* facts are replicated again in the way [the California statute] threatens to frustrate the operation of the particular mechanism the President has chosen." Quoting directly from *Crosby*, the *Garamendi* Court concluded that "'[t]he fact of a common end hardly neutralizes conflicting means,'… and here [the California law] is ***an obstacle to the success of the National Government's*** chosen 'calibration of force' in dealing with the Europeans using a voluntary approach." *Id.* at 424 (quoting *Crosby*, 530 U.S. at 380).

To be sure, *Crosby* was decided on statutory preemption grounds. But, as *Garamendi* shows, the case is replete with relevant discussion of the effect of congressional acts on the President's power over foreign affairs. For these reasons, Defendants' efforts to dislodge "obstacle" preemption from the Foreign Affairs Doctrine are misplaced.[16] There

[16] Regardless, Defendants have been repeatedly presented the opportunity to address these arguments and are now addressing these arguments. They cannot establish prejudice. The issue is thus properly presented for resolution. *See* March 12 Order, ECF No. 90 at 31-32 n.14 ("[T]he United States resisted the state's characterization of their argument as a preemption claim at the hearing, and the state had an opportunity to entertain the argument

is no impermeable membrane or blood-brain barrier between statutory/treaty preemption on the one hand and constitutional preemption on the other.

B. The United States has established that the Agreement and Arrangements obstruct the United States' foreign policy.

In its Motion, the United States explained that "Congress has, at many times, in many ways, and with no less force than in *Crosby*, delegated authority to the Executive Branch to develop and advance this nation's international policy and relations." ECF No. 102 at 24. Plaintiff explained that the UNFCCC, a treated ratified by the President with the advice and consent of the Senate, reflects the will of the federal government. Congress has also directed the President and various senior officials to set national and international climate change policy for the nation under other statutes, including the GCPA. And following these laws and commitments, the United States has repeatedly entered into international negotiations with foreign governments on climate policy, *e.g.*, the Paris Agreement. These authorities enable the President to speak with a singular and "effective voice," and, under *Crosby*, the states may not obstruct this congressionally delegated ability "to take initiative for the United States among the international community. 530 U.S. at 381.

Defendants respond that the GCPA has no preemptive effect. And they repeatedly assert, without much elaboration, that the Agreement and Arrangements are "entirely consistent with the UNFCCC." ECF No. 110 at 32. But Defendants are missing the obvious: Both the GCPA and the UNFCCC have the same intent and effect as did the underlying statute in *Crosby*—they expressly authorize the President to act on behalf of the United States in a particular sphere of foreign policy. Thus, they preempt and preclude California's unprecedented dalliance into foreign relations**,** regardless of any supposed

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in its response. Accordingly, the court finds it appropriate to consider the argument."); *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (explaining in a related context under Rule 15 that district courts should "facilitate decision on the merits rather than on the pleadings or technicalities." (internal quotation and citation omitted)).

consistency. Even a variation in means is preempted. *See Garamendi*, 539 U.S. at 427 ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves."). In any case, it is impossible to see consistency between the President exercising his authority under the UNFCCC and the GCPA to withdraw from Paris and California doing its utmost to prevent that from happening.

Defendants take three shots at distinguishing *Crosby*. ***First***, they argue that the GCPA is too dissimilar to the sanctions statute in *Crosby*. Defendants appear to forget the UNFCCC, and Plaintiff addresses that point below. ***Second***, Defendants claim, again forgetting the UNFCCC, that Congress did not intend the President to speak with one voice as it did in the *Crosby* sanctions statute. ***Third***, Defendants state that Plaintiff cannot show which "enclaves" of California are "fenced off willy-nilly by" tactics inconsistent with federal policy. None of these points have merit, leaving *Crosby* to control this case.

First, Defendants' attempts to distinguish the sanctions regime in *Crosby* from the host of congressional acts directing the Executive Branch to lead the nation's foreign climate policy are unavailing. In part, Defendants fail because they have only addressed the GCPA. The United States does identify the GCPA as one of the earlier statutes directing the Executive Branch to "coordinate[] national policy on global climate change," including "work[ing] toward international agreements." Pub. L. No. 100–204, Title XI, §§ 1101–1106, 101 Stat. 1331, 1407, *as amended by* Pub. L. No. 103–199, Title VI, § 603, 107 Stat. 2317, 2327, *reprinted as note to* 15 U.S.C. § 2901 (1978) (SUF ¶ 74). But that is not all the U.S. cites. Though the GCPA does indeed show that Congress spoke clearly to the Executive Branch's role in developing international greenhouse gas policies, the UNFCCC is the more precise directive, via a treaty, to entrench the President as the country's leader in establishing America's international climate policy. *See* UNFCCC, Mar. 21, 1994, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107, art. 2(e) (directing the Parties to "coordinate as appropriate with other such Parties, relevant economic and administrative instruments developed to achieve the objective of the Convention.").

Second, the UNFCCC is unquestionably relevant to the President's authority. Its "ultimate objective" is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.*, art. 2. As the United States explained in its motion, the UNFCCC is the primary structural vehicle for the United States to engage with other nations in climate policy. As a "framework" agreement, it establishes a "regime" through which the President is to represent the nation in international negotiations. See *Id.*, art. 4 (noting that the Parties commit themselves to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change"). Just like the sanctions "regime" in *Crosby*, the regime here gives the President a singular role; the UNFCCC does not provide our country's states with a seat at the table of nations and California points to no authority or Acts of Congress to suggest otherwise.

Likewise, Defendants' argument that Congress has given the President ***less*** authority to develop and negotiate ***international climate policy*** as compared to the ***Burma*** sanctions statute is irrelevant. Again, Defendants cite no legal authority establishing that a balancing or particular threshold is required. In *Crosby*, the statute at issue directed the President to "execut[e] a carefully calibrated diplomatic strategy" with respect to sanctions against ***Burma***. 530 U.S. at 381. Though Defendants try to steer the Court away from the UNFCCC, the Court need not follow them. The UNFCCC clearly directs the President to develop and execute federal climate policy and engage in related international negotiations. Every Administration since the passage of the UNFCCC has done so. Moreover, here California is directly engaged in foreign relations and establishing international agreements—which is a far more direct challenge to Executive objectives than *Crosby*.

Regardless, Congress' direction to the President to act "belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action." *Id.*

Third, the "enclaves" at issue here, *i.e.*, California's economy, have been as much negotiated away as they were in *Crosby*—in fact more so, given the size of California's economy compared to that of Massachusetts. Moreover, California continues to advertise that its program is open for expansion to still more jurisdictions. In *Crosby*, the Massachusetts law operated to withdraw the resources of that state from the federal government's diplomatic toolkit. Here too, the existence of the international aspects of the California program provides the federal government's negotiating partners with an alternative to engaging in diplomacy with the United States. *See* discussion *supra* Part I.C.1.

In sum, Defendants object by arguing that the Agreement and Arrangements do not present an obstacle to the President's express conduct of foreign policy developed pursuant to UNFCCC or the GCPA. But in making this argument, Defendants largely miss the point. Congress has authorized the President to speak with one voice on behalf of the nation. Thus, any perceptible interference with the President's policy will suffice. The United States has amply demonstrated that the Agreement and Arrangements, standing alone or as foreseeably expanded around the globe, as California intends, are inconsistent with and stand as an obstacle to the President's decision to withdraw from the Paris Agreement and seek a meaningful substitute arrangement. Those legal instruments fomented by California must be held to be preempted.

III. The Agreement and Arrangements are preempted because California has gone beyond a traditional area of state regulation and intruded into the field of foreign affairs.

Defendants are quick to say (and repeat) that cases finding state actions to be field-preempted are rare in the "already narrow foreign affairs doctrine." ECF No. 110 at 33 (citations omitted). But this is the rarest of cases where an individual state is directly engaging in international relations and shamelessly articulating its own foreign policy. It is

rarer still for a state to directly enter into independent agreements with foreign powers on a subject matter that overlaps with in-process, *in-medias-res*, evolving international relations still underway by the federal government. In response, Defendants can only stretch and strain to localize California's scheme. They contort history, hoping that this Court will conclude that California has acted within a "traditional area of [state] responsibility," such that the United States' "field preemption argument [must] fail[] on the first prong of the field preemption test[.]" ECF No. 110 at 41. Try as they might, Defendants' bids to minimize the scope and significance of the Agreement and Arrangements cannot alter reality. California has gone beyond its traditional state responsibility and intruded on the "exclusive" federal field of foreign policy. *See Movsesian III*, 670 F.3d at 1071 ("The Constitution gives the federal government the ***exclusive authority*** to administer foreign affairs.") (emphasis added).

A. The Court has not prejudged the United States' foreign affairs preemption claims.

Defendants misconstrue language from this Court's order of March 12, 2020, (the "March Order"). They argue that the Court has already effectively decided the field preemption question because the Court stated that California was acting under its traditional police powers. *See, e.g.*, ECF No. 110 at 34–35. The United States does not read the March Order in this fashion. Regardless, even if the Court's prior language could be read so as to foreclose the United States' field preemption arguments, the United States respectfully asks the Court to use its authority under Federal Rule of Civil Procedure 54(b) to go beyond that inherently interlocutory constraint to fully consider the United States' field preemption claim at this time.

In the March Order, the Court wrote that it "is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." ECF No. 91 at 30. But the Court did so in the context of adjudicating the United States' claim under the Compact Clause. The Court expressly stated that its analysis did not address the application

of the Foreign Affairs Doctrine, and thus did not analyze *Garamendi* or *Crosby*. *See id*. at 29.[17] In fact, this Court specifically said "[w]hat is before the court now is not the question of preemption but the question of whether California's power has been increased such that it encroaches upon or interferes with the just supremacy of the United States." *Id*. at 29.

Thus, the March Order does not control the Court's decision on the United States' foreign affairs preemption claims. Whether California has acted within is traditional scope of power is still very much a live question. And as described below, California's conduct has exceeded that traditional scope and should be preempted.

B. California has gone leagues beyond an area of traditional state responsibility.

As the Supreme Court and the Ninth Circuit have observed more than once, a court must look beyond a state's ostensible purpose in deciding whether in fact it has "no serious claim to be addressing a traditional state responsibility." *Movsesian III*, 670 F.3d at 1074 (citing *Garamendi*, 539 U.S. at 419). Here, that analysis should start with the fact that California is operating well outside its "traditional state responsibility" by directly invading the "exclusive" province of the central government to negotiate international agreements. California cites not a single case affirming a state's ability to enter into international

[17] To be sure, *Am. Fuel & Petrochem. Mfrs. v. O'Keefe*, 903 F.3d 903 (9th Cir. 2018), which the Court cited and which the Defendants have now glommed onto, addressed Oregon's efforts to limit GHG emissions only ***within its borders***. The Oregon law at issue there required regulated parties to "keep the average carbon intensity of all transportation fuels ***used in Oregon*** below an annual limit." *Id*. at 908 (emphasis added). Oregon's law may have had impacts beyond its borders. But—unlike California's Agreement and Arrangements—Oregon was not intentionally engaging in foreign relations beyond its borders to foster cross-border agreements with foreign jurisdictions on issues of international concern. The United States has not sued California because it is trying to limit GHG emissions within its borders. The United States sued California because it has usurped, and is continuing to usurp, the United States' authority to negotiate, enter into, or to ***decline*** to enter into, international agreements addressing climate change. The same can be said about *Goldstene*, a case on which Defendants also rely.

relations and agreements on a subject matter field in which the federal government is currently engaged.

But courts have struck down state actions under the Foreign Affairs Doctrine even where states have legislated exclusively within their borders on matters with a historic local nexus. In *Zschernig*, for example, the Supreme Court found preemption even though Oregon's statute "appeared, at first blush, simply to regulate property—a traditional area of state responsibility." *Movsesian III*, 670 F.3d at 1073 (discussing *Zschernig*, 389 U.S. at 440-41). Similarly, in *Garamendi*, the Supreme Court found preemption, even though California purported to be regulating insurance. As the Court wrote in that case, "there [was] no serious doubt that the state interest ***actually underlying*** [California's statute was] concern for the several thousand Holocaust survivors said to be living in the State." *Garamendi*, 539 U.S. at 426 (emphasis added). Likewise, the Ninth Circuit found preemption in *Von Saher I*, even though "the general subject area of the statute, the regulation of stolen property, is traditionally an area of state responsibility." *Movsesian III*, 670 F.3d at 1074 (discussing *Von Saher I*, 592 F.3d at 964). As the Ninth Circuit noted in *Von Saher I*, "[c]ourts have consistently struck down state laws which purport to regulate an area of traditional state competence, but ***in fact, affect foreign affairs***." 592 F.3d at 964 (emphasis added).

Here, too, California claims to be serving only local interests. Defendants accuse the United States of cherry-picking from a "hodgepodge of unrelated statements and irrelevant documents." ECF No. 110 at 40. To this end, Defendants ask the Court to ignore approximately fourteen years' worth of statements, laws, regulations, and policies laying bare that California fancies itself as a key player in the global effort to combat climate change. The United States submits numerous government documents of the State of California. Defendants cite no authority establishing that their statements can be ignored—particularly on a motion for summary judgment.

Regardless, California endeavors to frame its direct international relations and agreements as purely local in nature. It says that "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[.]" ECF No. 110 at 35. That may be one reason for what California did. But numerous of the Defendants' own documents prove that this is not the only, or even the primary, reason motivating California's foreign relations. And the Defendants cannot avoid summary judgment by pointing the Court to only those facts that support their story while asking it to ignore all of the contradictory evidence. In any event, the problem is not with California expanding the options of businesses local to that state; it is that California is expanding into the business of regulating ***outside of its borders*** and setting itself up as if it is, in the words of former Governor Schwarzenegger, its own "nation state." *See* Adam Tanner, Schwarzenegger: California is 'Nation State' Leading World, Washington Post (Jan. 9, 2007) (1st Iacangelo Decl., Exh. 14) (SUF ¶ 20). Not all acts of "expansion" with a thin nexus to local California businesses are traditional areas of state concern.

1. The cross-border regulation of GHGs is not local.

The Supreme Court's cases require courts to look past broad labels such as "probate," "insurance," or "environment" to determine where a state is pursuing a traditional state interest. *See, e.g.*, *Movsesian III*, 670 F.3d at 1073 (discussing *Zschernig*); *see also Garamendi*, 539 U.S. at 426. The regulation of conventional pollutants, such as particulate matter, sulfur dioxide, ozone, nitrogen oxides, carbon monoxide, and hydrocarbons, has long been a local issue. This is because of the localized effect that these pollutants have on the environment. These pollutants subsist in a defined regional airshed for a limited time. But this principle has no application to GHGs, which disperse to the upper atmosphere and around the world.

As the Supreme Court observed in *Am. Elec. Power v. Connecticut*, 564 U.S. 410, 422 (2011), "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." And ***as CARB itself explains***:

> ***GHGs are global pollutants, unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.*** Whereas pollutants with localized air quality effects have relatively short atmospheric lifetimes (about one day), GHGs have long atmospheric lifetimes (one to several thousand years). GHGs persist in the atmosphere for long enough time periods to be dispersed around the globe . . . . The quantity of GHGs in the atmosphere that ultimately result in climate change is not precisely known, but is enormous; ***no single project alone would measurably contribute to an incremental change in the global average temperature, or to global, local, or micro climates.***

CARB, *Appendix F: Final Environmental Analysis for the Strategy for Achieving California's 2030 Greenhouse Gas Target*, Attach. A at 24–25 (2017), https://ww3.arb.ca.gov/cc/scopingplan/2030sp_appf_finalea.pdf (emphasis added). Thus, by CARB's own admission, when a state undertakes to regulate GHGs, it is necessarily undertaking to regulate a single, global airshed.

This does not mean, of course, that states may not regulate the emission of GHGs within their borders. Defendants charge that the United States "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 States' traditional area of responsibility." ECF No. 110 at 40 (emphasis in original). That is incorrect. Consistent with sources of federal law not at issue in this case, California can tell its powerplants not to emit GHGs. On the same basis, California can limit the GHG emissions of wood-burning stoves, burger joints, cement factories, supermarkets, and scientific laboratories, just to name a few types of facilities. The United States did not sue California because California has "act[ed] within its traditional powers" to regulate "within its borders." *See id.* The issue here is that California is directly engaged in international relations. It is entering into agreements with foreign powers on subject matters in a field occupied by the federal government.

Moreover, California is not establishing linkages with other jurisdictions merely because it intends to reduce compliance costs or emissions in California. California's various leaders have declared that California has the population, technological savvy, and economic power to forge its own foreign policy; promised to work with "other states and provinces and even countries" to stop climate change; met with China on environmental issues in the wake of President Trump's decision to withdraw from the Paris Agreement; and boasted of galvanizing cap-and-trade efforts around the world. (SUF ¶¶ 20; 18; 14; 27). Yet Defendants have not pointed to any precedent that permits states to enter into international agreements concerning global problems with foreign countries.

In a last-ditch effort to legitimize California's scheme as "local," Defendants also suggest that Congress, through the Clean Air Act, left "room for state action either in concert with federal action or beyond it." ECF No. 110 at 45 (citations omitted). Again, all else being equal, states do have certain authority to act ***within*** their borders to regulate GHG emissions. *See Massachusetts*, 549 U.S. at 532. But California cites to no language of the Clean Air Act that authorizes states to freely forge their own emissions agreements with foreign countries. *See id*. at 519 (recognizing that states cannot negotiate emissions treaties). That is because no such authority exists. California's direct engagement in international diplomacy and agreements regarding GHG emissions is not operating within a traditional area of state concern.

2. The Agreement and Arrangements are intended to have, and in fact have, effects far beyond simply reducing costs of compliance.

As this Court knows, California and Quebec hold joint auctions for "compliance instruments" that can be used in either jurisdiction. Over and over, Defendants describe this common market as intended merely to reduce costs of compliance. This is both misleading and beside the point. The United States does not deny that a larger market can reduce costs of compliance. But document after document produced by California admits that its engagement in international relations and agreements is not merely about an innocent and

foreign-policy-free effort to reduce compliance costs for in-state businesses. California has instead thrust itself into the "exclusive" federal field of foreign relations to advance its own foreign policy. The Constitution prohibits this.

First, as Defendants admit, by entering into its international agreements with foreign powers, "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***."[18] ECF No. 110 at 37 (emphasis added). And that admission by Defendants' counsel is confirmed by numerous documents in the record. These include:

- The Global Warming Solutions Act charged CARB to "facilitate the development of integrated . . . regional, national, and ***international*** greenhouse gas reduction programs," (SUF ¶ 23) (emphasis added);
- California—along with the governors of several states and premiers of several Canadian provinces, including Quebec—formed or joined the Western Climate Initiative to establish ***a North American market*** for the regulation of GHGs, (SUF ¶ 28) (emphasis added);
- The 2010 design for California's cap-and-trade program contemplated that smaller jurisdictions, like Quebec, could link to larger ones, like California, in order to stabilize the smaller systems and make them viable, (SUF ¶ 32);
- The implementing regulations of California's cap-and-trade program contemplate future linkages with other jurisdictions that also have GHG emissions trading systems, (SUF ¶ 115);
- The Agreement with Quebec allows for the addition of other jurisdictions that wish to reduce GHG emissions, (SUF ¶ 69);

[18] To be fair, the language Defendants cited referenced a potential linkage with "New Mexico and other WCI member States." ECF No. 110 at 38 (citations omitted). But the WCI included international partners from the outset, and the very existence of this dispute shows California's ambitions were not only regional, they were international. Unless, of course, the "region" Defendants refer to is "North America" or the "Western Hemisphere."

- Governor Brown—speaking about President Trump's decision to withdraw from the Paris Agreement—said that "[i]t cannot stand," and he promised that "California will do everything it can to not only stay the course," but to also "build more support—in other provinces, in other countries," (SUF ¶ 103);
- The California Legislature has admitted that California's policies are meant to reduce GHGs in light of the state's interest in providing "global leadership," (SUF ¶ 104).

Second, California has conceded that its Agreement reflects minimum standards for the regulation of greenhouse gases with foreign powers. For example, Defendants acknowledge that, before CARB may "link to another program," the Governor must find "that the '[t]he jurisdiction has adopted program requirements for greenhouse gas reductions . . . that are ***equivalent to or stricter than*** those required' by California's legislature." ECF No. 50-1 at 7 (quoting CAL. GOV. CODE § 12894(f)) (emphasis added). Moreover, a common market in compliance instruments ***necessarily*** requires some degree of cross-border regulation. This is Economics 101, and it is commonly known as Gresham's Law. In brief, if two jurisdictions share a market for compliance instruments—like the credits and offsets at issue in this case–and one jurisdiction were to lift its restrictions, then all instruments would flow to the jurisdiction that tries to hold the line. This is because they would be unnecessary in the jurisdiction that lifted its restrictions, whereas they would remain valuable in the jurisdiction that tries to hold the line. This would result in a net increase in emissions in both places. Thus, no matter how tacit the understanding might be, all jurisdictions participating in a common market must adhere to some outer bounds on emissions. In other words, there is, and in fact there must be in such an arrangement, cross-border regulation.[19] Scholars are well aware that functional linkage requires at least some

[19] Avoiding the consequence of Gresham's Law is indeed one of the primary purposes of the Agreement. *See* Agreement. art. 4. ("To support the objective of harmonization and integration of the programs, any proposed changes or additions to those programs shall be

degree of joint control. *See* Lars H. Gulbrandsen et al., *The Political Roots of Divergence in Carbon Market Design: Implications for Linking*, CLIMATE POL'Y, 19:4, 427-38 (2019) ("Unfettered linkage between these markets would not create incentives for cooperation. Instead, it would create currency and capital flows along with incentives for firms to seek the least well regulated, cheapest compliance credits—a carbon variant of Gresham's law."). *Cf.* Juliet Howland, *Not All Carbon Credits are Created Equal: The Constitution and the Cost of Regional Cap-and-Trade Market Linkage*, 27 UCLA J. ENVTL. L. & POL'Y 413, 434 (2009) ("The problem is that sales under a safety valve create a variant of Gresham's Law, in which 'bad' credits (undervalued safety valve credits) will chase out 'good' credits (those that represent the actual cost of emissions within the cap).").

Thus, by California's own admissions, and as a matter of pure economics, California and Quebec in fact jointly regulate each other's GHG emissions, in that they must ensure that a set of minimum requirements are met in order for their overall trading regime to function properly on both sides of the border. *See* ECF No. 50-1 at 7 (quoting CAL. GOV. CODE § 12894(f)); Sahota Decl. ¶ 33 (acknowledging that the Governor made the minimum requirements finding for Quebec).[20]

Third, perhaps most importantly of all, California's own laws, executive orders, and regulations—which speak for themselves—abundantly demonstrate the intentionally

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discussed between the Parties.'). Both California and Quebec recognize that "[i]n order . . . to implement a joint market program, there are key mechanisms in the two programs that must be identical." CARB Statement of Reasons (2d Iacangelo Decl., Exh. 47 at 31) (SUF ¶ 152). They acknowledge that small changes, even to the parties' reporting and verification rules, could undermine the equivalence that is necessary for the joint market to function. At all times, the parties must ensure that one ton of emission reductions in California equals one ton of emission reductions in Quebec.

[20] In its order of March 12, 2020, this Court wrote that "the Agreement does not allow California to exercise any power it would not ordinarily have." ECF No. 91 at 30. If by this language this Court meant to suggest that not even a tacit understanding as to outer limits on emissions exists between California and Quebec, the United States respectfully submits that the Court suggested something contrary to California's own admissions, something inconsistent with basic principles of economics, and something capable of being revised given the interlocutory nature of the Court's order. *See* Fed. R. Civ. P. 54(b).

international nature of the state's Agreement and Arrangements. The United States has described the major peaks of this mountain range before, *see* ECF No. 102 at 13-14, and therefore provides only a quick recapitulation here:

- In AB 32, the "***Global*** Warming Solutions Act of 2006" (emphasis added), California's legislature directed the state to "facilitate the development of integrated and cost-effective regional, national, ***and international*** greenhouse gas reduction programs." CAL. HEALTH & SAFETY CODE § 38564 (emphasis added).
- That same year, Governor Schwarzenegger ordered CARB to "collaborate with [designated others] to develop a comprehensive market-based compliance program with the goal of creating a program that permits trading ***with the European Union***, the Regional Greenhouse Gas Initiative and other jurisdictions." Cal. Exec. Order No. S-20-06 (Oct. 18, 2006) (emphasis added).
- In 2011, CARB adopted regulations that explicitly contemplate that "compliance instrument[s] issued by an ***external greenhouse gas emissions trading system*** … may be used to meet" the state's regulatory requirements. CAL. CODE OF REGS. 17 § 95940 (2011) (emphasis added).
- That same year, CARB adopted the "Tropical Forest Standard" regulations to facilitate links with developing countries to protect tropical forests. *See, e.g., id.* § 95993 (providing that credits "may be generated from … Reducing Emissions from Deforestation and Forest Degradation (REDD) Plans").

To this may be added a variety of formal administrative documents and public pronouncements that establish beyond peradventure that California's "real desiderata," *Zschernig*, 389 U.S. at 437, is establishing a globe-wide regime for regulating GHG emissions. To give one example among many, Defendant Newsom said in October 2019 that "the Trump administration's abysmal record of denying climate change and propping up big polluters ***makes cross-border collaboration all the more necessary.***" (2d Iacangelo Decl., Exh. 56) (emphasis added).

Another example is the CARB Executive Officer's explanation in 2013 of why California should link its cap-and-trade program with that of Quebec:

> In the Global Warming Solutions Act of 2006, the Legislature directed [CARB] to facilitate the development of integrated regional, national, and ***international*** greenhouse gas reduction programs. ***Indeed, climate change is a global problem that requires innovative national and international solutions.*** Linking California and Québec's programs will demonstrate the ability of two jurisdictions to effectively work together to ***develop and implement cost-effective regional greenhouse gas emission reduction programs***.

Letter from James N. Goldstene, Executive Officer of CARB, to Governor Edmund G. Brown Jr. (2d Iacangelo Decl., Exh. 43) (SUF ¶ 147); *see also supra* note 10 and accompanying text. Illustrating California's goal of expanding its operations as much as possible, the Executive Officer added that "linking the programs will provide ***a framework for additional partners to join***, and demonstrate a workable template for urgently needed action." *Id.* These comments built on CARB's on-the-record rationale for amending its regulations to link with Quebec. For example, in its Statement of Reasons, it celebrated the "proposed regulation [because it] furthers ***California's effort to address climate change through coordinated subnational efforts***, positions our economy to benefit from investment in clean energy technologies, and will help ***catalyze action throughout the country and the world***." (2d Iacangelo Decl., Exh. 47 at 9) (SUF ¶ 150).

Defendants also suggest that the statements the United States has cited to show California's true intent are just expressions of objections to the federal government's foreign policy decisions that are part of a "'long tradition of issuing pronouncements, proclamations, and statements of principle[.]'" ECF No. 110 at 33 (citing *Gingery v. City of Glendale*, 831 F.3d 1222, 1230 (9th Cir. 2016)). What is at issue in this case, however, is more than mere pronouncements or proclamations for internal consumption. California has taken real, affirmative actions in the field of foreign affairs. It has entered into negotiations with foreign officials. It has entered into agreements with foreign nations. The objection is not that California's leaders are merely expressing opposition to United States foreign policy.

They are doing so while meeting with foreign leaders to adopt contrary international policies and arrangements from those announced by the United States.

There can be no genuine dispute that linkage is more than just "cost savings." The evidence proves, by admissions, that linkage also acts to secure "reduction[s] of greenhouse gas emissions that can be achieved collectively by the two programs [that are] larger than what can be achieved through a California-only program." Statement of Reasons (2d Iacangelo Decl., Exh. 49 at 16) (SUF ¶ 151). CARB's articulated rationale for the linkage included "[d]ecreas[ing] GHG emissions to achieve the AB 32 mandate" and "[m]aximiz[ing] global GHG emission reductions through coordinated subnational efforts" *Id.* (SUF ¶ 148). These were CARB's ***first*** and ***second*** "objectives" for implementing a linkage with Quebec. This precludes a finding at summary judgment that the Agreement and Arrangements are mere cost-reduction measures.

B. California has intruded on the United States' foreign affairs powers.

To try to prevent the obvious application of field preemption to this unprecedented case of California actually entering into the federal field of direct international relations, Defendants strain to minimize California's actions. Defendants claim that "[s]tate actions that implicate foreign affairs 'indirectly or incidentally' are not an 'intrusion' justifying preemption." ECF No. 110 at 42 (citations omitted). But, again, this is not a case about mere implication or indirect or incidental effects of internal regulation. Of all the cases the parties have cited, not one approved of a state action like the Agreement and Arrangement under challenge here where a state, dissatisfied with the federal government's diplomatic efforts in dealing with a global issue, decided to forge its own path and create an independent foreign policy on that issue and forge an operative agreement with a governmental entity in a foreign nation. This may be the clearest case ever presented to any federal court of a state lunging into a prohibited field of action.

For this reason, the foreign affairs preemption cases that have come before are instructive. But they do not fully capture the illegality of the Agreement and Arrangements

because California's actions go far beyond the internal state laws that courts have found preempted where the state actions at issue merely affected foreign affairs. The Agreement and Arrangements do not incidentally or indirectly affect foreign policy. They ***are*** a direct entry into the prohibited, "exclusive" federal field of foreign policy. Under the Constitution, "the field of foreign affairs" was unquestionably entrusted by the Constitution "to the President and the Congress." *Zschernig*, 389 U.S. at 432.

In perhaps their most legally irrelevant attempt to downplay California's action, Defendants note that "States and cities likewise have concluded thousands of agreements with foreign jurisdictions, such as 'Sister City' agreements, without legal challenge or negative federal attention." ECF No. 110 at 42. But California and Quebec are not engaging in mere cultural exchanges. Regardless, there is no estoppel against the sovereign. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419–20 (1990) ("From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants."). And California is not merely building a local or regional structure, such as a bridge across a shared border. California is pursuing its own foreign policy, plain and simple. States have broad power to regulate activities within their borders. But they have no comparable role on the international stage. The Constitution reserves to the political branches of the federal government the authority and responsibility to negotiate with foreign governments regarding appropriate programs and policies relating to climate change. This is reflected in such federal authorities as the GCPA and the UNFCCC, which principally delegate that responsibility to the Executive Branch.

The policies and choices in these negotiations—whether to affirmatively engage with the world on a global issue, or choose to withdraw, reassess, and re-engage at a later date—must be made by the political branches of the federal government. For even negative actions are undermined if states are permitted to act contrary to the federal government's actions. *See, e.g., Gerling Global v. Quackenbush*, No. Civ. S-00-0506WBSJFM, 2000 WL 777978 *1, *8 (E.D. Cal. 2000) ("In any case, even if the [Holocaust Victims Relief Act]

did not actually affect the negotiations, it certainly ***has the potential to affect foreign affairs and it is embarrassing to the United States to have individual states enacting legislation inconsistent with Executive promises and negotiations***.”). On the issues of great importance, the United States must speak with one voice.[21] California’s Agreements and Arrangements with Quebec are actions in a subject matter field exclusively reserved by federal law, and delegated to the President. They are preempted.

CONCLUSION

Through its Agreement and Arrangements with Quebec, which it stands ready to expand over the entire globe, California is attempting to establish its own foreign policy, usurping the power that the Constitution jealously confers exclusively on the federal government. As the United States has demonstrated in this Reply and Opposition, California’s act or series of acts stands in clear conflict with the express foreign policy of the United States to withdraw from the Paris Agreement to instead pursue a better deal that optimizes not only environmental protection, but economic growth, energy independence, and basic fairness in international relations. And, even if the Agreement and Arrangements do not directly conflict with federal foreign policy, which is not the case, California has impermissibly intruded on the field of foreign affairs occupied by the federal government. California’s actions are therefore preempted. This Court should declare the Agreement and Arrangements invalid, grant the United States’ motion for summary judgment, and enjoin further implementation of California’s unconstitutional actions.[22]

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[21] The amici in this case submit arguments that largely duplicate the arguments put forth by Defendants. The Professors of Foreign Relations, though, contribute one notable novel argument—that the United States’ one-voice argument is a myth. *See* ECF No. 113 at 9–14. But they cite only academic papers. And this claim also conflicts with their own acknowledgement that “the U.S. Supreme Court has invoked the ‘one-voice’ idea in a variety of contexts[.]” *Id*. at 7.

[22] In its opening brief, the United States moved to dismiss its fourth cause of action in its Amended Complaint under Federal Rule of Civil Procedure 41(a)(2). *See* ECF No. 102 at ii; *id.* at 4, n.2. Defendants have responded that this Motion instead be made under Federal

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Respectfully submitted,

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Rule of Civil Procedure 15, and ask that the Court so construe the request. *See* ECF No. 109. The United States has no objection to that approach.