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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, **v.** THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc., Defendants.	2:19-cv-02142-WBS-EFB **STATE DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** Date: June 29, 2020 Time: 1:30 p.m. Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: October 23, 2019

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

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INTRODUCTION

It is now clear why Plaintiff did not include foreign affairs preemption in its first motion for summary judgment: it has no viable theory of preemption. Despite its heated rhetoric, Plaintiff does not dispute that the linkage between the California and Quebec cap-and-trade programs serves a legitimate purpose: expanding compliance options for businesses regulated by the programs, and thereby reducing costs. While Plaintiff contends that the 2017 agreement and the regulations facilitating this linkage conflict with foreign policy, its theories of how they do so continue to shift, and the theories that it now stresses no more show the requisite clear conflict with an express foreign policy than its previous ones. Plaintiff's obstacle preemption argument, which was not pled in the complaint, likewise fails; indeed, Plaintiff is not even able to articulate how the 2017 agreement and the linkage regulations impede the objectives of any statute, negotiation of any new international agreement, or any other policy Plaintiff can articulate. And Plaintiff's field preemption claim does not even make it out of the starting gate, as this Court has already correctly held that the 2017 agreement and linkage regulations represent nothing more than exercises of California's normal police powers to regulate greenhouse gas (GHG) emissions. Moreover, California's efforts to reduce compliance costs for California businesses do not intrude into any exclusive area of foreign relations. In short, like its Treaty and Compact Clause claims, Plaintiff's preemption claims cannot withstand scrutiny and fail as a matter of law.

ARGUMENT

I. PLAINTIFF HAS FAILED TO ESTABLISH A CLEAR CONFLICT WITH ANY EXPRESS FEDERAL FOREIGN POLICY.

In its opposition and reply brief, Plaintiff confirms it is not challenging California's cap-and-trade program. Pl. Reply in Supp. of 2d Mot. for S.J. & Opp. to Def. 2d. Cross-Mot. for S.J. (ECF 125, hereafter Pl. Opp.) at 21:12, 40:15-22.[1] Plaintiff similarly acknowledges "the problem is not with California expanding [compliance] options of businesses local to the state." *Id.* at

[1] All terms and abbreviations not otherwise defined herein carry the same meaning as in State Defendants' Memorandum in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (ECF 110, hereafter Def. MSJ).

39:9-10. These statements box in Plaintiff's conflict preemption claim because, as this Court has recognized, expanding compliance options—and thereby decreasing compliance costs—is exactly what California's linkage with Quebec does. *See* ECF 91 (MSJ Order) at 9:19-22. Plaintiff also does not dispute that the cap-and-trade program and linkage are consistent with the express policy in the United Nations Framework Convention on Climate Change (UNFCCC): to stabilize GHG emissions in a cost-effective manner. Def. MSJ at 17:2-9; Pl. Opp. at 27:8-13. Plaintiff thus has little room to make out a conflict preemption claim.

Conflict preemption requires a clear conflict with an express foreign policy, notwithstanding Plaintiff's unsupported attempts to lower this burden. The only express foreign policy that Plaintiff can identify is the decision to withdraw the United States from the Paris Agreement, Pl. Opp. at 11:9-10, 13:8-13, but Plaintiff is unable to show how either the linkage regulations or California's agreement with Quebec concerning the linkage creates a clear conflict with the withdrawal. Indeed, rather than defend the theories it advanced in its motion for summary judgment, Plaintiff shifts to a series of new arguments, suggesting that linkage may frustrate or blunt withdrawal, or may impede negotiation of a new agreement, or may expand into a globe-wide "universal linkage" regime. None of these evolving theories is supported by evidence, and none demonstrates a clear conflict with an express foreign policy.

A. Plaintiff Cannot Avoid Its Burden to Show a Clear Conflict with an Express Foreign Policy.

Faced with a lack of authority and evidence for its arguments, Plaintiff devotes a significant portion of its brief to muddying the standard for foreign affairs conflict preemption, attempting to lower its burden below what the Supreme Court and Ninth Circuit require: a clear conflict with an express federal policy. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-21 (2003) ("express" foreign policy preempts state law where there is "evidence of [a] clear conflict."); *see also* Def. MSJ at 13:21-14:8 (citing cases). While Plaintiff pays lip service to the requirement of a "clear conflict," Pl. Opp. at 8:1-3, it attempts to diminish this standard, asserting that it is a "light-touch standard," *id.* at 8:3-4, that requires only a "mere likelihood" of "more than incidental" interference, *id.* at 7:3, 7:16-17, 18:12, 21:19, 25:4, or "some frustration," *id.* at 9:10. *See also id.*

at 25:23 ("California is certainly acting to blunt [withdrawal] to some degree"). Plaintiff even claims that it "does not need to prove a direct, existing conflict." *Id.* at 18:10-11. This is simply wrong.

In styling its burden as "mere likelihood" of "more than incidental" interference," Plaintiff cites the Supreme Court's decision in *Garamendi* and the Ninth Circuit's decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712 (9th Cir. 2014) ("*Von Saher II*"). *Id.* at 7:3-10. But neither case used the word "mere": that is Plaintiff's addition. *Garamendi*, 539 U.S at 420; *Von Saher II*, 754 F.3d at 720. Both cases make plain that the obligation to prove a likely and meaningful conflict is no less a burden than "clear conflict." *Id.* "Likelihood" certainly does not permit Plaintiff to rest its case on speculation: on the contrary, it is well-settled that "[a] hypothetical conflict is not a sufficient basis for preemption." *Incalza v. Fendi North Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict [with federal law] is insufficient to warrant the pre-emption of the state statute."). And, contrary to Plaintiff's assertion that no "direct" conflict is necessary, the Supreme Court has held that "some incidental *or indirect* effect in foreign countries" from a State's action is insufficient for preemption. *Clark v. Allen*, 331 U.S. 503, 517 (1947) (emphasis added).

Plaintiff is also wrong in asserting that foreign affairs preemption "in nowise depends on the strength of the state's interest." Pl. Opp. 9:3-4. Plaintiff claims the passage from *Garamendi* discussing the importance of States' areas of traditional competence, which State Defendants cited, Def. MSJ at 14:9-11, explains "what is ***not*** the law." Pl. Opp. at 8:10-19; *see Garamendi*, 539 U.S. at 420. That is incorrect. In *Garamendi*, the Supreme Court discussed two views of foreign affairs preemption: a "field"-based approach in the majority opinion in *Zschernig v. Miller*, 389 U.S. 429 (1968), and the "conflict"-based approach in Justice Harlan's dissent. 539 U.S. at 418-20. Far from rejecting Justice Harlan's approach, *Garamendi* applied it to decide that case, recognizing that under this approach, the strength of the state interest should be considered:

> For even on Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law. And since on his

> view it is legislation within "areas of ... traditional competence" that gives a State any claim to prevail, … it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.

Id. at 420. Indeed, it is from this very passage that Plaintiff draws (albeit with embellishment) its standard of "mere '"likelihood … [of] more than an incidental effect … ."'" Pl. Opp. at 7:3-4, 18:12-14, 21:18-21(quoting *Garamendi*, 539 U.S. at 420). Thus, because California "has acted within … its 'traditional competence'" here, Plaintiff should be required to show a conflict "of a clarity or substantiality" matching the importance of the State's traditional responsibility over air pollution control. *Garamendi*, 539 U.S. at 419 n.11; *see* Def. MSJ at 14:9-16:7.

Plaintiff also asserts that it should be subject to an "even less demanding" standard because California has "rushed" into the field of international relations. Pl. Opp. at 9:12-13. As shown below, *infra*, 23-25, Plaintiff's conclusory assertions about California's involvement in international relations beg the question before the Court. Plaintiff is unable to offer any justification for applying such a lax standard; certainly, it is not justified by any "unprecedented context," *id.* at 11:2, since *all* foreign affairs conflict preemption cases involve state laws or programs with alleged foreign affairs implications. Nor does the existence of the 2017 agreement make a difference: the Court has already ruled this agreement is consistent with the Treaty and Compact Clauses, the constitutional provisions that expressly govern state agreements with foreign entities. Plaintiff is unable to offer any reason for this Court to fashion a special preemption rule for agreements that both Clauses permit.

B. Plaintiff Cannot Show Any Clear Conflict Between Linkage and the United States' Withdrawal from the Paris Agreement.

Although Plaintiff has set out one express federal policy—U.S. withdrawal from the Paris Agreement—it has not shown a "clear conflict" with that policy, much less a conflict of the clarity and substantiality that *Garamendi* requires here. Indeed, Plaintiff makes no attempt to defend the comparison in its opening brief to *Garamendi*, *see, e.g.*, Pl. MSJ at 20:11-17, which, as State Defendants demonstrated, involved a far more concrete foreign policy, a weaker state

interest, and an actual, clear conflict, Def. MSJ at 26:15-29:5. Here, each of Plaintiff's shifting arguments fails for lack of either an express, definite, and authorized federal policy; lack of any conflict, let alone a clear, non-speculative one; or both.

1. As Plaintiff Concedes, Withdrawal from the Paris Agreement Will Be Effective Regardless of Linkage.

It is undisputed that the United States' withdrawal from the Paris Agreement "will become effective on November 4, 2020." Pl. Opp. at 13:6-7. And, as Plaintiff concedes, that exit will happen notwithstanding California's linkage with Quebec's cap-and-trade program. This reality is fatal to Plaintiff's conflict preemption claim because exiting the Paris Agreement is the only express, definite, and authorized federal policy it can identify.[2] For all that Plaintiff warns about undermining the President's "capacity … to speak for the Nation with one voice in dealing with other governments," it cannot show this voice has in any way failed to have its full constitutional effect. Pl. Opp. at 1:13-14, *see id.* at 28:6-9. The President *has* spoken for the nation: the United States will exit the Paris Agreement, and for all that others may criticize his decision—exercising their First Amendment rights—their criticism will not prevent this exit.

2. Plaintiff's Previous "Facilitation" Theory and Its Reframed "Functional Participation" Argument Both Depend on Unsupported Speculation.

Unable to show a clear conflict with exiting the Paris Agreement, Plaintiff suggests linkage may "blunt to some degree the effect of withdrawal." Pl. Opp. at 25:23. However, Plaintiff fails to establish that any of these theories establishes a clear conflict.

In its opening brief, Plaintiff argued that California's linkage with Quebec frustrated the United States' withdrawal from the Paris Agreement by "facilitat[ing] Canada's participation in

[2] Plaintiff does not dispute that a federal policy must be definite to support conflict preemption. Pl. Opp. 15:13-17:2; *see Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1186 (E.D. Cal. 2007); Def. MSJ at 13:24-14:8. Nor does it contest that a federal policy must be a valid exercise of constitutional authority. Pl. Opp. at 10:4-20; *see Medellin v. Texas*, 552 U.S. 491, 532 (2008) (finding a Presidential memorandum directing Texas courts to honor judgment of international tribunal was not grounded in his constitutional authority, and thus did not compel courts to "set aside … state laws"); Def. MSJ at 17:19-18:6. While Plaintiff purports to draw irrelevant and debatable factual distinctions from *Medellin* and *Central Valley Chrysler-Jeep*, Pl. Opp. at 10:4-20, 15:20-17:2, none of them undermine the requirement of a definite and authorized federal policy.

that agreement," because Canada might use allowances issued by the California Air Resources Board (CARB) as Internationally Transferred Mitigation Outcomes (ITMOs) to satisfy its obligations under the agreement, Pl. MSJ at 19:14-15, 22-24, 20:18-22:7. However, as State Defendants showed in their cross-motion, Def. MSJ at 21:10-22:3, this "facilitation" argument does not show conflict with an express foreign policy. Even if, as Plaintiff contends, linkage "allow[s] [Canada] to meet its Paris Agreement obligations," Pl. Opp. at 19:7-8, Plaintiff failed to identify any express policy—much less evidence of such a policy—against *other countries* meeting their Paris Agreement obligations. Nor does Plaintiff explain how such a policy could be reconciled with the UNFCCC's objective of stabilizing GHG emissions, which, as the "law of the land," is a foundational part of the United States' express foreign policy. Pl. Opp. 30:22-23.

In reply, Plaintiff claims State Defendants "misinterpret[ed]" its argument: the problem is not (as Plaintiff stated) Canada's participation in the Paris Agreement; it is that, "through a sub-unit of Canada, *California* is itself participating in an international agreement that has been rejected by the United States." Pl. Opp. 19:20-20:3 (emphasis added). In other words, Plaintiff's revised theory is that California is a "functional participant" in the Paris Agreement. *Id.* at 19:12; *see id.* at 18:24-26. This revision does not save Plaintiff.

Like its facilitation theory, Plaintiff's revised "functional participation" theory is based on implausible speculation. *See* Def. MSJ at 21:1-24:23. Both arguments rely on a 2016 report that (1) stated Canada would "consider" using ITMOs as a "complement" to meet its Paris Agreement obligations, and (2) mentioned the linkage of California and Quebec's cap-and-trade programs. Pl. Opp. at 18:18-26; Pl. MSJ at 21:5-22:7. But, as State Defendants demonstrated in their cross-motion, Canada's use of ITMOs, and use of CARB-issued allowances *as* ITMOs, remains conjectural; several legal and practical hurdles make Plaintiff's theory unlikely at best. Def. MSJ at 22:4-24:23. Particularly given the text of Paris Agreement Article 6, which provides for ITMOs between *Parties*, Plaintiff has not shown any likelihood that Canada will be able to use ITMOs from a non-Party—which the United States shortly will be. Paris Agreement, Art. 6, ¶¶ 2, 3 (First Iacangelo Decl. (ECF 12-2), Exh. 3); Def. MSJ at 23:10-15. Notably absent from

Plaintiff's reply is any attempt to plug this hole at the center of its theory.[3] Instead, Plaintiff characterizes its sole piece of evidence—Canada's statement that it "will consider" using ITMOs to partly meet its NDC—as "proof, not speculation." Pl. Opp. at 18:9-10, 22-23. Here again, Plaintiff is wrong: "consider" is an inherently noncommittal word. *See, e.g.*, *Consider*, Merriam-Webster's Collegiate Dictionary 246 (10th ed. 1997) ("to think about carefully"; "CONSIDER may suggest giving thought to in order to reach a suitable conclusion"). Canada's plan to think about using ITMOs hardly establishes a likelihood that it will do so, or will or can use CARB allowances.

Finally, Plaintiff's novel concept of "functional participation" is far too loose and insubstantial to establish conflict preemption. In no meaningful sense is California participating in the Paris Agreement by way of linkage with Quebec: for example, there is no argument that California will, either directly or "through a sub-unit of Canada," Pl. Opp. at 20:2, submit an NDC, provide a "national inventory report" of GHG emissions and sinks, vote in the Conference of the Parties, or in any other way actually participate in the Paris Agreement. *See* Paris Agreement, Art. 4 ¶ 2, Art. 13 ¶ 7(a), Art. 16 ¶ 1. Rather, under Plaintiff's theory, California is "involved" because Quebec businesses buy CARB-issued allowances (whether from private holders or at auction), which "allows" Canada to meet its emission reduction obligations. Pl. Opp. at 19:7. If that is all it takes to "participa[te] in Paris," *id.* at 19:12, then any State that shares information about how to reduce GHG emissions or whose businesses sell GHG-reducing products to Canadian clients is a "participant" too. This is not participation in an international agreement, and certainly no basis for preempting a state program.

3. Plaintiff's "Functional Analogue" Argument Likewise Fails.

Plaintiff also contends that California's linkage with Quebec "act[s] as a functional analogue to Paris," and thereby frustrates, or "blunt[s] to some degree," the President's decision to withdraw the United States from the Paris Agreement. Pl. Opp. at 22:6, 25:23. This

[3] Plaintiff is wrong to claim that State Defendants have "conceded" the 2017 agreement can "facilitate Canada's continued participation in the Paris Agreement"; the sentence it cites shows State Defendants characterized this argument as convoluted and speculative. Pl. Opp. at 18:7-9 (citing Def. MSJ at 1:23).

contention appears to be a revision of another prior argument—that the linkage advances cross-border emission strategies rejected by the United States—whose defects have been demonstrated. Pl. MSJ at 19:16-17; Def. MSJ at 19:14-20:6. In any event, the "functional analogue" argument is without merit.

As a threshold matter, an analogy is not a "clear conflict." *Cf. Kansas v. Garcia*, 140 S.Ct. 791, 806 (2020) (stating that mere "overlap" between state and federal laws "does not even begin to make a case for conflict preemption"). Plaintiff does not even attempt to explain how the use of measures analogous to those in the Paris Agreement creates a clear conflict with any express, definite, and authorized foreign policy. Its implication that California embraced such measures to "fill the perceived void" created by withdrawal from the Paris Agreement (Pl. Opp. at 25:7-17) is nonsensical, as linkage predates the Paris Agreement by more than three years.

Moreover, neither the 2017 agreement nor the linkage regulations provide any "functional analogue" of the Paris Agreement. Certainly, linkage has no functional analogue of an NDC: as this Court already has found, linkage does not set or alter any emission reduction goals. *See* MSJ Order at 9:24-25. Nor is the allowance trading facilitated by the California-Quebec linkage analogous to ITMOs under Paris Agreement Article 6. While Plaintiff suggests that the Paris Agreement is "an international cap-and-trade system" that involves "carbon trading," Pl. Opp. at 25:10-11, 26:13-14, it does not—and cannot—show that ITMOs constitute any kind of market. ITMOs are bilateral arrangements between Parties to the Paris Agreement that permit one sovereign Party to count an emission reduction (or other mitigation outcome) that occurs in another sovereign Party's territory towards its NDC. *See* Paris Agreement, Art. 6 ¶¶ 2, 3. It is thus no equivalent to the trading of allowances by private parties created by California's cap-and-trade program, much less the expansion of that private market in the linkage at issue.[4]

[4] Plaintiff also briefly analogizes California's regulatory language regarding offset credits generated from reducing emissions from deforestation and degradation (REDD) to Parties funding conservation of forests and other GHG sinks under Article 5 of the Paris Agreement. Pl. Opp. at 23:21-23. This argument is different from what Plaintiff presented in its original motion, *see* Pl. MSJ at 12:14-23, but it fails in any case. It is undisputed that CARB has not actually approved any offsets under a REDD plan, Pl. MSJ at 14 n.7, and the bilateral sovereign arrangements permitted under Article 5 of the Paris Agreement bear little resemblance to the market-based transactions between private entities that such a plan would permit.

Even if these analogies were more than superficial, they are irrelevant to the reasons behind the President's withdrawal from the Paris Agreement, and can contribute nothing toward showing "clear conflict." Even while it continues to stress the concerns that the President expressed about asymmetry of obligations between developed and developing nations, and the supposed economic burden on the United States, Plaintiff does not deny that California's linkage benefits the economy. Pl. Opp. 11:22-13:5, 14:13-20 (citing Byrd-Hagel resolution for Congress's similar objections to Kyoto Protocol).[5] Rather, Plaintiff acknowledges linkage *reduces* the compliance costs of regulated entities, Pl. Opp. at 41:25-26, and even contends linkage subsidizes their GHG reductions with Canadian dollars, Pl. MSJ at 21:26-22:1. *See* Def. MSJ at 20:15-22. Plaintiff does argue, mysteriously, that "what benefits California's treasury does not necessarily serve the nation as a whole." Pl. Opp. at 26:10-11. However, State Defendants' argument is not that linkage benefits California's treasury; rather, California *businesses*, which are the United States' businesses too, receive the benefit of reduced costs and any positive balance of allowance trading caused by linkage.[6] Plaintiff's faulty and superficial analogies thus bring it no closer to showing any clear conflict with the President's decision to exit the Paris Agreement.

4. Plaintiff Fails to Offer Any Persuasive Defense of Its Negotiating Leverage Argument.

While Plaintiff continues to assert that the 2017 agreement and the linkage regulations undercut U.S. negotiating leverage to pursue a new emissions agreement, Pl. Opp. at 17:23-25, 20:11-14, it offers little defense of this theory.

In the first place, "seeking a better deal" is not a policy upon which preemption may be based. As previously shown, seeking a better deal is not a *definite* policy. Def. MSJ at 25:13-26:3. To the contrary, as this Court has recognized, "[i]t is merely a statement of an intent to negotiate on the terms specified," which is "a means to achieve an acceptable policy but not the

[5] California's linkage with Quebec plainly does not resemble the supposed asymmetry of the Paris Agreement, since Quebec has equivalent or stricter targets than California. MSJ Order at 25:20-26:2.

[6] In addition, it is undisputed that those same American businesses would suffer severe economic burdens if Plaintiff's suit were successful. ECF 105 at 22:1-23:14 (opposition brief of International Emissions Trading Association).

policy itself." *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1186. Plaintiff attempts to distinguish this precedent by asserting "the United States has moved well beyond simply announcing a 'strategy'" and is "implementing the President's unmistakably declared 'policy.'" Pl. Opp. 16:17-19. But that "actual implementation" of "declared policy" refers only to exit from the Paris Agreement, *id.* at 16:12-16; Plaintiff never shows that "seeking a better deal" has moved beyond a nebulous interest into a "concrete set of goals, objectives, and/or means." *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1186.

Even if Plaintiff could show an express foreign policy in favor of negotiating a better deal on international GHG emissions, its leverage theory would still fail because it cannot show that the California-Quebec linkage clearly conflicts with such a policy. As previously noted, in its opening brief Plaintiff failed to explain how an arrangement with a Canadian province that lowers the cost of emission reductions discourages Canada or other major emitters from entering into an agreement to reduce their emissions. Def. MSJ at 26:4-14. Far from curing this defect, Plaintiff asserts without explanation that "Canada's interest in negotiating with the federal government is diminished" by linkage. Pl. Opp. at 20:11-14. Its argument appears to be that Canada would take linkage between a single province and single State as a satisfactory alternative to an international emissions treaty. *See also* Pl. Opp. at 35:8-10 (stating linkage "provides the federal government's negotiating partners with an alternative to engaging in diplomacy with the United States."). But Plaintiff offers no evidence that this is true. In marked contrast to the letters and testimony from State Department officials that featured in *Garamendi*, Plaintiff offers nothing at all—not even a proposed undisputed fact—to show such a reduction of interest exists outside its brief. *See Garamendi*, 539 U.S. at 424-25. Despite State Defendants' challenge, Plaintiff's offers no response to the *amicus* brief of past diplomats who explained how state and local efforts *enhanced* climate negotiations. *See* Def. MSJ at 26:8-14 (citing ECF 65-1, at 4:20-5:3). And it defies common sense that other countries interested in securing emission reductions from the United States would see linkage—which does not itself set any emission reduction goals—as a satisfactory alternative. Thus, Plaintiff has failed as a matter of law to show a clear conflict based on its leverage theory.

5. Plaintiff's New "Universal Linkage" Theory Fails.

In a dramatically expanded argument, Plaintiff warns that "if this Court should uphold California's [linkage] with Quebec, nothing would prevent California and WCI from establishing a comparable relationship with ***every other jurisdiction in the world***." Pl. Opp. at 23:24-24:1. While Plaintiff asserts that such a "universal" linkage would conflict with the policy of withdrawal from the Paris Agreement, *id.* at 23:21, 24:3-5, it does not even begin to show any likelihood California could pull off such a feat. It merely asserts there is "no limiting principle to such a viral-like expansion of California's own international climate policy." Pl. Opp. 24 at n.10. Putting aside the sheer logistical obstacles to linkage between California and every State, province, canton, and other subnational government in the world, Plaintiff itself identifies one absolute limiting principle: under California law, the State may link only with jurisdictions that have "adopted program requirements for greenhouse gas reductions … that are equivalent to or stricter than those required" by California. Cal. Gov. Code, § 12894(f); Pl. Opp. at 24 n.10. Indeed, as discussed *infra*, 20-21, this is one reason why California has so far linked to only two jurisdictions.

Plaintiff attempts to bolster its wild speculation about universal linkage with former Governor Brown's criticism of the President's withdrawal from the Paris Agreement, asserting that he, and other officials, meant for universal linkage to "fill the perceived void" left by withdrawal. Pl. Opp. at 25:9. Governor Brown said no such thing, of course. *See* Pl. Stmt. of Undisputed Facts, at Fact Nos. 102-03 (ECF 102-1, at 20). Plaintiff offers no evidence of California pursuing "universal expansion"—only yet another conclusory accusation that "California is engaged in the field of international relations to posture itself as its own player in world affairs." Pl. Opp. at 25:7-8. Such accusations are indistinguishable from Plaintiff's field preemption argument. *Id.* at 9:12-13 ("California rushes headlong into the field of international relations"); *id.* at 15:21-16:1 ("Here, California is engaged in the 'exclusive' federal domain of foreign affairs and international agreements"). That distinct theory of preemption is subject to its own requirements under the Foreign Affairs Doctrine, which, as shown below (*infra*, Part III), Plaintiff does not satisfy.

Plaintiff's universal linkage theory is thus based on entirely unsupported speculation, which cannot trigger preemption and thus fails as a matter of law. *See Rice*, 458 U.S. at 659 (holding that "hypothetical or potential" conflict cannot preempt state law).

* * *

None of Plaintiff's theories of conflict are factually supported or legally sufficient to show a clear conflict with an express foreign policy, much less a conflict of a clarity and substantiality commensurate with California's traditional police powers over air pollution control. Accordingly, Plaintiff's conflict preemption argument fails as a matter of law, and the State Defendants are entitled to summary judgment against it.

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

Consistent with its efforts to lower its burden for conflict preemption, Plaintiff argues that even if it cannot prove a "clear conflict," "it would still be entitled to relief if it could demonstrate that [linkage] represent[s] a cognizable obstacle to the 'full purposes and objectives' of the United States' foreign policy." Pl. Opp. at 29:11-14. But Plaintiff cites no case—and State Defendants have found none—in which a court relied on an "obstacle"-based argument to hold that a foreign policy could preempt state law with anything less than a clear conflict.[7] If obstacle preemption is simply another way of stating the *Garamendi* rule, Plaintiff's claim fails because it has not shown a clear conflict with federal policy. *See* Part I, *supra*.

If Plaintiff asserts a true obstacle preemption claim, it must establish that state law poses an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Yet the Supreme Court has made clear obstacle preemption, as much as express or conflict preemption, must be "grounded in the text and structure of [a] statute," treaty, or constitutional text—not the unenacted "priorities or

[7] While both *Garamendi* and *Von Saher II* cite "obstacle"-based language from *Crosby*, those two cases apply the familiar conflict preemption test, *Garamendi*, 539 U.S. at 424; *Von Saher II*, 754 F.3d at 720. One federal court, faced with an obstacle preemption claim based solely on executive foreign policy—*i.e.*, that state law "impedes the goals of a[] federal policy," rather than the goals of a statute—questioned whether such a doctrine "exists at all." *Hartford Enters., Inc. v. Coty*, 529 F. Supp. 2d 95, 102 (D. Me. 2008) (rejecting "obstacle" argument under abstention standard).

preferences of federal officers." *Garcia*, 140 S.Ct. at 801, 804, 807 (internal quotations omitted); *see also Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901 (2019) ("Invoking some brooding federal interest … should never be enough to win preemption of a state law."). If Plaintiff is asserting such a claim, it fails for four reasons. First, Plaintiff waived any obstacle preemption claim based on the Global Climate Protection Act (GCPA) by failing to plead the claim in its Amended Complaint. Second, its claim is not grounded in the "text and structure" of the GCPA—or, under its new argument, the UNFCCC. Third, Plaintiff fails to present evidence of an impediment to the President's ability to negotiate a new international agreement, the "obstacle" it identified. Fourth, it has not shown any other obstacle to the formulation of international climate policy.

A. Plaintiff Has Waived a Statutory Obstacle Preemption Claim Based on the Global Climate Protection Act.

As previously shown, Plaintiff did not plead a statutory preemption claim, or reference the GCPA, in its Amended Complaint; thus, it has waived this argument. Def. MSJ at 29:12-18. Plaintiff responds with an abstract discussion of the Supremacy Clause doctrines, accusing State Defendants of "attempt[ing] to manufacture a supposed wall between foreign affairs and statutory preemption, [where] there is none." Pl. Opp. at 30:19-20. This is not the argument. Rather, State Defendants argue that Plaintiff has failed to satisfy notice pleading's minimal requirements for this claim because obstacle preemption and the GCPA appear nowhere in its pleadings. Plaintiff can point only to its allegation of interference with foreign policy "*including, but not limited to the United States' participation in UNFCCC*." Pl. Opp. at 30 n.15 (quoting Am. Compl. ¶ 178). This reference to other, unspecified foreign policy plainly fails to provide adequate notice of a claim under the GCPA. Plaintiff has waived its statutory obstacle preemption argument and, in particular, any argument based on the GCPA.

B. Neither the Global Climate Protection Act nor UNFCCC Supply Any Basis for Obstacle Preemption.

Even if Plaintiff had not waived its obstacle preemption claim, it has failed to ground its argument in the "text and structure" of a statute, treaty, or constitutional text, as required. *Garcia*,

140 S.Ct. at 801, 804, 807. In its opening brief, Plaintiff identified the GCPA as the primary statutory basis for its obstacle preemption argument. Pl. MSJ at 24:20-25:13. As set forth in State Defendants' cross-motion, however, the GCPA does not invest the President with ongoing authority over "national and international climate change policy," Pl. MSJ at 24:23-24; rather, its primary function was to assign the executive a discrete task: report a climate change strategy to Congress. Pub. L. 100-204, § 1104, 101 Stat. 1407, 1409 (1987); Def. MSJ at 31:26-32:3. That task was completed in 1991, and the climate strategy it reported—"facilitat[ing] the negotiation of a framework climate convention"—was realized in 1992 with the UNFCCC. *See* Def. MSJ at 3:22-4:2; Second Dorsi Decl., Exh. 18, at 77 (ECF 110-2). In any event, given that the stated purposes and objectives of the GCPA all concern understanding and reducing GHG emissions, linkage cannot possibly stand as an obstacle to these. Def. MSJ at 29:19-30:7; *see also id.* at 29:19-30:7 (noting Plaintiff's failure to discuss the GCPA's objectives at all in its briefing).

Plaintiff offers no answer. Instead, after a conclusory reference to the GCPA, it pivots to the UNFCCC, arguing that "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." Pl. Opp. at 33:21-24. In addition to being new, *see* Pl. MSJ at 26:4-12, this argument is unmoored from the "text and structure" of the UNFCCC. *Garcia*, 140 S.Ct. at 804. The UNFCCC, as an international treaty ratified by 197 countries, says nothing about the United States President; nor does it assign responsibilities for developing climate policy between the internal divisions of a UNFCCC Party. *See* Pl. Opp. at 34:7-12 (citing UNFCCC, Art. 4, ¶ 1(b)). Thus, Plaintiff has no textual basis (or other authority) to assert "[t]he UNFCCC clearly directs the President to develop and execute federal climate policy." Pl. Opp. at 34:22-23.

As the Ninth Circuit recently observed, "[t]he Supremacy Clause gives priority to the Laws of the United States, not the priorities and preferences of federal officers, or the unenacted approvals, beliefs, and desires of Congress." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020) (internal quotations omitted). Because Plaintiff cannot show any ongoing directive to the President in the GCPA or the UNFCCC, Plaintiff's vague invocations as to their "intent and effect" or "the will of the federal

government" at most amount to such unenacted preferences, and its obstacle preemption claim thus fails.

C. Linkage Does Not Impede the President from Negotiating a New International Agreement on Greenhouse Gas Emissions.

Plaintiff argues linkage is an obstacle to the President's ability to negotiate "a meaningful substitute arrangement" for the Paris Agreement, which, in turn, compromises the President's ability "to speak with one voice on behalf of the nation." Pl. Opp. at 35:14-19; *see also* Pl. MSJ at 27:8-20. This appears to be the same argument as Plaintiff's "negotiating leverage" theory of conflict preemption, which, as demonstrated above, fails because Plaintiff has shown no definite policy of "seeking a better deal" nor any clear conflict with such a policy. *See, supra*, 9-10. In making the same argument under obstacle preemption, Plaintiff fails only adds another defect: its failure to identify a statute or treaty whose purposes and objectives, as set out in its text and/or structure, include the President's negotiation of a new emissions agreement. *See, supra*, 13-15. And even if Plaintiff could overcome these defects, its obstacle preemption claim would fail because Plaintiff does not explain how linkage could impede such negotiations, much less offer any evidence that it does or will do so.

As set out in State Defendants' cross-motion, Plaintiff never shows how the 2017 agreement or the linkage regulations reduce the President's negotiating power. Def. MSJ at 30:12-31:5. That negotiating power comes primarily from his constitutional authority: it is undisputed that the President could negotiate an international treaty or executive agreement on GHG emissions, and that treaty or agreement would have its appropriate preemptive effect over inconsistent state laws. U.S. Const., Art. II, § 2; *id.*, Art. VI. That is what the "one voice" doctrine means: not that the only permissible speech is to agree with the President, but that, where the President has been delegated authority to act for the nation as a whole, the President's voice is what legally affects the nation's foreign relations. *Crosby*, 530 U.S. at 381; *see Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941). And that is the "bargaining power" the Supremacy Clause ensures: the capacity to making binding offers and commitments with the assurance that

"state law must yield" when it conflicts with or "impairs" a treaty or agreement. *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

The only explanation Plaintiff offers for how linkage could impede negotiations is that it "provides" other countries an "alternative to engaging in diplomacy with the United States." Pl. Opp. at 35:8-10. This is the same argument as discussed above: that Canada would have "diminished" interest in negotiating with the national government given its access to CARB allowances, *id*. at 20:11-14, and it suffers the same flaws. Here too, Plaintiff offers no evidence to show any purported impediment to negotiations. *See*, *supra*, 9-10.[8] This argument thus remains entirely speculative.

D. Plaintiff Has Not Shown Any Other Obstacles to Foreign Policy as in *Crosby*.

Besides claiming linkage diminishes the President's negotiating power—a claim it has not supported with evidence—Plaintiff articulates no other specific obstacle to federal foreign policy on climate change. It does not claim that linkage impedes the United States' compliance with the UNFCCC, notably. As with the GCPA in its opening brief, Plaintiff neglects to discuss the UNFCCC's objectives—to ensure emissions reductions are achieved cost-effectively—or to show that linkage poses any obstacle to these objectives. UNFCCC Art. 2, 3 ¶ 3. Indeed, the United States' submissions under the UNFCCC identify California's climate programs and laws as "measures that *complement* federal efforts to reduce GHG emissions." Def. MSJ at 9:22-10:24, 33:12-19 (citing National Communications) (emphasis added).[9] Neither does Plaintiff offer any

[8] Plaintiff's undeveloped assertion that "the 'enclaves' at issue here, *i.e.*, California's economy, have been as much negotiated away as they were in *Crosby*," fails to offer any clarity on this leverage theory. Pl. Opp. at 35:3-5. Nor does Plaintiff explain how linking to another cap-and-trade program in any way resembles the Massachusetts bar on state contracts with Burmese or Burma-related businesses. The latter clearly "fenced off" a portion of the U.S. economy; linkage does nothing comparable. *Crosby*, 530 U.S. at 381; *see* Def. MSJ at 30:27-31:1, 32:21-25.

[9] The closest to a substantive reply Plaintiff makes to the National Communications is that they describe California's programs generally, without mentioning linkage specifically—as if the State Department might not have fully understood the features of the programs it was reporting to the United Nations. Pl. Opp. at 27 n.12. This is not a persuasive inference.

evidence like the foreign diplomatic protests over the Massachusetts Burma law in *Crosby*. *See* 530 U.S. at 385-86.

In describing UNFCCC Article 4 as creating a "regime" for international negotiations, Plaintiff attempts to compare the UNFCCC to the federal Burma law's sanction regime at issue in *Crosby*. Pl. Opp. at 34:5-15. But the contrast is more illuminating. In *Crosby*, the federal Burma law represented a unique "calibration of force": it created a "specific range" of flexible sanctions, which empowered the President to execute a tailored diplomatic strategy in a "deliberate effort to 'steer a middle path.'" 530 U.S. at 377-380. State sanctions under Massachusetts' Burma law exceeded that range, and that inconsistency in legal effects—a state law prohibiting what federal law allowed—muddled the intended diplomatic effect, which in turn compromised the President's ability to speak for the nation effectively. *Id.* at 379-81. Here, by contrast, there is no such inconsistency between linkage and UNFCCC Article 4; indeed, Article 4 does not create anything like a "specific range" of measures that could produce an inconsistency in legal effects. Article 4 merely sets forth a series of general commitments, including preparation of national and, where appropriate, regional programs to address climate change. UNFCCC (First Iacangelo Decl., Exh. 1), Art. 4 ¶ 1(b). This broad directive can have no preemptive effect over state-level and local-level action, particularly since, as noted above, the UNFCCC says nothing about the internal assignment of roles for developing climate policy within a UNFCCC Party. Rather, the State Department previously indicated that state measures complement federal efforts under UNFCCC Article 4, and increase the credibility of international negotiations. Second Dorsi Decl., Exh. 22 at 127; ECF 65-1, at 4-5; *see* Def. MSJ at 9:18-22, 17:10-18.

Because Plaintiff has not shown linkage poses an obstacle to the purposes and objectives of any statute, treaty, or constitutional text, its obstacle preemption claim fails as a matter of law, and State Defendants' summary judgment motion should be granted on that claim.

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

State Defendants showed in their cross-motion that Plaintiff's field preemption claim fails as a matter of law for two independent reasons: (1) linkage addresses an area of traditional state

responsibility and (2) it does not intrude on the federal government's foreign affairs power. Def. MSJ 33:23-45:14. Plaintiff fails to rebut either point.

A. The 2017 Agreement and the Linkage Regulations Address Traditional State Responsibilities.

1. Plaintiff Offers No Reason for the Court to Reconsider its Prior Summary Judgment Order.

Plaintiff's field preemption claim fails first and foremost because Plaintiff offers no good reason for the Court to revisit its conclusion that the 2017 agreement and linkage regulations are exercises of the State's normal police power to regulate greenhouse gases, which precludes Plaintiff from satisfying the first element of field preemption. *See Movsesian v. Vitoria Verischerung AG*, 670 F.3d 1067, 1074 (9th 2012). Although Plaintiff asks the Court to reconsider its prior summary judgment order, Pl. Opp. at 36:19-23, the only argument it offers is that the Court's adjudication of its Compact Clause claim should not control its preemption claim under the Foreign Affairs Doctrine. *Id.* at 36:26-37:4. However, in arguing its Compact Clause claim, Plaintiff insisted "[t]here's unquestionably an overlap in the tests [and] in the analysis" as between that claim and its claim under the Foreign Affairs Doctrine, ECF 97 at 48:8-17, and it persisted in advancing that argument after the Court warned it would be bound by any rulings made, *id.* at 48:12-49:2. In addition, Plaintiff never addresses the Court's findings and reasoning behind its summary judgment order. The Court's findings on how linkage operates, and what it does *not* do, *see* MSJ Order at 9:19-25, together with "well-settled law" that greenhouse gas regulation falls within California's police powers, supported the Court's ultimate conclusion that neither the 2017 agreement nor the linkage regulations "allow California to exercise any power it would not normally have." *Id.* at 30:3-23; *see id.* at 25 n.12. Thus, Plaintiff fails to offer any persuasive reason to revisit that conclusion.

2. Plaintiff Fails to Rebut the Text and History of Linkage Showing its Real Purpose Is to Expand Compliance Flexibility for California Businesses.

Even if the issue is reconsidered, this Court should find that the 2017 agreement and the linkage regulations are an exercise of traditional state responsibility. The parties agree that, under the Ninth Circuit's field preemption cases, courts must judge a State's claim to address a

traditional area of responsibility by looking to the law's "real purpose." Pl. Opp. at 37:11-13, 38:3-18; Def. MSJ at 35:17-18, 40:17-41:26. Plaintiff, however, ignores *how* courts determine real purpose. As Defendants showed in their cross-motion, Def. MSJ at 40:17-41:26, the Ninth Circuit has consulted the "text and legislative history" of the challenged laws, finding their targeted scope and explicit embrace of foreign policy goals showed their purpose lay outside traditional state subject matters of insurance and property torts. *Movsesian*, 670 F.3d at 1075; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010) ("*Von Saher I*"); Def. MSJ at 40:17-41:26. Here, in contrast, the text and scope of the linkage regulations—as well as their regulatory history—show their "real purpose" is expanding compliance flexibility, by allowing California businesses to turn in either CARB- or Quebec-issued instruments to satisfy their compliance obligation. Def. MSJ at 35:17-37:24. Plaintiff makes little attempt to rebut this demonstration.

Plaintiff notes that CARB expressed hope that "a successful California cap-and-trade program would encourage other jurisdictions to adopt similar programs and link into a regional system." Pl. Opp. at 42:5-7 (emphases omitted); *see id.* at 42:9-23, 43:5-7. Plaintiff claims this hope demonstrates California's "real purpose" is to expand linkage into a "globe-wide regime for regulating GHG emissions." *Id*. at 45:21-24; *see also id.* at 44:17-46:18. However, linkage does not regulate GHG emissions; as this Court has recognized, "linking does not substantively alter each jurisdiction's cap-and trade program." MSJ Order at 9:24-25. Instead, both California and Quebec set their own greenhouse gas emission targets and regulations, and they retain the sovereign right to shape their programs as they wish. *Id.* at 9:28-10:14, 27:11-21. Certainly, one of the ultimate goals of linkage is to "[d]ecreas[e] GHG emissions to achieve the AB 32 mandate" (Pl. Opp. at 47:8), but linkage does so not by regulating GHGs, but by allowing already-regulated businesses to seek out the most cost-effective emissions reductions across a broader range of sources, and increasing the liquidity of the allowances market that facilitates emissions reductions. Def. MSJ at 6:14-19, 8:1-6, 36:13-37:3.

As a consequence, a linked market can expand only if jurisdictions voluntarily adopt cap-and-trade programs under their own, independent authority—the same way a uniform tax

standard comes into being by States adopting compatible laws under their own, independent authority. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 456, 473, 475 (1978); *see* Def. MSJ at 7 n.3, 37:4-16 & n.22. That is what CARB meant by "maximizing emission reductions through coordinated subnational efforts." Pl. Opp. at 47:9 (quoting 2016 Initial Statement of Reasons) (emphases omitted). What California can do—and has done—to encourage other jurisdictions to adopt their own programs is to demonstrate that its cap-and-trade program works, and that the linked market works. That is how linkage "help[s] catalyze action throughout the country and the world": by proving the concept. *Id.* at 46:15-18 (quoting 2012 Initial Statement of Reasons) (emphases omitted).[10] Aspiring to such leadership by example does not bring California outside the realm of traditional state responsibility, which includes operating as "laboratories for "novel social and economic experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Plaintiff also introduces an entirely new argument that "as a matter of pure economics, California and Quebec in fact jointly regulate each other's GHG emissions." Pl. Opp. at 44:11-12. Besides the impropriety of raising this new point on reply, Plaintiff's economic argument is wrong as a matter of fact and law. Plaintiff relies on two articles that apply Gresham's Law to linked carbon credit markets and find, in essence, that linkage with a poorly designed cap-and-trade program may flood the market with artificially cheap credits, allowing covered entities to satisfy their compliance obligations without reducing equivalent emissions. *Id.* at 44:1-10 (citing L. H. Gulbrandsen et al., *The Political Roots of Divergence in Carbon Market Design: Implications for Linking*, Climate Pol'y, 19:4 (2019), and J. 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 (2009)). Based on this, Plaintiff asserts that linked jurisdictions must have at least a "tacit" "arrangement [for] cross-border regulation." Pl. Opp. at 43:21-24. But far from suggesting joint control, the articles cited by Plaintiff conclude that

[10] *See also* Pl. Opp. at 46:12-13 (linkage will "demonstrate a workable template") (quoting letter from CARB executive officer to Governor Brown); *id.* at 46:5-7 (linkage "will demonstrate the ability of two jurisdictions to effectively work together") (same).

incompatible programs simply will not—and should not—link to each other. Howland, *supra*, at 442-43 ("California must take care to avoid linking with poorly designed cap-and-trade markets"); Gulbrandsen, *supra*, at 434 (Given the diversity of cap-and-trade programs, "it is hardly surprising" that global linkage "has remained elusive.").

That solution—avoiding or cancelling linkage between incompatible programs—is in fact what California has done. As noted above, California law only permits linkages with jurisdictions that have greenhouse gas emission reduction requirements that are equivalent to or stricter than California's. *See* Cal. Health & Safety Code § 12894(f)(1). Indeed, it is precisely because California and Quebec are *not* jointly regulating that consultations and communication are important to maintain harmonization. The 2017 agreement provides that the jurisdictions "will endeavor" to keep their programs harmonized, where possible, but recognizes jurisdictions' full authority to modify their programs. ECF No. 7-2, art. 14, 20. And if differences among programs cannot be resolved, the jurisdictions can exit the linkage, as Ontario did in 2018. *See id.*, art. 17; Def. MSJ at 9:13-16. Thus, the 2017 agreement plainly does not allow California and Quebec to jointly regulate each other's greenhouse gas emissions.

3. Plaintiff's Reliance on "Extrinsic Evidence" of Purpose Is Unprecedented, Improper, and Unpersuasive.

Although Plaintiff abandons some of its opening brief's irrelevant "extrinsic evidence," Pl. MSJ at 33:16, it continues to urge the Court to determine the linkage's "real purpose" based on "fourteen years' worth of statements, laws, regulations, and policies" unrelated to the 2017 agreement or the linkage regulations. Pl. Opp. at 38:22-23.[11] Neither *Movsesian* nor *Von Saher I* engaged in such a far-reaching exercise, and recent statutory preemption cases explain why not:

[11] For example, Plaintiff cites AB 32, claiming it directs CARB to "facilitate the development of integrated . . . regional, national, and international greenhouse gas reduction programs," Pl. Opp. at 42:9-11 (quoting Cal. Health & Safety Code § 38564), but makes no showing that this language refers to a future cap-and-trade program, much less linkage. In context, the statute directs CARB to "consult" with state, federal, and national governments and "*identify the most effective strategies and methods to* … facilitate the development of integrated and cost-effective regional, national, and international greenhouse gas reduction programs." Cal. Health & Safety Code § 38564 (emphasis added). In other words, it is an information-exchange directive, not a directive for regulating outside California's borders.

preemption turns on "*what* the State did, not *why* it did it." *See, e.g., Va. Uranium*, 139 S.Ct. at 1905 (citing cases). These cases confirm that foreign affairs field preemption should focus not on how "California fancies itself," Pl. Opp. at 38:22-23, but on what California has enacted into law, as demonstrated by the law's text, as well as the stated goals and findings in the law. Plaintiff offers no authority or even reason for looking beyond such materials.

In any event, none of the statements cited by Plaintiff transform linkage from a compliance flexibility measure into the "globe-wide regime" Plaintiff imagines. For example, citing a 2017 CARB environmental analysis document discussing the global reach of GHGs, Plaintiff argues that "when a state undertakes to regulate GHGs, it is necessarily undertaking to regulate a single, global airshed."[12] *Id.* at 40:3-13. But Plaintiff immediately concedes that "of course" States can "regulate the emission of GHGs within their borders." *Id.* at 40:15-22; *see also id.* at 41:13-14. Here, California's regulations plainly fall within this power: the emission restrictions in California's cap-and-trade regulation apply only to California covered entities and their emissions, Cal. Code Regs., tit. 17, §§ 95811, 95841, and the linkage with Quebec does not change this, MSJ Order at 9:24-25. Plaintiff's distinction is that California has gone beyond its traditional powers by "entering into agreements with foreign powers." Pl. Opp. at 40:24-26. However, this Court already rejected that assertion in ruling on Plaintiff's Compact Clause claim: "the [2017 agreement] does not allow California to exercise any power it would not normally have," in particular, California's "police powers to … regulate greenhouse gas emissions." MSJ Order at 30:18-23; *see also*, *infra*, 23-25.

Pointing to various statements by Governors, Plaintiff also asserts there is a California foreign policy on climate change. Pl. Opp. at 39:11-12, 41:2-7, 43:1-4; *see* Pl. MSJ at 31:10-34:15, 35:18-36:13. However, it fails to establish that these statements have anything to do with

[12] Plaintiff also asserts there is a distinction between GHGs and "conventional pollutants," which, it claims, have more localized effects. Pl. Opp. at 39:20-25. The relevance of this purported distinction is unclear, given Plaintiff's concession that a State's police powers encompass regulating its own GHG emissions. In any case, Plaintiff's distinction, if there is one, makes no difference here: the Clean Air Act considers GHGs to be "pollutants" as much as sulfur dioxide, and reaffirms "pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

linkage. Plaintiff also fails to distinguish the Ninth Circuit's clear holding that state and local officials act well within their traditional responsibilities when they communicate their "views and values" to the citizenry. *Gingery v. City of Glendale*, 831 F.3d 1222, 1230 (9th Cir. 2016). While it contends—without explanation—that "California has taken real, affirmative action" and "entered into agreements with foreign nations," Pl. Opp. at 46:24-26,[13] it does not even try to explain how that distinction makes a difference, especially in the absence of any violation of the Treaty Clause or the Compact Clause.

Similarly, Plaintiff's hyperbolic assertion that linkage "stands ready to expand over the globe," *id.* at 49:8-9, glosses over what the linkage regulations actually do: they allow California covered entities to turn in Quebec-issued compliance instruments to satisfy their compliance obligation under California regulation. MSJ Order at 9:19-22; Cal. Code Reg., tit. 17, § 95943(a). It is, however, what a law actually does that drives the "real purpose" test. *Movsesian*, 670 F.3d at 1075; *see also Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 619 (9th. Cir. 2013) (ruling, as to the "intrusion" prong of foreign affairs field preemption, what the challenged law "*may* permit … is not the test for preemption"). Because the linkage merely determines how California entities may comply with their obligations under California environmental law, its "real purpose" is firmly within the area of traditional state responsibility.

B. Plaintiff Fails to Identify Any Intrusion on Exclusively Federal Foreign Affairs Powers.

Plaintiff's field preemption claim also fails because it does not establish the second element of field preemption: that state law intrudes into the "the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432; *Movsesian*, 670 F.3d at 1072. As set out in State Defendants' cross-motion, linkage does not resemble any of the state laws that have been found subject to field preemption by either the Supreme Court or the Ninth Circuit, all of which either intruded on the federal settlement of wartime claims or

[13] Plaintiff offers no evidence at all for its claim that California officials have "me[t] with foreign leaders to adopt contrary international policies and arrangements from those announced by the United States." Pl. Opp. at 47:1-2. To the extent Plaintiff refers to the 2017 agreement and linkage, Plaintiff has not demonstrated any conflict or "contrary" policy. *See, supra*, Part II.

attempted to set up genocide reparation regimes. Def. MSJ at 43:18-44:3. Linkage, in contrast, expands the compliance options of California businesses under an internal cap-and-trade program, thereby reducing its cost. This does not implicate federal powers over foreign relations, not even incidentally.

Rather than explain how such a cost-containment measure intrudes on foreign relations, Plaintiff goes big, stating that the linkage presents "the clearest case ever presented to any federal court" because California, "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." Pl. Opp. at 47:21-24; *see also id.* at 48:2-4, 5-16 ("The Agreement and Arrangements … ***are*** a direct entry into the prohibited, 'exclusive' field of foreign policy," and "California is pursuing its own foreign policy, plain and simple."). That is obviously not true. Indeed, because linkage predates the Administration's change in diplomatic policy on the Paris Agreement and greenhouse gas emissions by more than three years, it cannot be a *reaction* to that change. Even more fundamentally, as shown above, linkage does not create a "foreign policy" or even forge much of a path: it simply lets regulated entities under two existing, already similar cap-and-trade programs use each program's compliance instruments and thereby reduce costs.

Signing the 2017 agreement is the *only* thing factually related to linkage that Plaintiff identifies as an intrusion into the federal foreign affairs powers. Pl. Opp. at 47:23-24 (California "forge[d] an operative agreement with a … foreign nation."); *id.* at 36:1, 37:17-38:2. But this is once again simply its Compact Clause claim, recycled: arguing that *any* agreement with a foreign jurisdiction, without Congress's approval, is per se unconstitutional. *See* ECF 78, at 29:15-33:2 & n.32; ECF 97 at 36:4-38:25. The mere fact that California has entered into an agreement with a foreign subnational entity does not *ipso facto* trigger preemption under the Foreign Affairs Doctrine: state agreements with foreign governments are the domain of the Treaty Clause and the Compact Clause, and implied preemption under the Foreign Affairs Doctrine cannot be expanded to swallow up the provisions of the Constitution expressly dealing with such agreements. Courts have in fact upheld agreements between States and foreign jurisdictions: for example, an

agreement between San Diego and Mexico concerning nonresident juveniles. *In re Manuel P.*, 215 Cal. App. 3d 48, 71 (1989) (finding border youth project did not "implicate[] exclusive federal power over foreign relations"); *see also* Def. MSJ at 42 n.31 (discussing existence of thousands of uncontroversial agreements between subnational governments and foreign jurisdictions). Plaintiff has conceded information-sharing agreements are acceptable. ECF 78, at 36:3-4 ("Virginia is at liberty to share information with the United Kingdom, or Idaho with British Columbia."); *see also id.* at 34:9-36:12 (discussing various acceptable examples of state-foreign agreements). And this Court has declined Plaintiff's proposed per se rule. MSJ Order at 28 n.13. Plaintiff does not even attempt to explain why such a rule should be reinstated under the guise of preemption and the Foreign Affairs Doctrine.

As Plaintiff has failed to establish either the first or second element of field preemption, its field preemption claim fails as a matter of law, and State Defendants are entitled to summary judgment on that claim as well.

CONCLUSION

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

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Respectfully Submitted,

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