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August 10, 2020

Via ECF

Maria R. Hamilton
Clerk of Court
John Joseph Moakley U.S. Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: *State of Rhode Island v. Shell Oil Products Company, LLC, et al.*, No. 19-1818
Plaintiff-Appellee's Citation of Supplemental Authorities

Dear Ms. Hamilton,

Appellee State of Rhode Island (the "State") writes pursuant to Fed. R. App. 28(j) to notify the Court of *United States v. California*, No. 2:19-cv-02142, __ F. Supp. 3d __, 2020 WL 4043034 (Eastern Dist., Cal., July 17, 2020) (Ex. A, attached). Should the Court reach the issue—which the State argues it should not—the district court's opinion supports the State's position that remand is proper because the State's claims are not preempted by the foreign affairs doctrine.

In *California*, the federal government challenged an agreement between California and the province of Quebec, Canada, that links their greenhouse gas emissions trading programs. The U.S. asserted that the foreign affairs doctrine preempts the agreement, rendering it unconstitutional. More specifically, the U.S. argued that the agreement stands as an obstacle to achievement of the purposes of domestic statutes and international treaties, and that it "undermine[s] the federal government's ability to" negotiate a new climate change agreement. *Id.* at *7.

The district court rejected these arguments and granted summary judgment to California. The court held the U.S. "failed to identify a clear and express foreign policy that directly conflicts with" the agreement and accompanying state laws. *Id.* at *6–7. The district court also found the President's authority to negotiate international agreements did not preempt the agreement because it does not intrude on the federal government's foreign affairs power. Importantly, the court noted "the absence of concrete evidence that the President's power to speak and bargain effectively with other countries has actually been diminished," and observed that "hypothetical or speculative fears cannot support a finding that this state program has more than an incidental effect on foreign affairs." *Id.* at *12 (citations omitted).

Defendants-Appellants' argument that removal is proper based on foreign affairs preemption under *Grable* is not properly subject to appellate review because appellate jurisdiction is limited to considering federal officer removal. Moreover, the foreign affairs doctrine is a preemption defense and so cannot satisfy *Grable*'s requirements. Nonetheless, if the Court were

to consider the issue, *U.S. v. California* supports remand as it rejects the notion that Plaintiffs' claims are preempted by the foreign affairs doctrine.

Respectfully submitted,

/s/ Victor M. Sher
Victor M. Sher
Sher Edling LLP

Counsel for Appellee
State of Rhode Island

cc: All Counsel of Record (via ECF)

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

No. 2:19-cv-02142 WBS EFB

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

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

I. Summary of Facts and Procedural History

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

A. Relevant Policies

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

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[1] State defendants include 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 of California's Environmental Protection Agency ("CalEPA"). These defendants will collectively be referred to as "State defendants" or "California."

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

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

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

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

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

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

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

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

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

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

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

On February 22, 2013, CARB requested that California's Governor, Edmond G. Brown, Jr., make the findings required by law to link California's cap-and-trade program with Quebec's. (Sahota Decl. ¶ 32.) Governor Brown made the four linkage findings in April 2013. (Id. ¶ 33.) After the programs were linked in September 2013, the parties signed an agreement memorializing their commitment "to work jointly and collaboratively toward the harmonization and integration of [their] cap-and-trade programs for reducing greenhouse gas emissions" ("2013 Agreement"). (Id. ¶¶ 44-49; First Dorsi Decl., ¶ 10, Ex. 8.) The linkage between California and Quebec became operational by regulation on January 1, 2014. Cal. Code Regs. tit. 17, § 95943(a)(1).

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

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

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

President Trump's announcement did not deter California from expanding its cap-and-trade program. A linkage between California, Quebec, and Ontario became operational by regulation on January 1, 2018, although the relationship with Ontario ended shortly thereafter. See Cal. Code Regs. tit. 17, § 95943(a)(2). Despite Ontario's withdrawal, California and Quebec remain parties to the Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions ("the Agreement"), signed by each jurisdiction following the linkage in 2017.[5] (First Iacangelo Decl. ¶ 28, Ex. 26.)

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

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

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

10), the jurisdictions are effectively "free to withdraw at any time." (See MSJ Order at 28.)

B. Procedural History

The United States initially filed this action in October 2019, asserting that the Agreement, Agreement 11-415, and "supporting California law"[6] operationalizing California's cap-and-trade agreement are unconstitutional under Article I's Treaty and Compact Clauses[7] and the Foreign Affairs Doctrine.[8] (See

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

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

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

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

II. Standard

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

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

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

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

III. Discussion

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

(2003)).

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

A. Conflict Preemption

"The exercise of the federal executive authority means that state law must give way where . . . there is evidence of clear conflict between the policies adopted by the two." Garamendi, 539 U.S. at 421. "[T]he 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." Id. at 420 (emphasis added); see also Clark v. Allen, 331 U.S. 503, 517 (1947). Foreign policy may be expressed through a "federal action such as a treaty, federal statute, or express executive branch policy." Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010) (citations omitted). A federal statute

can also preempt state law when the state law "stands as 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) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

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

First, the court will consider the GCPA's preemptive effect on California's cap-and-trade program.[10] The United States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

California's program is not barred by conflict preemption.

B. Field Preemption

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

1. Traditional State Responsibility

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

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

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

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

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

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

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

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

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

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

"Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs." Von Saher, 592 F.3d at 964 (citations omitted). This practice is particularly prevalent when the focus of a state law extends beyond the enacting state's borders. See, e.g., id.; Movsesian, 670 F.3d at 1075-77. California contends that its cap-and-trade program is "expressly targeted" at mitigating compliance costs for California businesses. (CA Second MSJ at 35, 41.) While the court has previously recognized that this is one effect of linkage (see MSJ Order at 8-9), an ancillary benefit conferred on in-state entities does not absolve a state from acting outside of its traditional state responsibility. See Movsesian, 670 F.3d at 1076 (quoting Von Saher, 592 F.3d at 965).

In its current form,[15] California's cap-and-trade program has extended beyond an area of traditional state

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

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

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

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

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

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

2. Intrusion on Federal Government's Power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: July 16, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE