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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 THE UNITED STATES OF AMERICA,
 14
 Plaintiff,

15 v.

17 THE STATE OF CALIFORNIA; GAVIN C.
 NEWSOM, in his official capacity as Governor
 18 of the State of California; THE CALIFORNIA
 AIR RESOURCES BOARD; MARY D.
 19 NICHOLS, in her official capacity as Chair of
 the California Air Resources Board and as
 20 Vice Chair and a board member of the Western
 Climate Initiative, Inc.; WESTERN CLIMATE
 21 INITIATIVE, INC.; JARED BLUMENFELD,
 in his official capacity as Secretary for
 22 Environmental Protection and as a board
 member of the Western Climate Initiative, Inc.,
 23
 Defendants.

2:19-cv-02142-WBS-EFB

**STATE DEFENDANTS' NOTICE OF
 CROSS-MOTION AND CROSS-MOTION
 FOR SUMMARY JUDGMENT**

Date: June 29, 2020
 Time: 1:30 PM
 Courtroom: 5
 Judge: Honorable William B. Shubb
 Trial Date: Not Set
 Action Filed: 10/23/2019

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 26
 27 ¹ The State Defendants are State of California; Gavin C. Newsom, in his official capacity
 as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in
 28 her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his
 official capacity as Secretary for Environmental Protection.

1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

7 **CROSS MOTION FOR SUMMARY JUDGMENT**

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

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

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

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Dated: May 18, 2020

Respectfully submitted,
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/s/ M. Elaine Meckenstock
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 20 Vice Chair and a board member of the Western
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2:19-cv-02142-WBS-EFB

**STATE DEFENDANTS’
 MEMORANDUM IN SUPPORT OF
 CROSS-MOTION FOR SUMMARY
 JUDGMENT AND OPPOSITION TO
 PLAINTIFF’S MOTION FOR
 SUMMARY JUDGMENT**

Date: June 29, 2020
 Time: 1:30 p.m.
 Courtroom: 5
 Judge: Honorable William B. Shubb
 Trial Date: Not Set
 Action Filed: October 23, 2019

25
 26
 27 * 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
 28 her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his
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1 **INTRODUCTION**

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

8 Although Plaintiff’s main theory is conflict preemption, Plaintiff cannot establish *any*
9 conflict with a foreign policy of the United States, let alone the clear conflict required to preempt
10 part of a state air pollution control program. Plaintiff does not—and cannot—assert any conflict
11 with the express foreign policy adopted by both the Executive and Legislative branches in the
12 United Nations Framework Convention on Climate Change (UNFCCC). In fact, California’s
13 linkage with Quebec’s cap-and-trade program advances the core purpose and principles of the
14 UNFCCC to reduce greenhouse gas emissions in a cost-effective manner. This leaves Plaintiff
15 attempting to establish conflict with the unilateral policy of the Executive. But while Plaintiff
16 relies on the President’s decision to withdraw from the Paris Agreement as the relevant foreign
17 policy, California’s linkage with Quebec plainly did not prevent the withdrawal, which Plaintiff
18 admits *will* become effective later this year, regardless of any action California has taken or could
19 take. And Plaintiff fails to explain how a program that benefits businesses in the United States,
20 by lowering the cost of emissions reductions, conflicts with concerns expressed by the Executive
21 about unfair burdens imposed by the Paris Agreement. In addition, while Plaintiff contends that
22 the linkage facilitates Canada’s continued participation in the Paris Agreement, Plaintiff is only
23 able to do so through a convoluted chain of speculation that is the antithesis of the clear conflict
24 required here. Plaintiff’s complaints about reduced diplomatic leverage are even vaguer and
25 without basis. This is a far cry from *American Insurance Association v. Garamendi*, 539 U.S.
26 396 (2003), where the Court found a clear conflict based on a concrete and well-defined federal
27 foreign policy addressing the exact same subject as a California law employing the very means
28 rejected by the federal government.

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

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

19 BACKGROUND

20 I. RELEVANT ASPECTS OF THE FEDERAL GOVERNMENT’S REGULATION OF AIR 21 POLLUTION AND ITS CLIMATE CHANGE POLICY

22 A. The Clean Air Act

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

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

6 **B. The Global Climate Protection Act**

7 In 1987, Congress passed the Global Climate Protection Act (GCPA), Pub. L. No. 100-204,
8 101 Stat. 1407 (codified as a note to 15 U.S.C. § 2901). Noting evidence that greenhouse gas
9 emissions may be producing a substantial, long-term temperature increase and that more research
10 is crucial to developing an effective response, Congress enacted the statute to “increase
11 worldwide understanding” of the problem, to “foster cooperation among nations” on scientific
12 research, to “identify technologies and activities to limit mankind’s adverse effect on the global
13 climate,” and to “work toward multilateral agreements.” *Id.* §§ 1102, 1103(a).

14 The GCPA tasked the President, through the Environmental Protection Agency (EPA), with
15 developing a coordinated national policy on climate change and proposing that policy to
16 Congress. *Id.* § 1103(b). It also directed the Secretary of State to coordinate aspects of the
17 United States policy requiring multilateral diplomacy, working, through the President, with EPA
18 and other federal agencies engaged in environmental protection, in the formulation of policy. *Id.*
19 § 1103(c). The Secretary of State and EPA were to submit a report to Congress within 24
20 months, including a strategy for seeking further international cooperation to limit climate change.
21 *Id.* § 1104.

22 The State Department and EPA submitted their report to Congress in February 1991.
23 Second Declaration of Michael S. Dorsi (Second Dorsi Decl.), Exh. 18. The report stated that
24 much remained unknown about global climate change, including whether such changes had been
25 detected, but indicated that any efforts to address such changes should include “the development
26 and implementation of feasible and cost-effective policies and practices.” *Id.* at 1; *see also id.* at
27 17 (“Policies to limit climate change should be designed to ensure that they are both efficacious
28

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

3 C. The UNFCCC

4 The framework convention referenced in the GCPA report—the United Nations Framework
5 Convention on Climate Change (UNFCCC)—was ratified in 1992. Plaintiff’s Statement of
6 Undisputed Facts (ECF No. 102-1), Fact 1. Having received the consent of the Senate, this treaty
7 is “the law of the land.” Plaintiff’s Motion for Summary Judgment (ECF No. 102) (Pl. MSJ) at
8 6:2. The UNFCCC’s “ultimate objective” is “stabilization of greenhouse gas concentrations in
9 the atmosphere at a level that would prevent dangerous anthropogenic interference with the
10 climate system.” Iacangelo Decl., Exh. 1 (UNFCCC), Art. 2. In addition the treaty recognizes
11 that measures taken to accomplish this objective “should be cost-effective so as to ensure global
12 benefits at the lowest possible cost.” *Id.*, Art. 3, ¶ 3.

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

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

21 A. The California Global Warming Solutions Act of 2006

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

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

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

11 **B. California’s Cap-and-Trade Program**

12 In 2011, as part of its broader efforts to achieve the statewide GHG emissions targets
13 established by the Legislature, CARB adopted a cap-and-trade program. Declaration of Rajinder
14 Sahota (Sahota Decl.) (ECF No. 49-1), ¶ 20; Declaration of Michael S. Dorsi (Dorsi Decl.) (ECF
15 No. 49-2), Exh. 4. The program’s compliance obligations for regulated sources began on January
16 1, 2013. Cal. Code Regs., tit. 17, § 95840(a). These regulated sources (called “covered entities”)
17 include major GHG emitters in the State, such as refineries, electric power plants, certain
18 manufacturing or production plants, and suppliers of electricity and natural gas (including
19 utilities). *Id.* § 95811.

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

25 Covered entities are required to acquire and surrender eligible compliance instruments—
26 allowances and other instruments called offsets¹—equivalent to the metric tons of GHGs they

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

1 emit. *Id.* §§ 95850(b), 95856(a). The majority of California allowances are made available
 2 through quarterly auctions, though some allowances are provided to regulated parties at no cost.
 3 *See* Cal. Code Regs., tit. 17, § 95910. Covered entities may buy and sell compliance instruments
 4 in the secondary “carbon market” and may also bank them for later use. MSJ Order at 4:12, 8:8-
 5 10, 8:23-24. Thus, covered entities have the flexibility to design and implement the lowest cost
 6 compliance strategies—the combinations of emissions reductions and instrument transactions—
 7 that best reflect their business needs and market conditions (including the price of compliance
 8 instruments). *See* Cal. Code Regs., tit. 17, § 95856(a); *see also* Dorsi Decl., Exh. 1 at 1-2.

9 C. The Linkage Framework Regulations

10 When it designed California’s cap-and-trade program, CARB included several cost
 11 containment measures designed to minimize the costs of reducing GHG emissions. Second Dorsi
 12 Decl., Exh 23 at II-4.² Among the proposed measures was a framework for linking CARB’s cap-
 13 and-trade program to another program, by accepting that program’s compliance instruments as
 14 effectively equivalent to those issued by California. *Id.* at II-4 to II-6. Although CARB did not
 15 propose to link to any particular program at that time, it recognized that doing so in the future
 16 would permit regulated businesses to “seek out the lowest cost [emissions] reductions to be
 17 found” within any of the linked jurisdictions. *Id.* at II-40. “For this reason,” CARB stated,
 18 “linkage allows for increased cost-containment by reducing the aggregate cost of meeting the
 19 cap.” *Id.*

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

22 _____
 23 “offset” authorizes a metric ton of emissions, but, unlike an allowance, an offset corresponds to
 24 emissions reductions by a source not covered by the program. *See* Cal. Code Regs., tit. 17, §
 25 95802(a). In essence, an offset is a mechanism that allows a covered entity to pay a non-covered
 26 entity to reduce or remove emissions. Because the use of offsets is limited under California’s
 27 program, and for purposes of brevity and simplicity, the discussion here focuses on allowances.

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

1 containment measures, including the linkage framework regulations. Many urged CARB to link
2 to other programs as soon as possible so that they could realize the benefits of increased
3 compliance flexibility. For example, the Western States Petroleum Association supported linkage
4 as a way to “achieve cost effective reductions without significant economic impacts.” Dorsi
5 Decl., Exh. 5 at 167 (CARB paraphrasing). Others supported linkage because it “would provide
6 greater market liquidity while encouraging the realization of the most cost-effective reduction
7 opportunities for GHG emissions.” *Id.* at 191 (CARB paraphrasing); *see also id.* at 191-193.
8 CARB adopted the cap-and-trade regulation in 2011 with the regulatory provisions for future
9 linkage, recognizing that linking to other programs in the future would “provide an additional cost
10 containment mechanism.” *Id.* at 193.³

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

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

23
24
25 ³ CARB has recognized that the adoption of cap-and-trade programs in other jurisdictions,
26 and linkage with those programs, could have other benefits as well. *Id.* at 193. Because “each
27 linked partner jurisdiction” reduces its own emissions, “an expanded linked Program can result in
28 greater emissions reductions” than California’s program can. Second Dorsi Decl., Exh. 25 at 532.
In any event, the direct effect of linkage—of “[e]xpanding the number of sources that are able to
trade allowances”—is to “reduce[] the overall cost of achieving emission reductions and
improve[] the efficiency of the allowance market.” *Id.*

1 **D. Linkage with Quebec**

2 On April 19, 2013, CARB amended its cap-and-trade regulation to link to a similar program
3 adopted by Quebec. Sahota Decl., ¶¶ 33-34, 40; Dorsi Decl., Exh. 6; *see also* Cal. Code Regs.,
4 tit. 17, § 95943(a)(1).⁴ CARB found the linkage would provide greater flexibility for California
5 businesses and greater market liquidity, and could benefit the California economy. Sahota Decl.,
6 ¶ 32. By operation of these regulatory amendments (“the linkage regulations”), linkage with
7 Quebec took effect January 1, 2014. Cal. Code Regs., tit. 17, § 95943(a)(1). As a result, for the
8 last six years, CARB has accepted Quebec-issued compliance instruments, alongside those issued
9 by CARB, as a form of compliance with CARB’s cap-and-trade program. *Id.* Businesses
10 regulated under either program may participate in the joint auctions and may trade with each
11 other in the secondary market. *See id.*; *see also* Sahota Decl., ¶ 61.⁵ The California and Quebec
12 programs are otherwise unaltered. Sahota Decl., ¶¶ 42-43; MSJ Order at 9:24-25. For example,
13 linkage did not change emissions limits in either jurisdiction. Sahota Decl., ¶¶ 42-43.

14 In September 2013, approximately five months after it adopted the linkage regulations,
15 CARB and California’s Governor signed an agreement with Quebec, reflecting both jurisdictions’
16 intentions to continue coordinating with regard to their respective cap-and-trade programs. *See*
17 *Am. Compl.*, ¶ 57; *see also* Dorsi Decl., Exh. 8. Coordination helps ensure that each jurisdiction
18 understands what program changes are being considered by the other and whether those changes
19 might have indirect effects on one or both programs. Sahota Decl. ¶ 49. But, as the agreement
20 expressly recognized, each jurisdiction’s program continues to be governed by its own regulations
21 and its “sovereign right and authority to adopt, maintain, modify, or repeal any of their respective
22 program regulations....” Dorsi Decl., Exh. 8 (14th WHEREAS clause); *see also id.*, Arts. 6, 7,
23 8). Indeed, the greenhouse gas emission requirements in the two jurisdictions are not identical:
24 while Quebec set a province-wide greenhouse gas emissions target for 2020 requiring reductions
25

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

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

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

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

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

17 **III. THE UNITED STATES’ NATIONAL COMMUNICATIONS UNDER THE UNFCCC**

18 As noted above, the UNFCCC requires the United States to regularly report “detailed
19 information on its policies and measures” implementing its commitments under the treaty to limit
20 GHG emissions and mitigate climate change. UNFCCC, Art. 4, ¶¶ 2(a), (b), Art. 12, ¶ 2(a).
21 Since ratification in 1992, there have been seven rounds of these reports, called “National
22 Communications.” *See* Defendants’ Request for Judicial Notice (RJN), ¶ 1. Beginning with its
23 Third National Communication in 2002, the United States has reported its “policies and
24 measures” in two broad categories—those adopted by the federal government and those adopted
25 by others, primarily States and local governments. Second Dorsi Decl., Exh. 22 (2014 report) at
26 34; Exh. 21 (2010) at iii; Exh. 20 (2007) at 37-38, 50-53; Exh. 19 (2002) at 61.

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

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

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

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

13 California’s efforts to inventory and reduce its GHG emissions were listed in the “non-
14 federal” category of climate actions in the 2002, 2007, 2010, and 2014 reports submitted by the
15 United States. *Id.*, Exh. 19 (2002) at 62, Exh. 20 (2007) at 52, Exh. 21 (2010) at 63, Exh. 22
16 (2014) at 129. California’s commitment to a statewide limit on greenhouse gas emissions was
17 specifically included in all three reports submitted by the United States since 2006 when that
18 statewide limit was adopted. *Id.*, Exh. 20 (2007) at 52 (listing California as the only State with a
19 “Statewide GHG Emission Cap”); Exh. 21 (2010) at 61-62, Exh. 22 (2014) at 129. And
20 California’s cap-and-trade program was specifically listed in the Sixth National Communication,
21 the only one submitted after CARB’s adoption of the regulation in 2011. *Id.*, Exh. 22 (2014) at
22 129. At the time of that submission in 2014, CARB had already linked its program with
23 Quebec’s, signed the 2013 agreement with Quebec, and begun operating its program with linkage
24 in place. *See, supra*, at 7-8.

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

1 **IV. THE PARIS AGREEMENT**

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

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

15 **V. PRIOR PROCEEDINGS**

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

ARGUMENT

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

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

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

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

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

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

1 foreign policy that is both “express” and definite. *See id.* at 420, 422-24; *see also Museum of*
2 *Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 13 (1st Cir. 2010) (noting that “an express
3 foreign policy” must be “clear and definite”); *Faculty Senate of Fla. Int’l Univ. v. Winn*, 616 F.3d
4 1206, 1211 (11th Cir. 2010) (rejecting claim where plaintiff failed to show a conflict with
5 “definite substantive foreign policy position”).⁷ Thus, “a party asserting preemption on the
6 ground of foreign policy preemption ... must show what the policy of the United States is and
7 precisely how” state law conflicts with that policy. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*,
8 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007), *as corrected* (Mar. 26, 2008).

9 The strength and clarity of the conflict required to establish preemption increases where a
10 state law deals with an area of traditional state competence. *See Garamendi*, 539 U.S. at 420; *see*
11 *also id.* 419 n.11; *Winn*, 616 F.3d at 1211-12. Our Constitution creates a “system of dual
12 sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452,
13 457 (1991). Consequently, not every “exercise of state power that touches on foreign relations
14 must yield to the National Government’s policy,” *Garamendi*, 539 U.S. at 413, and the
15 President’s foreign affairs powers cannot “reach[] deep into the heart of the State’s police
16 powers” and compel courts to “set aside neutrally applicable state laws,” *Medellin v. Texas*, 552
17 U.S. 491, 532 (2008); *see also Arizona v. United States*, 567 U.S. 387, 400 (2012) (“In [statutory]
18 preemption analysis, courts should assume that the historic police powers of the States are not
19 superseded unless that was the clear and manifest purpose of Congress.”) (internal quotation
20 omitted). Accordingly, in applying preemption, courts “consider the strength of the state interest,
21 judged by standards of traditional practice,” and require a conflict “of a clarity or substantiality”
22 varying “with the strength or the traditional importance of the state concern asserted.”
23 *Garamendi*, 539 U.S. at 419 & n.11, 420.

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

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

1 air pollution. The courts have long recognized that air pollution control is an area of traditional
2 state regulation. *See, e.g., Am. Fuel & Petroleum Mfts v. O’Keeffe*, 903 F.3d 903, 913 (9th Cir.
3 2018); *Exxon Mobil Corp.*, 217 F.3d at 1255. In addition, while Congress has enacted federal
4 legislation concerning air pollution, in the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, it expressly
5 acknowledged that “air pollution prevention ... and air pollution control at its source is the
6 primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3); *see also id*
7 § 7416 (preserving state authority to establish and enforce air pollution standards beyond those of
8 the federal government).

9 The 2017 agreement and linkage regulations fall within this well-established area of
10 primary state responsibility. It is “well settled” that the States’ traditional police powers to
11 control air pollution extend to greenhouse gas emissions. *O’Keeffe*, 903 F.3d at 913. As
12 California’s cap-and-trade program seeks to reduce those emissions, it is plainly an exercise of
13 traditional state police power and responsibility. The part of that program Plaintiff challenges—
14 the decision to accept Quebec-issued compliance instruments—makes those reductions more
15 cost-effective by expanding the market for trading instruments; therefore, it likewise falls within
16 this area of traditional state responsibility. *See City & Cty. of San Francisco v. Mkt. St. Ry. Co.*,
17 98 F.2d 628, 632 (9th Cir. 1938) (holding that the state’s police power encompasses the “[c]hoice
18 of the means, by which ... those ends are to be attained”); *see also Allco Fin. Ltd. v. Klee*, 861
19 F.3d 82, 105-107 (2d Cir. 2017) (upholding Connecticut’s police power authority to decide which
20 instruments to accept as compliance with state law).

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

1 power,” and therefore “[i]t is well within California’s police powers to enact legislation to
 2 regulate greenhouse gas emission and air pollution.” *Id.* at 30 (quoting *Huron Portland Cement*
 3 *Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)). Thus, the 2017 agreement and linkage
 4 regulations are exercises of the most traditional state police power, and Plaintiff must establish a
 5 particularly clear and substantial conflict with the 2017 agreement and linkage regulations to
 6 trigger foreign affairs preemption. *See Garamendi*, 539 U.S. at 420; *see also id.* 419 n.11; *Winn*,
 7 616 F.3d at 1211.

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

11 The primary expression of this country’s foreign policy concerning greenhouse gas
 12 emissions is in the UNFCCC, a treaty negotiated by the President and ratified by the Senate that
 13 is, as Plaintiff recognizes, “the law of the land.” Pl. MSJ at 6: 1-3. Although Plaintiff references
 14 this treaty several times, *see* Pl. MSJ 17: 22, 20:4-6, it does not—and cannot—assert that the
 15 2017 agreement and linkage regulations conflict with the treaty because, in fact, they are entirely
 16 consistent with the UNFCCC.

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

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

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

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

19 Plaintiff’s inability to establish any conflict with the UNFCCC is telling, as any unilateral
20 Executive Branch action must itself be consistent with the UNFCCC. This is so because, under
21 the “familiar tripartite framework” for “considering claims of Presidential power,” executive
22 actions “incompatible with the express or implied will of Congress” require that “the President’s
23 asserted power” is “both exclusive and conclusive on the issue.” *Zivotofsky v. Kerry*, 576 U.S. 1,
24 135 S. Ct. 2076, 2083-2084 (2015) (internal quotation marks omitted). No such exclusive or
25 conclusive power exists here, by Plaintiff’s own admission. Pl MSJ at 4:16-17 (“*Congress* first
26

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

1 addressed the United States’ foreign policy in this area in the Global Climate Protection Act of
 2 1987.”) (emphasis added). Accordingly, any executive action on which Plaintiff relies here must
 3 be compatible with “the express ... will of Congress,” including the UNFCCC. *See Zivotofsky*,
 4 135 S. Ct. at 2084. Put simply, in order to prevail on its conflict preemption theory here, Plaintiff
 5 has to establish a clear conflict between a state policy and an executive foreign policy, both of
 6 which, in turn, must be consistent with the UNFCCC. Because Plaintiff cannot establish this
 7 clear conflict, as shown below, its conflict preemption claim fails.

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

10 Rather than relying on the express foreign policy of the United States to which both
 11 Congress and the Executive assented in the UNFCCC, Plaintiff bases its conflict preemption
 12 claim on the President’s decision to withdraw from the Paris Agreement.⁹ Not all executive
 13 actions have preemptive effect, even in the foreign policy arena. *See Medellín*, 522 U.S. at 530
 14 (holding that Presidential memorandum interpreting a treaty could not “establish binding rules of
 15 decision that preempt contrary state law”). And, as shown above, any allegedly preemptive
 16 executive action here must be consistent with the UNFCCC and other acts of Congress. It is not
 17 necessary, however, to reach such questions here because Plaintiff is unable to show that the 2017
 18 agreement and linkage regulations conflict, much less clearly conflict, with either the President’s
 19 decision to withdraw from the Paris Agreement or the rationales offered for doing so. Moreover,
 20 while Plaintiff complains that linkage facilitates Canada’s participation in the Paris Agreement, it
 21 is unable to identify any United States foreign policy against the participation of other countries
 22 in the Paris Agreement or any conflict—let alone a clear one—between such a policy and the
 23 2017 agreement and linkage regulations.

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

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

1 either the 2017 agreement or linkage regulations could do so when Plaintiff itself states that the
2 withdrawal from the Paris Agreement “will become effective on November 4, 2020.” Pl. MSJ at
3 11:13-15 (emphasis added). Indeed, it is hard to imagine that the 2017 agreement or linkage
4 regulations could have undercut the United States’ ability to withdraw from the Paris Agreement
5 in any meaningful way, given the sequence of events: the President announced that the United
6 States would withdraw from the Paris Agreement in June 2017, six years after California adopted
7 a regulatory framework to enable future linkages and more than three years after California linked
8 its program to Quebec’s. Further, the United States submitted formal notification of its
9 withdrawal from the Paris Agreement in November 2019, more than two years after the 2017
10 agreement was signed. Noticeably absent from Plaintiff’s brief is any evidence that, or even
11 explanation of how, California’s earlier actions undercut the United States’ withdrawal.¹⁰ Thus,
12 far from establishing any clear conflict, Plaintiff has failed to show any conflict at all with
13 withdrawal from the Paris Agreement.

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

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

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

7 3. Plaintiff also points to the economic concerns advanced in connection with the United
8 States’ withdrawal from the Paris Agreement: namely, the ““draconian financial and economic
9 burdens [of] the agreement”” and ““the burdens specific to the United States that other countries
10 do not face.”” Pl. MSJ at 20: 7-8 (quoting Statement on Paris Accord) (bold and italics omitted);
11 Pl. MSJ at 20 n. 8 (quoting *Nominations of Hon. Mike Pompeo to be Secretary of State Before the*
12 *S. Comm. on Foreign Relations*, 115th Cong. S. HRG. 15-339, at 216 (2018)); *see also* Pl. MSJ at
13 9:25-12:7 (discussing statements from the President and Secretary of State). But Plaintiff does
14 not—and cannot—explain how either the 2017 agreement or the linkage regulations conflict with
15 those concerns. California’s cap-and-trade regulation establishes a market-based program
16 designed to reduce emissions cost-effectively, and linkage expands the compliance instrument
17 market, providing even greater opportunities for cost reduction. Indeed, Plaintiff contends that
18 the linkage largely functions to California’s economic advantage, so that in effect “California is
19 selling greenhouse gas emissions” to Canada. Pl. MSJ at 21:26:22-1. If, as Plaintiff claims, the
20 net result of linkage is that Quebec businesses purchase more allowances or offsets from
21 California businesses than vice versa, then far from imposing any draconian financial or
22 economic burdens on the United States, linkage *benefits* the Nation.

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

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

10 To begin, Plaintiff's facilitation theory fails because it does not identify any clear and
 11 definite foreign policy on which it is based. Ninth Circuit as well as Supreme Court decisions
 12 require conflict with such a policy to trigger foreign affairs preemption. *See Von Saher v. Norton*
 13 *Simon Museum of Art at Pasadena*, 754 F.3d 712, 720 (9th Cir. 2014) (hereinafter "*Von Saher*
 14 *IP*") (quoting *Garamendi*, 539 U.S. at 420). While Plaintiff suggests that Canada's continued
 15 participation in the Paris Agreement creates a conflict with United States foreign policy, Plaintiff
 16 falls short of asserting that there is in fact any foreign policy, much less an express one, of
 17 undermining the participation of other Parties to the Paris Agreement. Indeed, at times the
 18 President has mused about the possibility of rejoining the Paris Agreement on different terms.¹²
 19 Nor does Plaintiff explain how such a policy could be reconciled with the UNFCCC, which, as
 20 previously noted, is the law of the land with which any Executive foreign policy must conform.
 21 Far from calling for the United States to undermine other countries' participation in the Paris
 22 Agreement, which was reached under its framework, the UNFCCC provides that Parties "may
 23 assist other Parties in contributing to the achievement of the objective of the Convention." Art. 4,
 24 ¶ 2(a). Finally, while Plaintiff asserts that "actions and agreements of the President" and even
 25 formal positions taken by senior federal officials may constitute foreign policy for preemption
 26 purposes, Pl. MSJ at 17:20-18:18, Plaintiff makes no attempt to show how policies *not* expressly

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

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

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

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

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

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

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

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

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

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

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

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

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

4 **D. Plaintiff's Negotiating Leverage Theory Fails**

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

10 *First*, as noted above, the decisions of the Ninth Circuit and the Supreme Court require an
11 express foreign policy to trigger conflict preemption. The mere assertion, in a legal brief, that the
12 2017 agreement and linkage regulations undermine the federal government's ability to negotiate,
13 in entirely unspecified ways, cannot satisfy this requirement. As noted above, courts apply
14 conflict preemption only where there is an express and definite foreign policy, such as concrete
15 and specific objectives and an identified strategy by which those objectives should be achieved.
16 *E.g.*, *Garamendi*, 539 U.S. at 421; *see also Von Saher II*, 754 F.3d at 716; *Seeger-Thomschitz*, 623
17 F.3d at 13; *Winn*, 616 F.3d at 1211. In other words, the conflict "must be with a policy, not
18 simply with the means of negotiating a policy." *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d
19 at 1186-87. Plaintiff's leverage theory fails to identify the requisite objectives or to provide any
20 details about the negotiations at issue. Consequently, what Plaintiff characterizes as United States
21 policy "is more accurately described as a strategy; that is, a means to achieve an acceptable policy
22 but not the policy itself." *See id.* at 1186.¹⁵ That is insufficient to establish conflict preemption.
23 *Id.* at 1186-87. Indeed, with no policy objectives or preferred means to achieve those objectives,
24 there is no way to begin an assessment of conflict; and, to allow vague allusions to hypothetical

25 ¹⁵ Although the Supreme Court found statutory preemption in *Crosby*, based, in part, on
26 interference with a congressionally directed strategy, 530 U.S. at 373-74, that strategy was both
27 concrete and an integral part of the foreign policy established by Congress. Specifically,
28 Congress had itself imposed sanctions on Burma, related to human rights abuses, directed the
Plaintiff points to no such concrete strategy or objectives here.

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

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

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

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

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

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

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

4 *Second*, the state interest in *Garamendi* was much weaker than it is here. *Garamendi*
5 considered the Holocaust Victims Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code
6 §§ 13800-13807, which required insurers doing business in California to disclose details
7 concerning a broad range of insurance policies issued by the insurers and any affiliates “to
8 persons in Europe[and] in effect between 1920 and 1945.” *Id.* § 13804(a). Although HVIRA
9 regulated insurance, a traditional area of state responsibility, it was not a law of general
10 application; quite the contrary, the statute applied to “only policies issued by European
11 companies, in Europe, to European residents, at least 55 years ago,” 539 U.S. at 425-426, which
12 raised “great doubt” that the Act was concerned with the reliability of insurance currently
13 available in California, *id.* at 426. In addition, while its disclosure requirements may have
14 benefited the several thousand survivors living in California, the vast majority of those benefited
15 by HVIRA’s disclosure requirements were outside the State. *Id.* at 426. The Supreme Court
16 therefore found that HVIRA was intended to vindicate the interests of Holocaust survivors in
17 general and that California’s interest in doing so was “weak[.]” *Id.* at 425.

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

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

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

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

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

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

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

7 Relying almost entirely on *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000)
 8 and the Global Climate Protection Act of 1987 (GCPA), Plaintiff also asserts that the 2017
 9 agreement and linkage regulations are preempted because they create an obstacle to congressional
 10 delegations of authority to the President. Pl. MSJ at 23:20-28:6.¹⁸ This claim was not properly
 11 raised and, in any event, is without merit.

12 Plaintiff did not plead a statutory preemption claim, or reference the GCPA, in its Amended
 13 Complaint. As a consequence, Defendants received no notice of this claim. Plaintiff should not
 14 be permitted summary judgment based on preemption under a statute never referenced in the
 15 pleadings. *See Rent Information Tech., Inc. v. Home Depot USA, Inc.*, 268 Fed. Appx. 555, 558
 16 (9th Cir. 2008) ("[Plaintiff] cannot bootstrap its new promissory estoppel argument onto its
 17 fraudulent misrepresentation claim because [it] failed to allege in the complaint particular facts
 18 supporting the new theory.").

19 In any event, Plaintiff's new statutory preemption claim fails as a matter of law because
 20 Plaintiff does not and cannot identify any objectives or other aspects of the GCPA with which the
 21 2017 agreement and linkage regulations interfere. The goals of the GCPA are to increase
 22 worldwide understanding of climate change, to foster cooperation on scientific research, to

23 ¹⁷ *United States v. Belmont*, 301 U.S. 324, 330 (1937) and *United States v. Pink*, 315 U.S.
 24 203 (1942) likewise do not aid Plaintiff. Both involved an international compact recognizing the
 25 Soviet Union, establishing diplomatic relations, and assigning claims to the United States. The
 Court's indication that state laws conflicting with these foreign policies would be preempted does
 nothing to establish preemption where, as here, Plaintiff cannot establish any conflict at all.

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

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

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

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

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

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

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

1 describing, *inter alia*, the United States’ strategy for seeking international cooperation to limit
2 climate change. Pub. L. 100-204, § 1104.¹⁹ That task was completed in 1991, and the report
3 identified the later-ratified UNFCCC as the United States’ strategy. There is no claim, akin to the
4 one in *Crosby*, that linkage has created an obstacle to the specific assignments delegated by the
5 GCPA to the Executive; indeed, that work was completed years before California adopted its cap-
6 and-trade program or linked it to Quebec’s. Moreover, as shown above, the 2017 agreement and
7 linkage regulations are entirely consistent with the UNFCCC. *See, supra*, at 16-18.

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

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

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

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

12 In addition, Plaintiff’s assertion that California’s statute establishing statewide emissions
 13 targets or its linkage between California’s and Quebec’s separate cap-and-trade programs
 14 somehow poses an obstacle to the climate change policy announced in the GCPA (Pl. MSJ at
 15 26:16-20) is belied by the National Communications submitted under the UNFCCC. In these, the
 16 United States has identified both California’s statutory targets and its linked cap-and-trade
 17 program as “measures [that] *complement* federal efforts to reduce GHG emissions.” Second
 18 Dorsi Decl., Exh. 22 at 127, 129; *see also id.*, Exh. 21 at 61 (referring to California’s statute);
 19 Exh. 20 at 52 (same).

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

22 **III. PLAINTIFF’S RESORT TO FIELD PREEMPTION FAILS AS A MATTER OF LAW**

23 Plaintiff’s final line of attack is field preemption. But field preemption is an exceptionally
 24 narrow, “rarely invoked” aspect of the already narrow foreign affairs doctrine. *Movsesian v.*
 25 *Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012). A state law is subject to foreign
 26

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

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

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

6 Plaintiff’s field preemption fails at the outset because, as noted earlier, this Court already
7 has ruled that the 2017 agreement and linkage regulations are an exercise of traditional state
8 power to regulate greenhouse gas emissions. In rejecting Plaintiff’s argument that the 2017
9 agreement and linkage regulations violated the Compact Clause, this Court found that the 2017
10 agreement does not allow California to exercise any power it would not normally have, because
11 “[i]t is well within California’s police powers to enact legislation to regulate greenhouse gas
12 emissions and air pollution.” MSJ Order at 30:18-19; *see also id.* at 25 n.12 (construing the
13 “supporting California law” Plaintiff challenged to refer to the linkage regulations). This finding
14 follows directly from Ninth Circuit law. *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940,
15 945-46 (9th Cir. 2019); *O’Keeffe*, 903 F.3d at 913. Indeed, as the Court noted, the regulation of
16 air pollution “clearly falls within the exercise of even the most traditional concept of what is
17 compendiously known as the police power.” MSJ Order at 30:12-16 (quoting *Huron Portland*
18 *Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)). In arguing California “has no serious
19 claim to be addressing a traditional state responsibility,” Pl. MSJ at 29:2-3, and “greenhouse gas
20 regulation is not a traditional area of state responsibility,” *id.* at 32:18-19, Plaintiff ignores this
21 Court’s plain ruling to the contrary and the “well settled” law it cited. *O’Keeffe*, 903 F.3d at 913.
22 Nor can Plaintiff escape this controlling law by mischaracterizing California’s linkage with
23 Quebec as “[r]egulating greenhouse gas emissions *to address global climate change*” or
24 “reducing greenhouse gas emissions *in foreign jurisdictions.*” Pl. MSJ at 29:8-10 (emphasis
25 added). In ruling on the prior summary judgment motion, this Court considered the same
26 program imposing the same regulations on greenhouse gas emissions at issue here, and far from
27 finding that the linkage reduces emissions in Canada, the Court found that linkage “does not
28 substantively alter each individual jurisdiction’s cap-and-trade program”; Quebec and California

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

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

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

17 To determine the “real purpose” of a challenged law, courts look beyond the general subject
18 matter being regulated and examine the “text and legislative history” of the law itself. *Movsesian*,
19 670 F.3d at 1075; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965
20 (9th Cir. 2010) (*Von Saher I*). Here, both the text and the history of the linkage regulations make
21 clear that the purpose of linkage is to expand the compliance options of California businesses
22 under California’s cap-and-trade regulation—a matter firmly within traditional state police
23 powers.

24 As this Court recognized, under the linkage regulations, once a linkage is approved,
25 “covered entities can use compliance instruments acquired through linked jurisdictions to satisfy
26 their compliance obligations in California, and vice versa,” and linked jurisdictions can offer their
27 compliance instruments alongside California’s in joint allowance auctions. MSJ Order at 9:19-24
28

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

4 covered or opt-in covered entities may use compliance instruments issued by the
 5 following programs to meet their compliance obligation under this article:

- 6 (1) Government of Quebec (effective January 1, 2014).

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

13 The regulatory history confirms this conclusion. In 2010, when it proposed the linkage
 14 framework, CARB identified the prospect of future linkage as one of several “cost-containment”
 15 features of its new program. Second Dorsi Decl., Exh 23 at II-4, II-6; *see also* MSJ Order at
 16 8:20-9:1 (linkage is one of several features CARB adopted “[t]o help regulated businesses
 17 mitigate their compliance costs”) (citing Sahota Decl. ¶ 24). For this reason, many California
 18 businesses facing regulation under the cap-and-trade program supported linkage and urged CARB
 19 to link to other jurisdictions as soon as possible. Dorsi Decl., Exh. 5 at 167, 191-193. When it
 20 proposed to link to Quebec’s program specifically, CARB reiterated, “linking provides California
 21 businesses with more opportunities on how best to comply.” Second Dorsi Decl., Exh. 30 at 8.
 22 In discussing the proposed linkage with Ontario, CARB found linkage would “provide additional

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

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

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

17 The sole “foreign” or “global” aspect of linkage (Pl. MSJ at 31:11) occurs when CARB
18 accepts instruments issued by a foreign province, rather than instruments issued by a sister State.
19 But this fact does not push California’s choice outside its traditional state responsibility to set the
20 terms of compliance in the first place. Neither does the 2017 agreement. MSJ Order at 30:22-23.
21 As the Supreme Court has recognized, a State exercises only its own, traditional powers when it
22 coordinates on matters of “uniformity and compatibility” of laws across jurisdictions, to improve
23 the functioning of its own laws, as California does under the 2017 agreement. *U.S. Steel Corp. v.*
24 *Multistate Tax Comm’n*, 434 U.S. 452, 456, 473 (1978); *see* ECF No. 7-2, art. 1, 14.²²

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

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

13 The text and history thus confirm the linkage regulations’ and 2017 agreement’s “real
 14 purpose” are within a traditional state responsibility, and Plaintiff’s field preemption claim fails
 15 on the first prong.

16 **2. The “Evidence” Plaintiff Relies on for Its Purpose Arguments Is**
 17 **Irrelevant and Misleading.**

18 Remarkably, Plaintiff avoids discussing the text or history of the linkage regulations, the
 19 2017 agreement, and the cap-and-trade regulation altogether. Plaintiff relies instead on former
 20 Governors’ criticisms of the President’s decision to withdraw from the Paris Agreement; CARB’s
 21 statements that acknowledge the scientific fact that climate change is a global, as well as local,
 22 problem; and other “extrinsic evidence” to claim linkage’s real purpose is to “pursue a foreign
 23 policy of its own” on international greenhouse gas regulation. Pl. MSJ at 31-34, 35-36. To call
 24 this “extrinsic evidence” (Pl. MSJ at 33:16) is too generous. None of these statements concern
 25 linkage; indeed, many were made years after the linkage with Quebec’s program occurred.

26 _____
 27 normally have.” MSJ Order at 30:21-23.

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

1 Plaintiff mainly points to the statements of California’s Governors and their “displeasure”
2 with the President’s withdrawal from the Paris Agreement. Pl. MSJ at 33-34, 35-36. These
3 statements, however, do not mention the linkage of California and Quebec’s cap-and-trade
4 programs, which occurred in 2013, more than three years before the Paris Agreement was
5 signed.²⁴ Moreover, as noted earlier, the Ninth Circuit made clear in *Gingery* that state and local
6 elected officials act well within their traditional responsibility when they communicate their
7 “views and values” to the citizenry. 831 F.3d at 1230.²⁵ Indeed, it would be astonishing to use
8 the narrow field preemption sub-doctrine to preclude an elected official from voicing objection to
9 a President’s conduct of foreign affairs.

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

22
23 ²⁴ Of these, only Governor Newsom’s statement mentions even California’s cap-and-trade
24 program generally, and then only as a model for similar policies elsewhere. Pl. MSJ at 36:7-10.
This statement does not relate to linkage, the aspect of the program Plaintiff challenges here.

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

1 Plaintiff also quotes a 2017 CARB environmental analysis and CARB’s summary of two
2 uncontroversial scientific facts: that GHGs are “global pollutants” and no single emitter of GHGs
3 is solely responsible for climate change. Pl. MSJ at 32:22-27.²⁶ Plaintiff’s emphasis on these
4 facts, and its characterization of CARB’s summary as somehow an admission, reveals the
5 extreme nature of its field preemption argument. Plaintiff wants this Court to rule that, because
6 climate change is a global problem, which California cannot solve on its own, *any* climate change
7 program is outside the State’s traditional area of responsibility. Pl. MSJ at 31-33. The rulings of
8 the Supreme Court, Ninth Circuit, and this Court do not allow for such an aggressive expansion
9 of foreign affairs field preemption, which, if accepted, would have grave implications for the
10 federalist balance the Constitution establishes. The COVID-19 pandemic is likewise a global
11 problem that California cannot completely solve on its own, but California can act within its
12 traditional powers to help the sick and reduce transmission of the virus within its borders. The
13 fact that California’s actions contribute to solving a global *problem* does not make those *actions*
14 global, let alone unconstitutional. Just so, the fact that California’s efforts to reduce its own GHG
15 emissions in a cost-effective manner contribute to solving a global problem does not remove
16 these actions from the realm of the State’s traditional authority.

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

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

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

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

21 Here, the linkage regulations are expressly targeted at—because they “appl[y] only to”—
22 California businesses, and how they comply with California’s regulation. *Movsesian*, 670 F.3d at
23 1075; Cal. Code Regs., tit. 17, §§ 95940, 95943(a). Because this purpose lies within the State’s
24 traditional area of responsibility, Plaintiff’s field preemption argument fails on the first prong of
25 the field preemption test and the Court should grant summary judgment to California on this basis
26 alone.

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

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

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

22
 23 _____
 24 ²⁷ *Gingery*, 831 F.3d at 1230-31.

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

26 ²⁹ *Winn*, 616 F.3d at 1211.

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

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

1 Intrusion occurs only when a State enters the “field of foreign affairs which the Constitution
2 entrusts to the President and the Congress.” *Zschernig*, 389 U.S. at 432. This field includes
3 Congress’s Article I powers to declare war, punish international crimes, and maintain an army
4 and navy, along with the President’s Article II powers to conduct war, negotiate treaties, and
5 appoint ambassadors. U.S. Const., art. I, § 8; *id.*, art. II, § 2; *see also Zivotofsky*, 135 S.Ct. at
6 2084-87 (discussing the President’s power to recognize foreign nations). All of the Supreme
7 Court and Ninth Circuit field preemption cases concerned intrusions into these core federal
8 powers used to manage the sensitive work of international relations. *See Deutsch v. Turner*
9 *Corp.*, 324 F.3d 692, 711 (9th Cir. 2003) (“Of the eleven clauses ... granting foreign affairs
10 powers to the President and Congress, ... seven concern preparing for war, declaring war, waging
11 war, or settling war. ... Even those foreign affairs powers in the Constitution that do not expressly
12 concern war and its resolution may be understood, in part, as a design to *prevent* war.”). Thus,
13 *Zschernig* concerned the exclusive federal power to judge the legitimacy of other nations’
14 governments and laws. 389 U.S. at 441 (finding Oregon law intruded into Cold War relations).³²
15 At the Ninth Circuit, *Deutsch* and *Von Saher I* concerned the settlement of wartime claims, while
16 *Movsesian* concerned redress to Armenian Genocide victims. *Movsesian*, 670 F.3d at 1076; *Von*
17 *Saher I*, 592 F.3d at 966; *Deutsch*, 324 F.3d at 711.

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

24
25 ³² Although *Hines v. Davidowitz* was decided on statutory preemption grounds, the
26 Court’s remark that the Pennsylvania alien registration act “provoke[d] questions in the field of
27 international affairs” was similarly premised on the potential for foreign offenses and hostilities
28 such a law carried: “Experience has shown that that international controversies of the gravest
moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s
subjects inflicted, or permitted, by a government.” 312 U.S. 52, 64 (1941); *see also United States*
v. Pink, 315 U.S. 203, 232 (1942) (“The nation as a whole would be held to answer if a State
created difficulties with a foreign power.”).

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

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

15 *Third*, Plaintiff cites no authority for the proposition that "global climate regulation and
16 greenhouse gas emissions" (Pl. MSJ at 37:4) is among the exclusive federal powers "concern[ing]
17 war ... [or] design[ed] to prevent war," such that field preemption would be triggered. *Deutsch*,
18 324 F.3d at 711. In so arguing, Plaintiff again disregards the States' traditional responsibility for
19 air pollution control and greenhouse gas regulation. *See, supra*, at 34. Most disturbingly, in
20 insisting "[o]ur country must speak 'with one voice,'" Pl. MSJ at 39:5-6, Plaintiff entirely
21 disregards the voice Congress has in shaping federal climate change policy, including foreign
22 policy, and the role Congress has reserved for the States. "It is not for the President alone to
23 determine the whole content of the Nation's foreign policy." *Zivotosfsky*, 135 S.Ct. at 2090; *see*
24 *also id.* ("The Executive is not free from the ordinary controls and checks of Congress merely
25 because foreign affairs are at issue."). And Congress has not been silent here. Congress
26 consented to the UNFCCC, passed the Global Climate Protection Act and the Clean Air Act, and
27 established the National Climate Program. Pub. L. 95-367, § 5, 92 Stat. 601 (1978) (National
28 Climate Act, codified at 15 U.S.C. § 2904). All these actions, not least Clean Air Act section

1 116, leave room for state action either in concert with federal action, or beyond it. 42 U.S.C.
2 § 7416 (preserving States’ authority to adopt more stringent air pollution regulations); 15 U.S.C.
3 § 2904(d)(7) (grants to state agencies for climate-related studies and services); *see also, supra*, at
4 10 (federal government describes state GHG laws and programs as contributing to U.S.
5 participation under the UNFCCC). Congress could have preempted state action on GHG
6 emissions if it so chose, but it has adopted exactly the opposite approach. *See* 42 U.S.C. § 7416.
7 This confirms this is not an appropriate field to invoke *against* States’ efforts. *Cf. Hughes v.*
8 *Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring)
9 (“[C]ourts must be careful not to confuse the congressionally designed interplay between state
10 and federal regulation ... for impermissible tension that requires preemption under the Supremacy
11 Clause.”) (internal quotation marks omitted).

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

15 CONCLUSION

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

19
20 Dated: May 18, 2020

Respectfully Submitted,

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