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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,  
Plaintiff,

v.

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

Defendants.

No. 2:19-cv-02142 WBS EFB

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

1 Plaintiff United States of America ("United States")  
2 brought this action against the State of California<sup>1</sup> and other  
3 related individuals and entities<sup>2</sup> alleging, inter alia,  
4 California's cap-and-trade program is preempted under the Foreign  
5 Affairs Doctrine. (First Am. Compl. ("FAC") (Docket No. 7).)  
6 Presently before the court are the parties' cross-motions for  
7 summary judgment on that claim alone. (Docket Nos. 102, 108,  
8 110.)

9 I. Summary of Facts and Procedural History

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

16 A. Relevant Policies

17 Beginning in the 1950s, "Congress enacted a series of  
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19 <sup>1</sup> State defendants include Gavin C. Newsom, in his  
20 official capacity as Governor of the State of California; the  
21 California Air Resources Board; Mary D. Nichols, in her official  
22 capacity as Chair of the California Air Resources Board; and  
23 Jared Blumenfeld, in his official capacity as Secretary of  
California's Environmental Protection Agency ("CalEPA"). These  
defendants will collectively be referred to as "State defendants"  
or "California."

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

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

14 In 1987, Congress passed the Global Climate Protection  
15 Act of 1987 (“GCPA”), Title XI of Pub. L. 100-204, 101 Stat.  
16 1407, note following 15 U.S.C. § 2901. Its ultimate aims were to  
17 “increase worldwide understanding of the greenhouse gas effect”  
18 and “foster cooperation among nations to develop more extensive  
19 and coordinated scientific research efforts with respect to the  
20 greenhouse effect.” Id. §§ 1103(a)(1)-(2). The GCPA directed  
21 the Environmental Protection Agency (“EPA”) to author a report to  
22 Congress detailing a “coordinated national policy on global  
23 climate change” and ordered the Secretary of State to work  
24 “through the channels of multilateral diplomacy” to combat global  
25 warming. Id. §§ 1103(b)-(c); see also Massachusetts, 549 U.S. at  
26 508.

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

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

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

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

1 California's cap-and-trade program was intended to provide a  
2 market-based approach to reducing greenhouse gas emissions. CARB  
3 establishes yearly caps, called "budgets," to limit the amount of  
4 emissions a group of particular sources, called "covered  
5 entities," may emit for a set period. (Sahota Decl. ¶ 21); Cal.  
6 Code Regs. tit. 17, § 95802(a). At year's end, covered entities  
7 are required to acquire and surrender "compliance instruments"  
8 equivalent to the metric tons of greenhouse gas they emit.  
9 (Sahota Decl. ¶ 22.) Budgets then decrease each year to  
10 encourage covered entities to reduce their emissions. (Id. ¶  
11 21.)

12 California's cap-and-trade program includes a  
13 "framework for linkage" to accept the compliance instruments of  
14 other "states and [Canadian] provinces" to "provide an additional  
15 cost containment mechanism . . . and secure additional  
16 [greenhouse gas emission] reductions." (First Dorsi Decl. ¶ 7,  
17 Ex. 5 at 193); see also Cal. Code Regs. tit. 17, §§ 95940-43.  
18 After an external trading system is approved by the legislature  
19 and California's Governor, see Cal. Gov. Code § 12894(f), covered  
20 entities can use compliance instruments acquired through linked  
21 jurisdictions to satisfy their compliance obligations in  
22 California, and vice versa. Cal. Code Regs. tit. 17, §§  
23 95942(d)-(e). California contracted with Western Climate  
24 Initiate, Inc. ("WCI, Inc."), a non-profit corporation, to  
25 facilitate linkages by tracking ownership of the compliance  
26 instruments.<sup>3</sup> (First Decl. of Greg Tamblyn ("First Tamblyn  
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28 <sup>3</sup> WCI, Inc.'s services are limited to technical and  
administrative support alone. See Cal. Gov. Code § 12894.5(a)(1)

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

4 On February 22, 2013, CARB requested that California’s  
5 Governor, Edmond G. Brown, Jr., make the findings required by law  
6 to link California’s cap-and-trade program with Quebec’s.

7 (Sahota Decl. ¶ 32.) Governor Brown made the four linkage  
8 findings in April 2013. (Id. ¶ 33.) After the programs were  
9 linked in September 2013, the parties signed an agreement  
10 memorializing their commitment “to work jointly and  
11 collaboratively toward the harmonization and integration of  
12 [their] cap-and-trade programs for reducing greenhouse gas  
13 emissions” (“2013 Agreement”). (Id. ¶¶ 44-49; First Dorsi Decl.,  
14 ¶ 10, Ex. 8.) The linkage between California and Quebec became  
15 operational by regulation on January 1, 2014. Cal. Code Regs.  
16 tit. 17, § 95943(a)(1).

17 In 2016, various parties to the 1992 Convention --  
18 including the United States -- entered into the Paris Agreement  
19 of 2015 by executive order (“Paris Accord”). (First Iacangelo  
20 Decl. ¶ 5, Ex. 3 at 3.) In furtherance of the 1992 Convention,  
21 the Paris Accord aims to “hold[] the increase in the global  
22 average temperature to well below 2 degrees Celsius” and  
23 “pursu[e] efforts to limit the temperature increase to 1.5  
24 degrees Celsius above pre-industrial levels.” (Id.) In June  
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26 (“California’s participation in the [WCI, Inc.] requires that its  
27 sole purpose be to provide operational and technical support to  
28 California . . . [g]iven its limited scope of activities, the  
[WCI, Inc.] does not have the authority to create policy with  
respect to any existing or future program or regulation.”).

1 2017, President Trump announced the United States would withdraw  
2 from the Paris Accord and instead “negotiate a new deal that  
3 protects our country and its taxpayers.”<sup>4</sup> (Id. ¶ 7, Ex. 5 at 5.)

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

14 The Agreement memorializes each jurisdiction’s  
15 commitment to harmonizing their cap-and-trade programs to ensure  
16 compatibility while respecting each jurisdiction’s individual  
17 sovereignty. (See generally Agreement.) It “does not modify any  
18 existing statutes and regulations nor does it require or commit  
19 the Parties or their respective regulatory or statutory bodies to  
20 create new statutes or regulations.” (Id. at 9.) While Article  
21 17 provides that parties “shall endeavor to provide” other  
22 signatories with 12 months’ notice before withdrawing, (id. at

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23  
24 <sup>4</sup> The United States did not submit formal notification of  
25 its withdrawal from the Paris Accord until November 4, 2019.  
26 (First Iacangelo Decl. ¶ 8, Ex. 6.) Under the Paris Accord’s  
27 withdrawal provision, a party cannot withdraw until a year after  
28 it provides formal notice. (Id.) The United States’ withdrawal  
will not take effect until November 4, 2020. (Id.)

<sup>5</sup> This Agreement replaced the 2013 Agreement between  
California and Quebec. (See Agreement at 2.)

1 10), the jurisdictions are effectively “free to withdraw at any  
2 time.” (See MSJ Order at 28.)

3 B. Procedural History

4 The United States initially filed this action in  
5 October 2019, asserting that the Agreement, Agreement 11-415, and  
6 “supporting California law”<sup>6</sup> operationalizing California’s cap-  
7 and-trade agreement are unconstitutional under Article I’s Treaty  
8 and Compact Clauses<sup>7</sup> and the Foreign Affairs Doctrine.<sup>8</sup> (See  
9

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10 <sup>6</sup> Both sides understand that the “Agreement” is the 2017  
11 Agreement on the Harmonization and Integration of Cap-and-Trade  
12 Programs for Reducing Greenhouse Gas Emissions and “Agreement 11-  
13 415” refers to the contract between California and WCI, Inc.  
14 (See USA Second Mot. for Summ. J. (“USA Second MSJ”) at 2 n.1  
15 (Docket No. 102).) However, the United States now asks the court  
16 to broaden the scope of its challenge to “start[] with”  
17 California’s Global Warming Act and include the “preparatory and  
18 implementing activities” from that point on. (Id.) The court  
declines to do so. Instead, the court will confine its analysis  
to the challenged provision of the Global Warming Act explicitly  
mentioned in the complaint, California Health & Safety Code §  
38564, as well as California Code of Regulations, Title 17,  
Sections 95940-43 pursuant to the complaint’s prayer for relief.  
(See FAC at 31-32; see also MSJ Order at 25, n.12.)

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

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



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

13 II. Standard

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

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

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

5 Where, as here, parties submit cross-motions for  
6 summary judgment, "each motion must be considered on its own  
7 merits." Fair Hous. Council of Riverside Cty., Inc. v. Riverside  
8 Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal citations and  
9 modifications omitted). "[T]he court must consider the  
10 appropriate evidentiary material identified and submitted in  
11 support of both motions, and in opposition to both motions,  
12 before ruling on each of them." Tulalip Tribes of Wash. v.  
13 Washington, 783 F.3d 1151, 1156 (9th Cir. 2015). Accordingly, in  
14 each instance, the court will view the evidence in the light most  
15 favorable to the non-moving party and draw all inferences in its  
16 favor. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097  
17 (9th Cir. 2003) (citations omitted).

### 18 III. Discussion

19 "[T]he Constitution entrusts [the nation's foreign  
20 affairs] solely to the Federal Government." Zschernig v. Miller,  
21 389 U.S. 429, 436 (1968); see also United States v. Pink, 315  
22 U.S. 203, 233 (1942). Accordingly, under the Foreign Affairs  
23 Doctrine, the Supremacy Clause of Article VI, Clause 2, of the  
24 United States Constitution preempts state laws that intrude on  
25 the federal government's exclusive power over foreign affairs.  
26 See U.S. Const. Art. VI, cl. 2; Movsesian v. Victoria  
27 Versicherung AG, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc)  
28 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418-20

1 (2003)).

2 The Foreign Affairs Doctrine encompasses “two related,  
3 but distinct, doctrines: conflict preemption and field  
4 preemption.” Id. (citing Garamendi, 539 U.S. at 418–20.) Under  
5 conflict preemption, “a state law must yield when it conflicts  
6 with an express federal foreign policy.” Id. (citing Garamendi,  
7 539 U.S. at 421). Conversely, under field preemption, a state  
8 law may be preempted “even in the absence of any express federal  
9 policy” if it “intrudes on the field of foreign affairs without  
10 addressing a traditional state responsibility.” Id. at 1072  
11 (citing Deutsch v. Turner Corp., 324 F.3d 692, 709 n.6 (9th Cir.  
12 2003)). The United States argues that the Agreement, Agreement  
13 11-415, and supporting California law are preempted under either  
14 theory. (USA Second MSJ at 16; FAC ¶¶ 174–75, 178.) Each will  
15 be examined in turn.

16 A. Conflict Preemption

17 “The exercise of the federal executive authority means  
18 that state law must give way where . . . there is evidence of  
19 clear conflict between the policies adopted by the two.”  
20 Garamendi, 539 U.S. at 421. “[T]he likelihood that state  
21 legislation will produce something more than incidental effect in  
22 conflict with express foreign policy of the National Government  
23 would require preemption of the state law.” Id. at 420 (emphasis  
24 added); see also Clark v. Allen, 331 U.S. 503, 517 (1947).  
25 Foreign policy may be expressed through a “federal action such as  
26 a treaty, federal statute, or express executive branch policy.”  
27 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d  
28 954, 960 (9th Cir. 2010) (citations omitted). A federal statute

1 can also preempt state law when the state law “stands as an  
2 obstacle to the accomplishment and execution of the full purposes  
3 and objectives of Congress.” Crosby v. Nat’l Foreign Trade  
4 Council, 530 U.S. 363, 373 (2000) (citing Hines v. Davidowitz,  
5 312 U.S. 52, 67 (1941)).

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

21 First, the court will consider the GCPA’s preemptive  
22 effect on California’s cap-and-trade program.<sup>10</sup> The United States

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

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

5 In Crosby, Massachusetts attempted to impose its own  
6 trade sanctions on Burma<sup>11</sup> by banning state entities from buying  
7 goods or services from any person doing business with the  
8 country. 530 U.S. at 367. Three months after Massachusetts’  
9 restrictions came into force, Congress passed a law “imposing a  
10 set of mandatory and conditional sanctions on Burma” that were to  
11 remain in effect “[u]ntil such time as the President determine[d]  
12 and certifie[d] to Congress that Burma has made measurable and  
13 substantial process in improving human rights practices.” Id. at  
14 368 (citation omitted). The Supreme Court held Massachusetts’  
15 ban on trade with Burma stood as an obstacle to the federal  
16 government’s more tempered approach by “fenc[ing] off” the  
17 President’s “access to the entire national economy” and this  
18 effectively negated Congress’ “delegation of effective  
19 discretion” to the President. Id. at 373, 381.

20 Crosby does not support a finding of obstacle  
21 preemption in this case because plaintiff is ascribing power to  
22

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

26 <sup>11</sup> The Supreme Court noted that while the military  
27 government of “Burma” changed its country’s name to “Myanmar” in  
28 1989, the parties, state law, and federal law all continued to  
refer to the country as “Burma” at the time of the case. 530  
U.S. at 366 n.1. This court will use the opinion’s language.

1 the GCPA that Congress itself did not. The GCPA was an  
2 appropriations rider adopted in 1987. As the Second Circuit  
3 noted, it “consists almost entirely of mere platitudes.”  
4 Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 382-83  
5 (2d Cir. 2009), rev’d on other grounds, 564 U.S. 410 (2011).  
6 Beyond requiring the Secretary of State and the EPA to submit a  
7 report to Congress within a two-year period, “the 1987 Act  
8 appears to require no action of any kind.” Id. at 383. The GCPA  
9 only articulates abstract goals that the United States “should  
10 seek to” accomplish, including “increas[ing] worldwide  
11 understanding of the greenhouse effect” or “work[ing] toward  
12 multilateral agreements” to assuage climate change. Title XI of  
13 Pub. L. 100-204, 101 Stat. 1407, note following 15 U.S.C. § 2901,  
14 §§ 1103(a)(1)-(4). The Agreement, Agreement 11-415, and the  
15 provisions of California law challenged by the United States do  
16 not stand as an obstacle to the GCPA’s general aims.

17 Furthermore, the 1992 Convention does not preempt the  
18 challenged agreements and regulations because they are entirely  
19 consistent with its objectives. The “ultimate objective” of the  
20 1992 Convention is “to achieve . . . stabilization of greenhouse  
21 gas concentrations in the atmosphere at a level that would  
22 prevent dangerous anthropogenic interference with the climate  
23 system.” (First Iacangelo Decl. ¶ 3, Ex. 1 at 4, Art. 2.)  
24 Article 3 of the 1992 Convention explicitly provides that  
25 “policies and measures [] deal[ing] with climate change should be  
26 cost-effective so as to ensure global benefits at the lowest  
27 possible cost,” and Article 4 echoes the same. (Id. at Art. 3, ¶  
28 3; see also Art. 4, ¶ 1(f).) The Agreement, Agreement 11-415,

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

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

15 First, under the current form of Article 6 of the Paris  
16 Accord,<sup>12</sup> member jurisdictions can set national greenhouse gas  
17 emission reduction targets, called “nationally determined  
18 contributions.” (First Iacangelo Decl. ¶ 5, Ex. 3 at 7, Art. 6  
19 ¶¶ 1-2.) These operate like California’s “budgets” in its cap-  
20 and-trade program, capping a party’s overall emissions. In order  
21 to comply with these contribution requirements, Article 6  
22 provides that parties can acquire “internationally transferred  
23 mitigation outcomes” from other participating jurisdictions.  
24 (Id. ¶¶ 2-3.) This is functionally equivalent to California

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

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

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

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



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

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

14           To support conflict preemption, foreign policy must be  
15 expressed through a "federal action such as a treaty, federal  
16 statute, or express executive branch policy." Von Saher, 592  
17 F.3d at 960 (citations omitted). To find otherwise would  
18 endanger the "system of dual sovereignty between the States and  
19 the Federal Government." Gregory v. Ashcroft, 501 U.S. 452, 457  
20 (1991). Accordingly, the Supreme Court, as well as the Ninth  
21 Circuit, have recognized conflict preemption only in the face of  
22 a clear and definite foreign policy. See, e.g., Garamendi, 539  
23 U.S. at 420-21 ("The issue of restitution for Nazi crimes has in  
24 fact been . . . formalized in treaties and executive agreements  
25 over the last half century."); Crosby, 530 U.S. at 378 ("The  
26 State has set a different course, and its statute conflicts with  
27 federal law at a number of points by penalizing individuals and  
28 conduct that Congress was explicitly exempted or excluded from

1 sanctions."); Movsesian, 670 F.3d at 1071; Von Saher, 592 F.3d at  
2 960.

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

17 Overall, the United States has failed to identify a  
18 clear and express foreign policy that directly conflicts with  
19 California's cap-and-trade program. Accordingly, the court finds  
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21 <sup>13</sup> Central Valley involved a challenge to regulations  
22 setting limits on carbon dioxide emissions for cars and certain  
23 trucks in California. The court concluded that the regulations  
24 were not expressly preempted by the Energy Policy and  
25 Conservation Act because its preemptive scope "encompass[ed] only  
26 those state regulations that are explicitly aimed at the  
27 establishment of fuel economy standards." 529 F. Supp. 2d at  
28 1175. In so doing, the court rejected "the President's avowed  
intent to seek . . . agreements with foreign countries" because  
the Supreme Court's guidance concerned cases with tangible  
agreements and treaties. 529 F. Supp. 2d at 1186 (discussing  
Garamendi, Crosby, and Zschernig). Accordingly, the court found  
the President's comments were "more accurately described as a  
strategy" rather than "the policy itself." Id.

1 California's program is not barred by conflict preemption.

2 B. Field Preemption

3 "Unlike its traditional statutory counterpart, foreign  
4 affairs field preemption may occur even in the absence of a  
5 treaty or federal statute, because a state may violate the  
6 Constitution by establishing its own foreign policy." Von Saher,  
7 592 F.3d at 964 (quoting Deutsch, 324 F.3d at 709 (internal  
8 modifications omitted)). To discern whether the law  
9 impermissibly impacts foreign affairs, the court must consider  
10 whether the state law "(1) has no serious claim to be addressing  
11 a traditional state responsibility and (2) intrudes on the  
12 federal government's foreign affairs power." Movsesian, 670 F.3d  
13 at 1074 (citing Garamendi, 539 U.S. at 426). A plaintiff must  
14 show both elements to prevail. See id.; see also Cassirer v.  
15 Thyssen-Bornemisza Collection Found., 737 F.3d 613, 617 (9th Cir.  
16 2013). The court will consider each in turn.

17 1. Traditional State Responsibility

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

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

1 Section 38564 and the challenged regulations were  
2 passed as part of (or in furtherance of) California's Global  
3 Warming Act. See Cal. Health & Safety Code § 38500 et seq. In  
4 the Act's legislative findings and declarations, the California  
5 legislature found that global warming posed "a serious threat" to  
6 the state's "economic well-being, public health, natural  
7 resources, and [] environment," noting it was likely to have  
8 "detrimental effects on some of California's largest industries."  
9 Id. §§ 38501 (a)-(b). While it recognized "[n]ational and  
10 international actions" would be "necessary to fully address the  
11 issue of global warming," California hoped to "exercise a global  
12 leadership role" by reducing its greenhouse gas emissions and  
13 "encouraging other states, the federal government, and other  
14 countries to act." Id. §§ 38501(d)-(e). Accordingly, Section  
15 38564 provides:

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

21 Cal. Health & Safety Code § 38564. Pursuant to this mandate,  
22 California Code of Regulations, Title 17, Sections 95940-43  
23 sought to "facilitate . . . regional, national, and international  
24

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

1 greenhouse gas reduction programs” by setting forth procedures to  
2 accept compliance instruments “issued by an external greenhouse  
3 gas emissions trading system.” Cal. Code Regs. tit. 17, §§  
4 95940-43. This design was intended in part to “minimize[] costs”  
5 for California businesses and “maximize[] benefits for  
6 California’s economy.” Cal. Health & Safety Code § 38501(h);  
7 (see also MSJ Order at 8-9).

8 California argues its cap-and-trade program regulates  
9 emissions and in-state businesses in a fashion that is consistent  
10 with its traditional police power. (CA Second MSJ at 34-37.) As  
11 this court has previously recognized, it is well within  
12 California’s power to enact legislation to regulate greenhouse  
13 gas emissions and air pollution. (See MSJ Order at 30); see  
14 also, e.g., Rocky Mountain Farmers Union v. Corey, 913 F.3d 940,  
15 945-46, 953 (9th Cir. 2019); Am. Fuel & Petrochem. Mfrs. v.  
16 O’Keefe, 903 F.3d 903, 913 (9th Cir. 2018). California can also  
17 “subject[] both in and out-of-jurisdiction entities to the same  
18 regulatory scheme to make sure that out-of-jurisdiction entities  
19 are subject to consistent environmental standards.” Rocky  
20 Mountain Farmers, 913 F.3d at 952 (finding California’s low  
21 carbon fuel standards did not violate the Commerce Clause).

22 However, a state’s police power is not without limits.  
23 Section 38564’s plain text contemplates “facilitat[ing] the  
24 development of” programs with “other nations.” Cal. Health &  
25 Safety Code § 38564. This invokes an exercise of power typically  
26 reserved to the federal government. See, e.g., Pink, 315 U.S. at  
27 233 (“Power over external affairs is not shared by the States; it  
28 is vested in the national government exclusively.”); Hines, 312

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

5 “Courts have consistently struck down state laws which  
6 purport to regulate an area of traditional state competence, but  
7 in fact, affect foreign affairs.” Von Saher, 592 F.3d at 964  
8 (citations omitted). This practice is particularly prevalent  
9 when the focus of a state law extends beyond the enacting state’s  
10 borders. See, e.g., id.; Movsesian, 670 F.3d at 1075-77.

11 California contends that its cap-and-trade program is “expressly  
12 targeted” at mitigating compliance costs for California  
13 businesses. (CA Second MSJ at 35, 41.) While the court has  
14 previously recognized that this is one effect of linkage (see MSJ  
15 Order at 8-9), an ancillary benefit conferred on in-state  
16 entities does not absolve a state from acting outside of its  
17 traditional state responsibility. See Movsesian, 670 F.3d at  
18 1076 (quoting Von Saher, 592 F.3d at 965).

19 In its current form,<sup>15</sup> California’s cap-and-trade  
20 program has extended beyond an area of traditional state

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

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

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

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

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

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

11 2. Intrusion on Federal Government's Power

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

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



1 . . . the Senate cannot intrude; and Congress itself is powerless  
2 to invade it.” United States v. Curtiss-Wright Exp. Corp., 299  
3 U.S. 304, 319 (1936); see also Zivotofsky v. Kerry, 576 U.S. 1,  
4 13-14 (2015).

5 “To intrude on the federal government’s foreign affairs  
6 power, a [state’s action] must have more than some incidental or  
7 indirect effect on foreign affairs.” Gingery v. City of  
8 Glendale, 831 F.3d 1222, 1230 (9th Cir. 2016) (quoting Cassirer,  
9 737 F.3d at 617) (alterations in original). To have more than  
10 some incidental or indirect effect, state laws must “impair the  
11 effective exercise of the Nation’s foreign policy” or have some  
12 “great potential for disruption.” Zschernig, 389 U.S. at 435,  
13 440.

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

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

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

11 "[I]n the absence of either a congressional grant or  
12 denial of authority" there is a "zone of twilight" in which the  
13 President's authority is less clear. Youngstown, 343 U.S. at  
14 637. Here, unlike in Crosby, there has not been a comparable  
15 statutory grant. Consequently, the President's authority is not  
16 at its maximum. While the President can, to an extent, "act in  
17 external affairs without congressional authority," id. at 635,  
18 absent an express delegation of power from Congress, "[i]t is not  
19 for the President alone to determine the whole content of the  
20 Nation's foreign policy." See Zivotofsky, 576 U.S. at 21; (see  
21 also Br. of Amici Curiae Professors of Foreign Relations Law at  
22 9-14 (Docket No. 113).) Accordingly, Crosby is distinguishable  
23 in this respect.

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

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

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

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

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

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

1 25 at 9 (“Any jurisdiction that wishes to link with the  
2 California Program . . . will need to be a member of WCI, Inc.”);  
3 (see Part III(A) at 15-16, supra).

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

14 While the President indisputably has “a unique role in  
15 communicating with foreign governments,” Zivotofsky, 576 U.S. at  
16 21, the United States has failed to demonstrate that the power to  
17 do so has been substantially circumscribed or compromised by  
18 California’s cap-and-trade program. As California recognizes, a  
19 future treaty would have “appropriate preemptive effect over  
20 inconsistent state laws.” (CA Reply in Support of Second MSJ at  
21 15 (Docket No. 127).) But in the interim, hypothetical or  
22 speculative fears cannot support a finding that this state  
23 program has more than an incidental effect on foreign affairs.  
24 See Gingery, 831 F.3d at 1230; see also Incalza v. Fendi North  
25 Am., Inc., 479 F.3d 1005, 1010 (9th Cir. 2007) (“A hypothetical  
26 conflict is not a sufficient basis for preemption.”).

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

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

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

13 Dated: July 16, 2020



14 **WILLIAM B. SHUBB**  
15 **UNITED STATES DISTRICT JUDGE**  
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