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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

2:19-cv-02142-WBS-EFB

BRIEF OF AMICI CURIAE THE STATES OF OREGON, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, RHODE ISLAND, VERMONT, WASHINGTON, AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION

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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IDENTITY AND INTERESTS OF AMICI CURAE

Amici curiae are the States of Oregon, Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, Rhode Island, Vermont, Washington, and the Commonwealth of Massachusetts. (collectively Amici States). The Amici States have a keen interest in the issues presented by this Motion. States have a compelling interest in being able to take action to protect their residents against threats to public safety, health, and welfare, including threats arising from environmental harms. The prospect that the Federal government may invoke foreign affairs preemption to attempt to overturn well-established state policies on issues like climate change, that have substantial effects on the health and welfare of Amici States' residents, threatens that interest.

More specifically, Amici States have a strong interest in preventing and mitigating damaging climate change harms to their residents, economies, and natural resources. And to that end, Amici States have an interest in upholding their traditional state authority to develop and implement policies to cost-effectively reduce carbon emissions, address other environmental harms, and promote local benefits, all within their borders - a fitting example being California's adoption of its cap and trade program and the subsequent linkage of the allowance trading program with Québec, that facilitates compliance for California's entities regulated under the cap.

And Amici States have a general interest in entering into cross-jurisdictional agreements, including agreements with foreign jurisdictions. Indeed, states have entered into numerous interjurisdictional agreements, including with foreign governments, to effectuate a wide range of important state policies on environmental and other subjects, without encroaching on Federal authority. A ruling limiting state authority in this sphere could have wide-ranging consequences.[1]

[1] Agreements between States and foreign governments alone number in the hundreds or thousands. *See, e.g.*, Michael Glennon & Robert Sloane, *Foreign Affairs Federalism: The Myth*

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The Amici States offer our collective experience in the above areas to assist the Court with its decision in this case.

SUMMARY OF ARGUMENT

The specific state actions that Plaintiff has challenged in this litigation are California's linkage regulations that authorize acceptance of Québec-issued compliance instruments under California's cap-and-trade program ("linkage regulations"), and a related agreement between California and the Canadian Province of Québec (the "Agreement"). Plaintiff's Amended Complaint (ECF 7) at 31-32 (Prayer for Relief). Plaintiff's arguments are legally groundless and do not comport with well-established precedent on foreign affairs preemption.

Plaintiff argues that because climate change is a global issue, regulating greenhouse gas emissions does not fall within states' traditional areas of responsibility. Plaintiff incorrectly argues that if a state addresses an issue of both local and international concern, then the state policy can be invalidated under the "field preemption" doctrine. Plaintiff also wrongly asserts that whether a state policy falls within a state's traditional field of responsibility hinges on the statements of state officials that are unrelated to that policy. Plaintiff even makes the remarkable argument that officials' statements made years after a state policy was adopted can *retroactively change the nature* of a state policy, transforming the policy from an exercise of traditional state authority to an attack on federal authority in foreign affairs. Finally, Plaintiff claims that the Agreement and linkage regulations conflict with national policy based on vague statements made by federal officials, but does not identify an established federal policy in conflict.

These arguments defy established legal precedent and common sense. The parameters of foreign affairs preemption are well-established. There are two forms of foreign affairs preemption. "Field preemption" applies only when a state "(1) has no serious claim to be

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of National Exclusivity 60 (2016) (noting that "state and local governments have entered into thousands of compacts and agreements with national and subnational governments around the world").

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addressing a traditional state responsibility, and (2) intrudes on the federal government's foreign affairs power." *Movsesian v. Victoria Versicherung*, 670 F.3d 1067, 1074 (9th Cir. 2012). Field preemption is "rarely invoked." *Id.* Conflict preemption, by contrast, can apply when a state is operating in a traditional field of responsibility, but a state law "conflicts with an express federal foreign policy" and the conflict is "clear." *Id.* at 1071 (citations omitted).[2] This Court has said that in order to show a "clear conflict," the claimant "must show what the policy of the United States is and precisely how [the state action] … would interfere with the United States' foreign policy." *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007).

Beginning with field preemption, the Ninth Circuit has made it clear that addressing climate change falls well within traditional spheres of state authority: "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *American Fuel and Petroleum Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018); *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 at 1079 (9th Cir. 2013) (describing California's Global Warming Solutions Act of 2006 as an example of California's "tradition of leadership" in environmental issues). This Court itself affirmed that principle in this very case when it decided arguments concerning the Compact Clause and the Treaty Clause in March: "It is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." *United States v. California*, 2:19-cv-02142-WBS-EFB, 2020

[2] Thus, a plaintiff making a foreign affairs preemption claim must make a stronger showing if a state is acting in a field of traditional responsibility. The Supreme Court in *American Insurance Ass'n v. Garimendi*, 539 U.S. 396, 419 n.11 (2003), observes that "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government … Where, however, a State has acted within what Justice Harlan called its "traditional competence"…but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."

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WL 1182663 at *30 (E.D. Cal. Mar. 12, 2020). Indeed, greenhouse gas regulation is firmly within the purview of state and local interests, regardless of the global dimensions of climate change. Greenhouse gases are air pollutants, which states have long regulated, and their dangers are affecting states and their residents now.

Furthermore, there is absolutely no support for Plaintiff's novel theory that an existing policy that fits within a state's traditional responsibilities can be transformed into an illegal arrangement based on statements made by federal officials on a tangentially related issue.

And as to conflict preemption, there is no federal "policy"—as this Court defined that term in *Central Valley*—with which the Agreement or linkage regulations conflicts. The vague statements by Administration officials that Plaintiff invokes certainly do not constitute a "policy." Moreover, in an attempt to manufacture a "clear" conflict from a nonexistent policy, Plaintiff relies on a flawed argument that state greenhouse gas regulations undermine the federal government's "leverage" in international discussions—a discredited and overbroad argument that, if accepted, could threaten any state regulation dealing with greenhouse gases.

Finally, Plaintiff's claims are extraordinarily broad in scope. If accepted, they would expand the foreign affairs preemption doctrine to threaten states' ability to address not only climate change, but numerous other critical issues that have both international and intrastate implications.

ARGUMENT

I. THE AGREEMENT AND LINKAGE REGULATIONS ARE NOT FIELD PREEMPTED

A. Addressing Climate Change Falls Within Traditional State Responsibilities and Does Not Intrude on the Federal Government's Foreign Affairs Power

It is well-settled that foreign affairs "field preemption" applies only when a state: "(1) has no serious claim to be addressing a traditional state responsibility, and (2) intrudes on the federal government's foreign affairs power." *Movsesian*, 670 F.3d at 1074. Consequently, if a state has a

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"serious claim to be addressing a traditional state responsibility," field preemption does not apply. Thus, "field preemption is a rarely invoked doctrine." *Id.*

Plaintiff argues that "[r]egulating greenhouse gas emissions to address global climate change is not a traditional state responsibility." Plaintiff's Brief in Support of Second Motion for Summary Judgement (hereafter "Pf. Br.") at 29. Plaintiff further asserts that "climate change is a global issue that exceeds the competence or capacities of individual states to resolve. The dispersion of greenhouse gases into the atmosphere is a global phenomenon, and cannot be regulated in any meaningful way at the state level." *Id.* at 31-32. Finally, Plaintiff notes that California officials have acknowledged that "[c]limate change is a global problem" and that "*GHGs are global pollutants.*" *Id.* at 32. Based on these assertions, Plaintiff argues that the field preemption doctrine applies.[3]

However, Plaintiff's position directly conflicts with the Ninth Circuit's decision in *American Fuel and Petrochemical Mfrs v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). In that case, the Ninth Circuit upheld Oregon's "Clean Fuels" program against a Commerce Clause challenge, declaring that:

> It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents. *Massachusetts v. EPA*, 549 U.S. 497, 522-23, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." *Exxon Mobil Corp. v. U.S. Envtl. Prot. Agency*, 217 F.3d 1246, 1255 (9th Cir. 2000).

And this very Court has expressly reaffirmed in this case that mitigating the effects of climate change by regulating greenhouse gases falls within states' traditional responsibility to protect health and welfare: "[i]t is well within California's police powers to enact legislation to regulate

[3] As California explains in its Memorandum in Support of Cross-Motion for Summary Judgement and Opposition to Plaintiff's motion for Summary Judgement, (hereafter "Cal. Mem."), the Agreement and linkage regulations "do not limit emissions," Cal. Mem. at 44, but "make those reductions more cost-effective," and are a "means" to accomplish the state's police power objectives. *Id.* at 15.

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greenhouse gas emissions and air pollution." *United States v. California*, 2:19-cv-02142-WBS-EFB, 2020 WL 1182663 at *30 (E.D. Cal., Mar. 12, 2020).

As the Ninth Circuit and this Court have recognized, climate change is an issue with both global and local consequences that is amenable to both global and local solutions. All Amici States are experiencing profound and costly impacts from climate change.[4] Within our borders, climate change is causing a loss of land due to rising seas; decreased drinking water supply due to diminished snowpack; reduced air and water quality, as well as diminished agriculture and aquaculture productivity; decimation of biodiversity and overall ecosystem health; and increased frequency and intensity of heatwaves, insect-borne diseases, wildfires, severe storms, and flooding.[5] If climate change continues unabated, the Amici States and other state and local governments will have to spend trillions of dollars in mitigation projects to safeguard our borders and resources, and to protect the health of our residents.[6]

[4] *See, e.g.*, U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* (D.J. Wuebbles et al. eds., 2017), https://www.globalchange.gov/browse/reports/climate-science-special-report-fourth-national-climate-assessment-nca4-volume-i (assessing the science of climate change, with a focus on the United States); U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (D.R. Reidmiller et al. eds., 2018), https://nca2018.globalchange.gov/ (assessing the impacts and risks of climate change in the United States).

[5] *See generally* Appendix A to Comments of the Attorneys General of New York, et al. on EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-HQ-OAR-2017-24817 (Oct. 31, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24817 (extensively documenting climate harms to numerous States and localities, including many of the Amici States).

[6] For example, New York City alone has proposed spending over $100 billion on a sea wall that would only partially mitigate the effects of climate-driven sea-level rise for portions of the City. Anne Barnard, *The $119 Billion Sea Wall That Could Defend New York . . . Or Not*, N.Y. Times, Jan. 17, 2020, https://www.nytimes.com/2020/01/17/nyregion/sea-wall-nyc.html. And the City of Boston estimates the costs of actions to address future flood risks created by sea-level rise range from $202 million to $342 million for its East Boston and Charlestown districts alone. *See Coastal Resilience Solutions for East Boston and Charlestown: Final Report* (2017), www.boston.gov/sites/default/files/climatereadyeastbostoncharlestown_finalreport_web.pdf; *see also Massachusetts State Hazard Mitigation and Climate Adaptation Plan* (2018), https://www.mass.gov/service-details/massachusetts-integrated-state-hazard-mitigation-and-

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Those harms are the types of local harms that states regularly address as sovereigns, and those harms can and have been mitigated by the same types of solutions states regularly employ. Indeed, states have exercised their authority to address climate change by passing and implementing a vast array of statutes and regulations to reduce greenhouse gas emissions and mitigate climate harms.[7] Those state laws apply traditional policy solutions, including the creation of mandatory market-based programs, that states have long used to address a wide range of transboundary environmental problems that directly harm their residents. This Court recognized in its prior summary judgment opinion the extensive state efforts on climate change, noting that "state governments have sought to combat greenhouse gas emissions in a variety of ways, including through the enactment of cap-and-trade programs." *United States v. California*, 2:19-cv-02142-WBS-EFB, 2020 WL 1182663 at *1 (E.D. Cal., Mar. 12, 2020).

Given that it is "well settled" that efforts to combat climate change are within the states' "legitimate interest" and "broad police powers," *O'Keeffe*, 903 F.3d at 913, Plaintiff is wrong to argue that these efforts have "no serious claim to be addressing a traditional state responsibility." *Movsesian*, 670 F.3d at 1074. As a result, field preemption does not apply to state efforts to address climate change.

Not incidentally, the court in *O'Keeffe* was well aware that Oregon state officials—just like the California officials Plaintiff cites in the case before this Court now—recognized both the global and local dimensions of climate change: "In 2007, the Oregon legislature found that '[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources and environment of Oregon,' and identified 'a need to ... take necessary action to begin reducing greenhouse gas emissions.'" *Id*. at 907. The Ninth Circuit further noted that "the stated

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climate-adaptation-plan (reporting that the replacement cost of state-owned facilities exposed to a 1% annual chance coastal flood event exceeds $500 million).

[7] *See, e.g.*, Ctr. for Climate & Energy Solutions, *State Climate Policy Maps*, https://www.c2es.org/content/state-climate-policy/ (documenting a wide range of state laws, regulations, and policies to address climate change, including carbon pricing, emission limits, renewable energy mandates, energy efficiency programs, and clean fuels programs).

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purpose of the Program is simply to 'reduce Oregon's contribution to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon.'" *Id*. at 912. Thus, Plaintiff's argument that state officials' statements about the global nature of climate change constitute an "admi[ssion] that greenhouse gas regulation is not a traditional area of state responsibility," Pf. Bf. at 11, simply cannot be reconciled with the holding in *O'Keeffe*. Because regulating greenhouse gas emissions fall squarely within the traditional area of state responsibility, field preemption cannot apply.

Moreover, the states' broad and longstanding authority to regulate emissions of climate-altering pollutants is confirmed by Congress's direction in the Clean Air Act that states generally retain their historic power to regulate emissions of air pollution more strictly than federal law may require. *See* 42 U.S.C. § 7401(a)(3) (combatting air pollution "is the primary responsibility of States and local governments"); *id.* § 7416 (reserving to states and political subdivisions the ability to "adopt or enforce" any measure to "control or abate" air pollution, except as otherwise expressly limited, so long as the measure is not "less stringent" than certain emissions reductions required by Clean Air Act).[8] *See also Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (finding that "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant'").

More generally, Plaintiff incorrectly suggests that states' traditional areas of responsibility do not include any issues that have global as well as local dimensions. For example, the trade in illegal drugs is very much an international as well as an intrastate problem, and the United States has engaged in diplomacy with other nations to address the drug trade.[9] In

[8] *See, e.g.*, *Bell v. Cheswick Gen. Station*, 734 F.3d 188, 190 (3d Cir. 2013) (states may "employ standards more stringent that those specified by the federal requirements").

[9] See, e.g., U.S. Department of State, "U.S. Relations with Mexico, Bilateral relations Fact Sheet," April 1, 2019, https://www.state.gov/u-s-relations-with-mexico/ (noting that "the United States and Mexico have forged a partnership to combat transnational organized crime and drug trafficking").

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fact, the drug trade fits Plaintiff's description of a "global issue that exceeds the competence or capacities of individual states to resolve" quite nicely. Pf. Bf. at 31. Nonetheless, states have long been at the front lines of the effort to stop illegal drug trafficking, in part because of the devastating effect that trafficking has on the health and safety of their communities.[10] No one seriously argues that drug laws do not fall within states' traditional areas of responsibility.

Wildlife trafficking is another issue of both international and local concern where the states have long played a critical role alongside federal efforts. As the U.S. Department of State explains on its website: "The United States is a leader in the fight against the illicit trade in wildlife and … plays an important role in the development and implementation of anti-wildlife trafficking policies around the world."[11] But states are also concerned and impacted by wildlife trafficking—much of which occurs within our state borders as well as in jurisdictions abroad—and several states have passed their own laws prohibiting the sale of products made from animals such as elephants and rhinos.[12]

So, too, with climate change: Even though no state can solve the entire global problem singlehandedly, states have a traditional responsibility to protect the health and welfare of their

[10] See Recovery.org, Guide to U.S. Drug Laws, https://www.recovery.org/addiction/us-drug-laws/.

[11] U.S. Department of State, "Environmental Crime and Wildlife Trafficking," https://www.state.gov/environmental-crime-and-wildlife-trafficking/.

[12] See, e.g., ORS 498.022 https://www.oregonlegislature.gov/bills_laws/ors/ors498.html; NJSA 23:2A-1 to 16, relating to endangered wildlife, and specifically 13.1 through 13.5, relating to ivory products; N.Y. Envtl. Cons. Law §11-0535-a (ivory and rhino horn); New Mexico, Senate Bill 75, "parts or products of animals covered in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora," https://www.nmlegis.gov/Sessions/20%20Regular/final/SB0075.pdf (Senate Bill 75 was signed by Governor. Dan McKay, "Governor Oks bills on wildlife, redevelopment," Albuquerque Journal, March 9, 2020).

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residents from the harms of climate change.[13] Field preemption certainly does not bar those efforts.

B. State Officials' Comments Relating to Foreign Affairs Do Not Nullify the States' Traditional Authority to Take Action on Climate Change

Plaintiff appears to argue that if state officials make statements about climate change that touch on foreign affairs, existing state climate policies that would otherwise be permissible are suddenly transformed into actions that are no longer addressed to a traditional state interest. *See, e.g.*, Pf. Bf. at 28 (citing California's "declared dissatisfaction" with federal climate-related foreign affairs policy as evidence that California acted "beyond a traditional area of state regulation"). Plaintiff argues that such remarks demonstrate that the "real purpose" of the policy is to meddle in foreign affairs; *ergo*, the policies are subject to field preemption. See Pf. Bf. at 29 (claiming that California "criticizes withdrawal from Paris" is evidence of California's "real purpose"). But field preemption does not turn on the statements of officials. Under Ninth Circuit precedent, when conducting a foreign affairs preemption analysis, this Court must determine the state's "real purpose" by using the traditional methods of statutory interpretation—namely, the law's "text," "legislative history," official "findings," and "scope." *Movsesian*, 670 F.3d 1075 & n.3. Plaintiff ignores this precedent in asserting that statements made by state officials—including statements made years after the policies at issue had been adopted—are evidence that

[13] Moreover, many state climate programs are also aimed at achieving other co-benefits that are totally local and not global in nature, including reducing other air pollutants, encouraging renewable energy development, or achieving economic development benefits. For example, see the New York State Climate Leadership and Community Protection Act – Chapter 106 of the Laws of 2019. Paragraph 3 of the legislative findings in the bill text includes: "Action undertaken by New York to reduce greenhouse emissions will have an impact on global greenhouse gas emissions and the rate of climate change ... It will also advance the development of green technologies and sustainable practices within the private sector, which can have far-reaching impacts such as a reduction in the cost of renewable energy components, and the creation of jobs and tax revenues in New York."

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California's true intent was to meddle in foreign affairs rather than address a legitimate state interest.

Plaintiff's reliance on California officials' comments about the Paris Agreement is most obviously misplaced. California enacted the linkage regulations in 2013 (see Cal. Mem at 8), and also signed the initial version of the Agreement with Québec in 2013,[14] which is years before the Paris Agreement was signed in 2015 or the current administration decided to withdraw from the Paris Agreement in 2017. Yet Plaintiff argues that comments about the Paris Agreement are evidence of the "real purpose" of the Agreement and linkage regulations. State officials' criticism of federal action years after a state policy was enacted cannot result in field preemption by *retroactively* changing the nature of a specific state policy that, under plain Ninth Circuit precedent, represents a permissible exercise of traditional state authority.

At a more basic level, state officials routinely comment on federal policies regarding issues of local, national and international importance like climate change. This is because the actions of foreign governments, and the federal government, often have a direct impact on the health and welfare of the residents of every state. It is perfectly reasonable—and consistent with state officials' efforts to protect their residents from environmental, economic, and public health harms—for state officials to be concerned about whether the federal government is doing its best to ensure that foreign governments limit greenhouse gas emissions. If state officials believe that the United States' withdrawal from the Paris Agreement makes it less likely that other nations will reduce their emissions, then criticizing that withdrawal is a natural outgrowth of that state's "traditional" concern for the health and welfare of its residents, and fully consistent with their constitutional roles in our system of dual sovereignty.

The idea that criticism of the Administration's decision to withdraw from the Paris Agreement retroactively renders invalid a state's otherwise legitimate climate policies would, if

[14] As this Court has already noted. *United States v. California,* No. 2:19-cv-02142-WBS-EFB, 2020 WL 1182663, at *10 (E.D. Cal. Mar. 12, 2020).

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accepted, raise questions about a host of such policies whose validity has never been seriously questioned. Notably, twenty-four states have joined the Climate Alliance, in which "states commit to … [i]mplement policies that advance the goals of the Paris Agreement,"[15] even as many of those states' officials have criticized the President's decision to withdraw from the Paris Agreement. To give just a few examples: in November of last year, "Montana Gov. Steve Bullock, a Democrat running for president, responded to the Paris pullout on Twitter, saying, 'Trump is putting polluters above people.'"[16] Governor Janet Mills of Maine stated that "[t]he Trump Administration's withdrawal from the Paris Climate Agreement, a landmark international accord to reduce greenhouse gas emissions, is an unparalleled abdication of U.S. leadership."[17] And Governor Steve Sisolak of Nevada added, "Today, Nevadans stand up once again to reaffirm our commitment to the Agreement and strongly oppose the Administration's misguided decision to begin the process of formally withdrawing from the Paris Agreement."[18] New Jersey Governor Phil Murphy tweeted "Abandoning the Paris Agreement is reckless and wrong. In New Jersey, we remain committed to leading the fight against climate change alongside [the United States Climate Alliance] while growing our clean energy economy."[19]

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[15] http://www.usclimatealliance.org/

[16] Noah Glick, "Mountain West Governors Buck Trump On Paris Accord," KUNR radio, Nov. 5, 2019. https://www.kunr.org/post/mountain-west-governors-buck-trump-paris-accord#stream/0

[17] Maine Governor Janet T. Mills, "Governor Mills Statement on Trump Administration's Formal Notice of Withdrawal from the Paris Climate Agreement," https://www.maine.gov/governor/mills/news/governor-mills-statement-trump-administrations-formal-notice-withdrawal-paris-climate

[18] Nevada Governor's Office of Energy, "Nevada Reaffirms Commitment to Paris Climate Agreement," Nov. 4, 2019, http://energy.nv.gov/Media/Press_Releases/2019/Nevada_Reaffirms_Commitment_to_Paris_Climate_Agreement/

[19] Governor Phil Murphy (@GovMurphy), Twitter (Nov. 4, 2019,7:23 PM), https://twitter.com/GovMurphy/status/1191511216738443264.

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If Plaintiff's analytical framework could apply to all of those states' previously adopted climate-related policies—or to other analogous situations where state officials have leveled similar critiques at federal policy in areas of overlapping local and global concern—the "rarely invoked" field preemption standard would apply to an untenably broad array of state actions. For example, historically, state officials have frequently gone on international trade missions, seeing such missions as part of their traditional role in fostering economic development.[20] But since international trade is, by definition, international, Plaintiff could argue that such missions do not fall within a state's traditional responsibilities, and seek to prohibit them on field preemption grounds, depending on the United States' current policies toward the country in question, or on state officials' comments on such policies.

Given that field preemption cannot, and should not, cast doubt on well-established state actions to regulate in-state greenhouse gas emissions, Plaintiff's motion seeking to invalidate California's agreement with Québec or California's linkage regulations on field preemption grounds should be denied. Thus, Plaintiff's only remaining relief is to demonstrate conflict preemption to prevail. As detailed below, it cannot.

[20] Trade missions to China, for instance, are popular. See, for example, Brandon Barger, "Governor undeterred by trade war as he prepares to travel to China," South Bend Tribune, Sept. 20, 2019. https://www.southbendtribune.com/news/business/governor-undeterred-by-trade-war-as-he-prepares-to-travel/article_ff710a04-053d-5fa4-9cc8-278157149122.html ; Lincoln Journal Star, "Trade mission led by Nebraska Gov. Ricketts Turns to China," Sept. 16, 2016; Liz Raines, "Walker, Alaska organizations head to China on Trade Mission," KTVA, May 19, 2018, https://www.ktva.com/story/38231487/walker-alaska-organizations-head-to-china-on-trade-mission; Charles E. Ramirez, "Snyder to lead 7th trade mission to China," Detroit News, July 28, 2017.

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II. PLAINTIFF'S CONFLICT PREEMPTION ARGUMENTS FAIL BECAUSE IT DOES NOT IDENTIFY A POLICY THAT CONFLICTS WITH THE AGREEMENT OR LINKAGE REGULATIONS, AND RELIES ON AN OVERBROAD AND DISCREDITED CONFLICT ARGUMENT

A. Plaintiff Does Not Articulate an Actual "Policy"

The Ninth Circuit has explained that "conflict preemption" applies when a state law "conflicts with an *express federal foreign policy*" and the conflict is "clear." *Movsesian*, 670 F.3d at 1071 (emphasis added). To demonstrate a "clear conflict," a claimant "must show what the policy of the United States is and precisely how [the state action] … would interfere with the United States' foreign policy." *Central Valley*, 529 F. Supp. 2d at 1184. In this context, "[t]he term 'policy' refers to a concrete set of goals, objectives and/or means to be undertaken to achieve a predetermined result." *Id.* at 1186. In the present case, Plaintiff has not articulated an "express foreign policy" with which the Agreement or linkage regulations conflict. And even if the vague statements by Administration officials that Plaintiff invokes were construed to constitute a "policy," Plaintiff does not demonstrate a conflict between that policy and the Agreement or linkage regulations.

This Court's decision in *Central Valley* is instructive, as it involved a similar claim that California's greenhouse gas policies were preempted by the foreign affairs doctrine. In that case, the Court found that the automobile industry Plaintiffs were not able to demonstrate any conflict with an actual "policy," explaining that:

> Plaintiffs look to the President's avowed intent to seek voluntary bilateral or multilateral agreements with foreign countries, including developing countries, and characterize this intent to negotiate as being the "policy"… What Plaintiffs label as a policy in this case is actually nothing more than a commitment to negotiate under certain conditions and according to certain principles.
>
> The term "policy" … refers to a concrete set of goals, objectives and/or means to be undertaken to achieve a predetermined result. A commitment to negotiate falls short of this definition. * * *
>
> * * * In order to conflict or interfere with foreign policy … the interference must be with a policy, not simply with the means of negotiating a policy.

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Id. at 1186-87.

In this case, Plaintiff's identifies even less of a "policy" than that described by the plaintiffs in *Central Valley*. Plaintiff alleges that "[t]he President wishes to obtain a better deal in the international arena," Pf. Bf. at 3, and indicates that such a "better deal" would require more of China, India, and "developing nations." *Id.* at 11-12. Plaintiff does not offer a "concrete set of goals and objectives." It has not explained what goals a hypothetical new international climate agreement would be designed to achieve, or what commitments Plaintiff would expect from Canada or any other nations. Thus, Plaintiff's alleged policy "does not guide the actions of any actors with respect to greenhouse gas reduction, and imparts no information to guide future actions that may increase or decrease greenhouse gas production." *Central Valley*, 529 F.Supp.2d at 1186.

Furthermore, at least in *Central Valley*, the plaintiffs could point to a "commitment to engage in negotiations" on climate change. But in this case, it is evident from Plaintiff's own brief that there is no such commitment. Plaintiff argues that California's conduct "prejudices the President's ability to find allies for an agreement representing a better bargain for the nation as a whole, *should he desire to pursue that approach* in light of all international relations factors that may inform his discretion." Pf. Bf. at 3 (emphasis added.) Given that the President might very well choose *not* to negotiate a new climate agreement, Plaintiff's assertion of a clear conflict is even more untenable than that in *Central Valley*. The vague and illusory assertions in Plaintiff's brief do not constitute a foreign policy that can preempt a valid exercise of state authority.

Importantly, an adverse finding that the vague statements offered by Plaintiff constitute a "policy" would open the floodgates, paving the way for a multitude of unjustified foreign affairs preemption claims. For that reason, courts regularly find that arguments based on assertions of a broad and amorphous "policy" cannot be the basis of a conflict preemption claim. For example, in *Lighthouse Resources, Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2019 WL 1436846 (W.D. Wash. 2019, April 1, 2019), a coal company brought suit alleging that Washington State's denial

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of certain requests related to its proposal to build a coal export terminal was preempted because it conflicted with the Administration's "policy of encouraging the development and export of coal." *Id.* at 6. The district court properly concluded that "[t]he President's and his administration official's generalized remarks favoring the development of the coal industry and the export of coal are not in clear conflict with the State's decision." *Id.* at 7. In our federalist system, such an attenuated "conflict" is not a basis for invalidating state actions. The Constitution creates a "system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). It would seriously undermine that system if such vague statements by federal officials were sufficient to divest states of authority to exercise their traditional police powers.

B. Plaintiff Relies on a Conflict Argument that Is Inconsistent with States' Plain Authority to Regulate Greenhouse Gases

As California explains in its brief, even if one were to go so far as to accept the idea that vague statements by administration officials constituted a "policy," Plaintiff cannot demonstrate that the Agreement or linkage regulations would undermine that "policy." Neither the Agreement nor the linkage regulations would interfere with the federal government's ability to negotiate a new international climate agreement. *See* Cal. Mem. at 22-26. In addition, Plaintiff takes an irrational and overbroad position that, if taken to its conclusion, could call virtually all state regulation of greenhouse gases into question. Plaintiff argues that the Agreement and linkage regulations conflict with the alleged policy of potentially pursuing a new climate agreement because they deprive the United States of "leverage." Plaintiff explains: "[t]he United States is one of the world's largest emitters of greenhouse gases . . . It therefore has significant leverage in climate negotiations." Pf. Bf. at 27.

The "leverage" argument makes no sense as applied to the Agreement or linkage regulations. As California has explained, the "the agreement and regulations do not limit emissions." Cal. Mem. at 44. California has committed to reducing its own emissions, but that

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commitment is completely independent of the Agreement and linkage regulations. *Id.* at 34-35. In other words, even if California had not linked its cap-and-trade program with Québec's, California's cap-and-trade program would continue to exist and mandate emission reductions, albeit at greater cost. Plaintiff's "leverage" argument is thus not traceable to the Agreement or the linkage regulations, but is instead aimed at California's preexisting commitment to reducing in-state carbon emissions. And in the absence of any federal law that supersedes states' historic authority, general statements by the President about balancing climate aims with economic interests in a future climate treaty do not divest the states of inherent authority to reduce emissions and mitigate harms now, and to use traditional tools at their disposal to do so.

Moreover, if "leverage" arises from the United States' status as a large greenhouse gas emitter, arguably, any state effort to reduce greenhouse gas emissions would undermine that "leverage," and, by Plaintiff's logic, would be invalid. This Court recognized the extreme consequences of such reasoning in *Central Valley*:

> The "bargaining chip" theory of interference also embraces an impermissibly broad range of activities that fall within the traditional powers of states to regulate under their own police powers for the health and welfare of their own citizens. If states can be barred from taking action to curb their greenhouse emissions, then the efforts of the various states to encourage the use of compact florescent light bulbs, subsidize the installation of solar electric generating panels, grants tax rebates for hybrid automobiles, fund renewable energy start-ups, specify enhanced energy efficiency in building codes, or any other activity that results in lower fuel or energy use would likewise constitute an interference with the President's alleged "bargaining chip policy."

Id. at 1187-88.[21] Plaintiff offers no limiting principle that would serve to invalidate the Agreement and linkage regulations for purportedly reducing federal "leverage" in the climate

[21] The Court also observed that the theory is inherently irrational, saying that it "only makes logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise." *Central Valley*, 529 F. Supp. 2d at 1187.

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arena, yet recognize valid laws and regulations that states have enacted under their traditional authority to address greenhouse gas emissions and protect public health and welfare from environmental harms.

CONCLUSION

For the reasons explained above, this Court should deny Plaintiff's motion for summary judgment and grant California's cross-motion for summary judgment.

DATED May 26th, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 26, 2020, I served the **BRIEF OF AMICI CURIAE THE STATES OF OREGON, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, RHODE ISLAND, VERMONT, WASHINGTON, AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION** upon the parties hereto by the method indicated below, and addressed to the following:

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