As my UCLA Law colleague Ann Carlson described last week, Trump's DOJ has filed two pretty extraordinary lawsuits against the states of Michigan and Hawaii trying to block those states — preemptively — from bringing suit against fossil fuel companies for climate harms. As Ann points out, these DOJ suits are among the first salvos fired as a result of President Trump's April 8 executive order targeting state and local climate efforts. Californians should read DOJ's complaints against MI and HI with particular interest, since we are also in the crosshairs of the anti-state-action EO. Last week, for example, I was asked to talk with the state's Independent Emissions Market Advisory Committee about threats to California's cap-and-trade program from the Trump Administration, and I took a few hints from those complaints.

To recap the threat, Trump's anti-state EO directs AG Pam Bondi to "identify . . . all State and local laws, regulations, causes of action, policies, and practices [that burden] the identification, development, siting, production, or use of domestic energy resources" and to assess whether those state laws are unlawful. The EO instructs the AG to prioritize for examination, among others, any State laws aimed at addressing climate change, greenhouse gas emissions, or carbon penalties and taxes. Once the AG identifies such state and local laws that she believes may be unlawful, the EO commands the AG to "expeditiously take all appropriate action to stop the[ir] enforcement." The order specifically calls out California's cap-and-trade program, characterizing it as "radical" and as setting "impossible caps on the amount of carbon businesses may use," all in "an effort to dictate national energy policy."

So that's what the EO says. It's important to recognize what it does and doesn't accomplish. I'll start with what it doesn't do. Amy Turner at Colombia points out that Trump's order "does not directly challenge, prohibit, argue preempted, or enjoin any particular state or local law." The EO does not initiate any legal proceeding, invalidate any law, or terminate any legal action. In essence, it's a directive to AG Bondi to consider undertaking some of those actions in the future, if she can. Ted Lamm has good thoughts about its lack of substantive basis here.

Nevertheless, the EO signals that DOJ will likely come after C&T, potentially with a federal lawsuit. If that happens, it wouldn't be the first time. Many of you may recall that Trump's DOJ took a swing at cap and trade before, bringing a lawsuit in 2019 that claimed that the program's linkage with Quebec was unlawful. In that suit — *United States v. California* (2019) — DOJ alleged that California illegally entered into an international treaty when linking its C&T program with Quebec , in violation of the Treaty Clause and the Compact Clause of the U.S. Constitution as well as the federal government's authority under the Foreign Affairs Doctrine and the Foreign Commerce Clause. In short, those doctrines

severely restrict or eliminate a state's ability to enter into foreign treaties or compacts, or to otherwise intrude on the federal government's exclusive power over foreign affairs and commerce.

The challenge failed. A district court concluded that the first Trump Administration could not show that CA's linkage with Quebec amounted to an unlawful treaty or state compact. The court also held that the agreement between California and Quebec was not preempted under the Foreign Affairs Doctrine because the United States could not identify "a clear and express foreign policy that directly conflicts" with the cap-and-trade program, and because the U.S. failed to show that the cap-and-trade program impermissibly intrudes on the federal government's foreign affairs power. (The court did not reach the merits of the claim under the Foreign Commerce Clause, because that argument was dropped by the feds along the way.)

So: we're not in uncharted territory if the Trump administration decides to take another run at cap and trade. But the kinds of challenges asserted this time around may be different — and likely more aggressive, especially if we look at cues from the recent lawsuits filed against MI and HI. In those cases, the feds try to stretch preemption and constitutional claims into new shapes. Of note:

- The feds assert, for example, that the Clean Air Act preempts much broader realms of state conduct than just the sorts of state standards expressly preempted by the Act–including by preempting state laws that "undermine federal objectives by increasing energy costs and disrupting the national energy market, contrary to the Clean Air Act's integration with national energy policy."
- They also assert that a state regulation that imposes liability for out-of-state GHG emissions violates the Due Process clause and the Interstate Commerce Clause.
- They further assert that by suing fossil fuel companies for harms caused within the state by those companies' global emissions, states would interfere with the President's foreign affairs prerogatives in a way that violates the Foreign Commerce Clause and invokes foreign affairs preemption.

One can imagine similar kinds of arguments brought against C&T. **To be very clear, these are not strong arguments, in my view.** In fact, they are quite weak against MI and HI, and would be even more so against CA regarding C&T. A state-run regulatory program to limit future in-state greenhouse gas emissions (i.e., cap and trade) is obviously very different from the potential state lawsuits at issue in MI and HI. Nevertheless, the claims asserted by DOJ against those states are instructive. For example:

- They suggest that this time around, DOJ may have an appetite to challenge the whole of C&T more directly, not simply California's linkage with Quebec.
- They also suggest that the feds may assert a newly broadened view of CAA preemption to argue that C&T as a whole serves as an obstacle to the achievement of some EPA goals or interferes with some Congressional scheme for the balance of state and federal air pollution regulation under the Act.
- The feds may also argue that C&T violates the foreign affairs doctrine and should be invalidated because it interferes with some expressed foreign policy of the President's, perhaps related to his "energy dominance" agenda by imposing additional burdens on the development and sale of energy resources.

California's lawyers are undoubtedly geared up. I suspect they aren't particularly worried about these potential lines of attack against C&T; and, of course, they are also actively litigating the kind of state law claims directly at issue in the MI and HI suits, so they'll be thinking about DOJ's new lawsuits from that perspective too. One takeaway from all of this is that state-level climate programs and lawsuits are tremendously useful and important; that's why the Trump Administration is attacking them, and it's why they are worth defending with the full force of the state.