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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 the Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacities as Chair of the California Air Resources Board and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacities 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.	Case No. 2:19-cv-02142-WBS-EFB **[PROPOSED] *AMICUS CURIAE* BRIEF OF THE NATURE CONSERVANCY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Hearing Date: February 24, 2020 Time: 1:30 PM Location: Courtroom 5, 14th Floor Judge: Hon. William B. Shubb Action Filed: Oct. 23, 2019

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INTRODUCTION & INTEREST OF *AMICI CURIAE*

The state of California has taken decisive action to address the effects of climate change within the state—described by its governor as posing an "existential threat" to its citizens—by enacting and implementing several regulatory programs. *See* California Air Resources Board, *California's 2017 Climate Change Scoping Plan* 1 (Nov. 2017), https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf. One of these is a cap-and-trade program, which uses market mechanisms to address emissions of greenhouse gases. For each ton of pollutants they emit into the atmosphere, major emitters of greenhouse gases in the state must obtain and submit compliance instruments issued by California regulators or acquired through a market. In order to enhance the functioning of this market, better achieve program objectives, and provide flexibility to regulated parties within the state, California opted to link its cap-and-trade program with a similar regime administered by the province of Quebec. As a result of the linkage, California amended its regulation to recognize compliance instruments issued by Quebec; Quebec regulators did the same with respect to California instruments.

The linkage is thus the outgrowth of a domestic initiative to protect the health and welfare of California's citizens and natural resources. As such, it is a wholly legitimate exercise of the state's police powers. That the linkage has some effects beyond the state's borders does not mean, as Plaintiff claims, that it is a treaty, conflicts with any defined federal policy, or aggrandizes state power, such that it required approval by Congress as a compact. The agreement signed by California and Quebec presents no constitutional concern because its terms are quite limited: It merely announces the intention of the parties to continue consulting with each other with respect to implementation of their respective regulatory programs; it creates no new burdens for entities subject to those programs. Thus, Plaintiff's motion for summary judgment should be denied, and Defendants' motion for summary judgment should be granted.

The Nature Conservancy is a non-profit corporation dedicated to the conservation of the lands and waters upon which all life depends. One of The Nature Conservancy's central priorities is addressing climate change and creating and supporting systems that align commercial interests and environmental values. The Nature Conservancy has conducted extensive research on the role that natural and working lands—such as forests, farms and rangelands—can play in California's achievement of its greenhouse gas reduction goals. *See, e.g.*, D. Richard Cameron, David C. Marvin, Jonathan M. Remucal & Michelle Passero, *Ecosystem management and land conservation can substantially contribute to California's climate mitigation goals*, 114 Proceedings of the National Academy of Sciences of the United States of America 12833, 12833-12838 (Nov. 28, 2017), https://www.pnas.org/content/114/48/12833 (concluding that changes in ecosystem management, restoration and conservation could contribute as much as 17.4 and 13.3 percent of the cumulative reductions needed to achieve the state's 2030 and 2050 reduction targets, respectively). The Nature Conservancy has also helped develop and implement California's cap-and-trade program, particularly its offsets program, which promotes emissions reductions outside of the activities regulated by the cap and creates a role for nature-based solutions in achieving California's climate goals. The Nature Conservancy has itself participated in the development of one category of offsets—related to protecting and promoting the health of U.S. forests—and is intimately familiar with its history and legal and technical aspects. As discussed in greater detail herein, the linkage benefits and expands offset programs both within the state and without. The Nature Conservancy submits this brief, both to educate the Court about the environmental benefits of offsets programs, and to explain how California's efforts to capture such benefits by linking its program with Quebec's program represent a lawful exercise of the state's police power.

STATEMENT OF FACTS

A. California's administration of its cap-and-trade program is part of the state's comprehensive toolkit to reduce the extreme threats climate change poses within the state.

In 2006, California enacted AB 32, landmark legislation to fight climate change by reducing statewide greenhouse gas emissions to 1990 levels by the year 2020. Cal. Health & Safety Code § 38550. In 2016, the legislature amended AB 32 to require that the state reduce emissions to 40 percent below 1990 levels by 2030. *Id.* § 38566. The state's express purpose was to protect the people and resources within its borders: The legislature found that "warming poses a serious threat to the . . . well-being . . . of *California*," and will have detrimental effects on some of the state's largest domestic industries, including "agriculture, wine, tourism, skiing, recreational and commercial fishing, and forestry." *Id.* § 38501 (emphasis added). As further explained by the California Air Resources Board ("CARB"):

> Continuing increases in global greenhouse gas emissions at business-as-usual rates would result, by late in the century, in California losing 90 percent of the Sierra snow pack, sea level rising by more than 20 inches, and a three to four times increase in heat wave days. These impacts will translate into real costs for California, including flood damage and flood control costs that could amount to several billion dollars in many regions such as the Central Valley, where urbanization and limited river channel capacity already exacerbate existing flood risks. Water supply costs due to scarcity and increased operating costs would increase as much as $689 million per year by 2050. ARB analysis shows that due to snow pack loss, California's snow sports sector would be reduced by $1.4 billion (2006 dollars) annually by 2050 and shed 14,500 jobs; many other sectors of California's economy would suffer as well.

CARB, *Climate Change Scoping Plan Pursuant to AB 32 ES-9* (Dec. 2008), https://ww3.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf (footnotes omitted) [hereinafter CARB, Climate Change Scoping Plan]. AB 32 has resulted in over 70 separate measures used to cut emissions. *See generally id.* (recommending programs for energy efficiency for buildings, installation of solar roofs, and development of high speed rail).

One of California's efforts to limit the impacts of climate change within the state is a cap-and-trade system. This system limits, or caps, emissions from high-emitting sectors of the economy, such as electricity generation, natural gas and petroleum supplying and refining,

and certain manufacturing sectors. The cap declines over time. Covered emitters must surrender compliance instruments, denominated as one ton of carbon dioxide equivalents, in an amount equal to their emissions every compliance period. Emitters can use two types of instruments to fulfill compliance obligations: allowances, which are state-issued authorizations to emit up to one ton of carbon dioxide and are either allocated freely to covered entities or purchased from an auction or secondary market, and offset credits, which are described in more detail below. *See generally* Cal. Code Regs. tit. 17, § 95801 *et seq*. The cap-and-trade program creates a market for emissions reductions: Companies have an incentive to reduce their emissions as much as possible, through the most efficient means possible, thereby enabling the state to achieve its greenhouse gas reduction targets at the lowest cost to businesses and consumers.

B. The offsets in California's cap-and-trade program provide many environmental benefits in addition to reducing carbon emissions.

An important feature of the system, and one which The Nature Conservancy has a substantial interest in, is the offsets program. As opposed to allowances, which authorize covered entities to emit and are issued by the state in amounts corresponding to the cap, offsets are reductions in emissions from activities not covered by the cap-and-trade program. An entity subject to the cap may contract for the right to use a verified emission reduction from a project (*e.g.*, forest conservation) to "offset" a portion of its own emissions. *See generally* Cal. Code Regs. tit. 17, § 95970 *et seq.*

Offset programs, including California's, have numerous advantages, reflecting the fact that a well-functioning market aligns both environmental and commercial interests. Most importantly for The Nature Conservancy, offsets have environmental benefits in addition to reductions in greenhouse gases. For example, CARB has approved an offset protocol related to maintaining and restoring forests. *See generally* CARB, *Compliance Offset Protocol U.S. Forest Projects* (Nov. 14, 2014), https://ww3.arb.ca.gov/regact/2014/capandtrade14/ctusforestprojectsprotocol.pdf. Projects that increase carbon storage (such as planting more trees on previously deforested lands and

adopting more sustainable forest management practices) or reduce the loss of carbon stored in trees (such as preventing forests from being converted to commercial, residential, or other land use) can generate offset credits. In addition to mitigating climate change, healthy forests provide habitat for species and promote ecosystem health. Other CARB-approved offset protocols, such as those related to livestock management and rice cultivation, support sustainable agricultural practices and target emissions of methane, a highly potent greenhouse gas. The Nature Conservancy is also part of a multi-stakeholder effort to develop a soil enrichment protocol to enhance carbon storage in soils and reduce emissions of another highly potent greenhouse gas, nitrous oxide. Offset credits under these protocols reward landowners' and farmers' efforts to protect and become better stewards of their land and thereby promote healthy ecosystems.

In 2017, AB 32 was amended to require that, starting in 2021, a significant portion of offset credits used to satisfy covered entities' compliance obligations must be sourced from projects that provide direct environmental benefits in California, assuring that the offset program will reduce or avoid emissions of air or water pollutants that would otherwise directly impact the environment in California. *See* Cal. Health & Safety Code § 38562(c)(2)(E).

On top of these environmental benefits, offsets provide covered entities with options for complying with emissions reductions goals, increasing business flexibility and reducing costs to industry and consumers. *See* CARB, *Process for the Review and Approval of Compliance Offset Protocols in Support of the Cap-and-Trade Regulation* 1 (May 2013), https://ww3.arb.ca.gov/cc/capandtrade/compliance-offset-protocol-process.pdf ("offset credits can provide covered entities a source of low-cost emissions reductions for compliance flexibility").

Finally, offsets also allow groups besides electric utilities, petroleum refiners, and other covered sources to participate in greenhouse gas reduction efforts. *See* Reid Harvey, Climate Change Division, Office of Air and Radiation, U.S. EPA, *Overview of Cap and Trade and Offsets* 7 (Aug. 25, 2009),

https://19january2017snapshot.epa.gov/sites/production/files/documents/2009_08_2527_reid-harvey-overview_candt.pdf (offsets "[p]rovide incentives for reductions in sectors that are not amenable to trading"). This has significant economic and cultural benefits. For example, California's Yurok tribe has created offsets through improved forest management practices on its lands along the Klamath River and has used proceeds from the sale of those offsets to repurchase ancestral lands, reclaim cultural heritage resources, and train Yurok fire crews in traditional fire management practices that will help reduce the risk of catastrophic wildfires exacerbated by climate change. *See* Ginger Strand, *Carbon Cache: California's Carbon Market is Helping One American Indian Community Protect its Forests—and its Way of Life—While Fighting Climate Change*, The Nature Conservancy (Oct. 1, 2016), https://www.nature.org/en-us/magazine/magazine-articles/carbon-cache/.

California's regulation also allows for offset projects to occur anywhere within the United States. *See* Cal. Code Regs. tit. 17, § 95972(c). Due to the long-lived and well-mixed nature of carbon dioxide in the atmosphere and the global nature of harms resulting from greenhouse gas emissions, reductions occurring outside of California have climate benefits for California. Providing California emitters access to a broader pool of offsets increases supply and reduces the cost for emitters to meet their obligations under the cap-and-trade program, while promoting conservation where it might not otherwise be economically feasible. For example, Stuart Land & Cattle, founded in 1774 and one of the largest cattle farms east of the Mississippi River, placed approximately 10,000 acres of its forest land in the Clinch Valley of Virginia under sustainable management; but the money earned from selling sustainably harvested timber from those and adjacent lands originally did not cover costs. *See* Brendan Borrell, *The California Effect*, The Nature Conservancy (Nov. 18, 2017), https://www.nature.org/en-us/magazine/magazine-articles/the-california-effect/. However, the sale of over 125,000 offset credits from the project to California emitters has put the project economics right-side up, supporting forest restoration on the western side of the Appalachian Mountains. *See id*. Despite the project's location in Virginia, the climate benefits secured by it

flow directly to California citizens and businesses, providing California emitters access to a relatively low cost source of reductions to fulfill their respective compliance obligations. California's recognition of such instruments is therefore an eminently reasonable exercise of the state's police power to protect its citizens against the environmental harms attributable to rising greenhouse gas emissions and to do so in a manner that minimizes costs to its businesses and consumers.

C. California linked its cap-and-trade program to supplement its existing regulatory scheme.

California foresaw that linking its cap-and-trade system with parallel systems in other jurisdictions would help to achieve its statewide emission reduction goals. *See* CARB, Climate Change Scoping Plan at 30; Cal. Code Regs. tit. 17, § 95940. Linkage is a simple concept, deriving from the fact that cap-and-trade uses markets to reduce pollution: California would amend its regulation to recognize compliance instruments issued by other jurisdictions as equivalent to those issued by California. The other jurisdiction's regulations would likewise recognize California's compliance instruments as equivalent to its own.

Linkage is not indispensable to the operation of California's program. Indeed, California's cap-and-trade program operated in isolation prior to its linkage with Quebec. But by expanding the size of the market, all participants in a linked market benefit from greater efficiencies. Linkage increases the pool of buyers for offset credits issued by California for reductions occurring in the United States. Linkage likewise provides California emitters access to offset credits issued by Quebec for reductions occurring in Canada.

California and Quebec signed an agreement pertaining to the linkage of their respective cap-and-trade regulations in 2013 and amended and restated that agreement in 2017[1] (the "Agreement"). *See* Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (2017), ECF No. 7-2 [hereinafter The

[1] *See* ECF No. 7-2. The 2017 version of the agreement is the focus of the instant dispute.

Agreement]. Its terms are quite limited. The Agreement merely effectuates "joint[] and collaborative[]" work towards "harmonization and integration" of greenhouse gas reporting and cap-and-trade programs. Agreement Art. 1. The Agreement does not impose new obligations on any private party, modify the total cap on emissions, or alter the number and initial allocation of compliance instruments in either jurisdiction. Each party had already "adopted their own greenhouse gas emissions reduction targets, their own regulation on greenhouse gas emissions reporting programs and their own regulation(s) on their cap-and-trade programs" before the Agreement was signed. *Id.*, recitals.

The Agreement does not constrain California's sovereignty or commit California to any regulatory enactment beyond the fact of linkage itself. The Agreement, by its own terms, "does not, will not and cannot be interpreted to restrict . . . each Party's sovereign right and authority to adopt, maintain, modify, repeal or revoke any of their respective program regulations or enabling legislation." *Id.* Nor does the Agreement have any independent enforcement mechanism. Instead, the parties agreed to "work cooperatively in applying their respective program requirements," and will "facilitate . . . the sharing of information to support the effective administration and enforcement of each party's statutes and regulations." *Id.* Art. 11. Although the Agreement obligates a party to "endeavour" to provide 12 months' notice before withdrawing, failure to abide by this condition does not carry any penalty. *See id.* Art. 17 (noting that "[i]f a Party withdraws, the Agreement shall remain in force for the remaining Parties"). Indeed, Ontario was previously a party to the Agreement, but withdrew without providing the notice, without formal rebuke or punishment. *See* David V. Wright, *Enforcement and Withdrawal under the California-Quebec (and not Ontario) Cap-and-Trade Linkage Agreement* 10 (Nov. 15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272541&download=yes (noting it was "abundantly clear" that Ontario did not provide notice, but that California nonetheless "acknowledge[d]" the withdrawal).

ARGUMENT

California's cap-and-trade program is an exercise of the state's unquestionable authority to protect the people, industries, and environment within its borders from the existential threat of climate change. As the Ninth Circuit has recently held regarding AB 32:

> The California legislators and regulators who created the CARB regulation of greenhouse gas emissions were clearly concerned with such dreadful environmental impacts. *And, whatever else may be said of the revolutionary colonists who framed our Constitution, it cannot be doubted that they respected the rights of individual states to pass laws that protected human welfare, and recognized their broad police powers to accomplish this goal*.

Rocky Mountain Farmers Union v. Corey, 913 F.3d 940, 945-46 (9th Cir. 2019) (citations and footnotes omitted, emphasis added).

The state has emphasized that the linkage provides flexibility to California businesses and enhances the effectiveness of the program within California. Linking the cap-and-trade program with the program of another jurisdiction is not a "foreign policy," but a prudent mechanism to more efficiently achieve the state's environmental objectives. The linkage is part of the state's protection of its environment from the harms associated with rising emissions of greenhouse gases. It represents a limited exercise of the state's police powers to ensure the health and welfare of its citizens. Because of its environmental and economic benefits and because it is effectuated not by the Agreement, but through California's and Quebec's implementation of parallel regulatory systems that allow for interoperability of instruments, the linkage does not contravene any constitutional prohibition or implicate federal powers in foreign affairs.

A. The linkage supports and facilitates California's domestic regulatory agenda, including its cap-and-trade program.

California has identified a threat to the welfare of its citizens from climate change and is responding directly to that threat, including through its cap-and-trade program. California linked its cap-and-trade program with Quebec's to bolster its carbon market and reduce the burden on regulated entities in California.

Linking the cap-and-trade programs has several benefits that support the success of the California program and, in particular, its offset component. First, the linkage enables additional entities—namely, those subject to Quebec's cap-and-trade program—to access emission reduction opportunities arising from California and the rest of the United States. This spurs additional demand and encourages projects advancing the state's emission reduction objectives. As the EPA has recognized, "[w]ith GHGs, emission reductions have the same effect regardless of where they take place." Harvey, *Overview of Cap and Trade* at 7. This is because the harms from greenhouse gas emissions occur due to the accumulation of emissions from all sources in the atmosphere. As a consequence, projects that reduce emissions in other U.S. states or Canadian provinces benefit California. By broadening the market of offset projects, California businesses have access to offsets produced outside of California, minimizing costs of compliance in California and providing landowners and farmers in other states opportunities to improve their agricultural and land management practices. Providing such opportunities for parties outside of California to help achieve the state's environmental goals is wholly consistent with the state's duties to protect its citizens and environment from the harms caused by climate change and to minimize costs to California businesses and consumers.

B. The Agreement is not a compact requiring Congressional approval because it does not aggrandize power vis-à-vis the federal government.

Because of the benefits to California, and because of the lack of binding commitments in the Agreement itself, the Agreement does not detract from federal sovereignty and did not require congressional approval under the Compact Clause. *See* U.S. Const. art. I, § 10, cl. 3.

The Supreme Court has made clear that not every "agreement" or "compact" requires congressional approval. *See Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (noting "[t]here are many matters upon which different states may agree that can in no respect concern the United States"); *see also U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459-60 (1978) (rejecting the notion that the Compact clause should be "[r]ead literally . . . [to] require . .

. congressional approval before entering into any agreement . . . irrespective of form, subject, duration, or interest"). Instead, the key question for determining whether an agreement is impermissible is whether it "enhance[s] state power to the detriment of federal supremacy." *U.S. Steel Corp.*, 434 U.S. at 460; *Virginia*, 148 U.S. at 518 (prohibiting only compacts that "increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States"). The Agreement does no such thing.

1. The harms California is seeking to mitigate are within a state's traditional powers.

First, as discussed above, the Agreement does not impinge on federal supremacy because the cap-and-trade program is a clear exercise of California's police powers to protect its citizens from the harms caused by pollution and the resulting impacts on its environment. These harms—reduced Sierra snowpack and the resulting water supply issues for cities and farmers, worsening air quality, the increasing severity of wildfires, and the devastation evidenced by the loss of life and property in cities such as Paradise—are the quintessential types of harm that the state is charged with addressing through its police powers. Agreements focusing on "areas of jurisdiction historically retained by the states," such as protecting the well-being of their citizens, are outside the scope of the Compact Clause. *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991). As the Supreme Court has repeatedly held, "[t]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of . . . the police power."); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007) (states have "quasi-sovereign interests" in protecting their territory and populations from climate change). And the Ninth Circuit has explicitly extended this principle to California's efforts to combat climate change: "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *See Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*,

903 F.3d 903, 913 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019); *see also Rocky Mountain Farmers Union*, 913 F.3d at 945-46 (framers "respected the rights of individual states to pass laws," such as to combat climate change, "and recognized their broad police powers" to do so).

Here, California has a legitimate interest in protecting its citizens against the harms from climate change and securing other environmental benefits of offsets generated both in California and elsewhere. California retains this power even if its actions will have some effect outside its borders. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) ("[T]he States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."); *Huron Portland Cement*, 362 U.S. at 442 (noting "in the exercise of [the police] power, the states . . . may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government").

California's interest in promoting robust, beneficial carbon markets to reduce pollution is especially strong because the United States has articulated no clear foreign policy with which California's actions conflict. As one court in this district has explicitly held: "[T]here is *absolutely nothing* . . . to support the contention that it is United States foreign policy to limit . . . the efforts of individual states in controlling greenhouse gas emissions." *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1187 (E.D. Cal. 2007) (emphasis added), *as corrected* (Mar. 26, 2008).

Given California's strong interest in addressing an issue having real impacts on health and welfare within its own borders, any uncertainty on the scope of the Compact Clause should be resolved in favor of Defendants. This Circuit has wisely endorsed "new uses" of compacts to solve difficult and pressing issues; they should be viewed as a flexible tool to allow states to "adapt[] to new situations." *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364 (9th Cir. 1986) (quoting Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925)). The unprecedented harms associated with climate

change are just such a new situation and the constitution does not bar California from mitigating those harms in the most cost-effective manner.

2. The Agreement does not aggrandize state power to the detriment of the federal government.

Second, the Agreement did not require approval under the Compact Clause because its specific terms do not aggrandize state power.[2] The Agreement does not confer on California any new power beyond what it already possessed. *U.S. Steel Corp.*, 434 U.S. at 473 (compact does not "enhance[] state power *quoad* the National Government" if it "does not purport to authorize member States to exercise any powers they could not exercise in its absence"); *Virginia*, 148 U.S. at 520 (hypothetical agreement memorializing what "actually existed before," and therefore had no new effect, would not be improper). None of the relevant aspects of either California's or Quebec's cap-and-trade programs—*e.g.*, the cap on the total number of emissions in the jurisdiction; the number and initial allocation of compliance instruments; or what constitutes an accepted offset project—derive from the Agreement. Indeed, the Agreement does not even accomplish the linkage itself, instead providing that each jurisdiction should effectuate mutual recognition of the other's compliance instruments through their "respective cap-and-trade program regulations." Agreement Art. 6; *see also id.* Art. 14 ("intended outcome" of agreement is to have each jurisdiction act "under its own statutory and regulatory authority"); Cal. Code Regs. tit. 17, § 95943(a) (permitting use of Quebec compliance instruments). California could have recognized compliance instruments from other jurisdictions in the absence of the Agreement; the Agreement merely announced the parties' intentions to continue consulting and coordinating with each other during implementation of their respective programs. *See e.g.*, *May Trucking Co. v. Dep't of Transp.*, 203 Or. App. 564,

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[2] The terms of the Agreement control; any statements California may have made regarding any "foreign policy" served by the linkage cannot trump the actual conditions in the Agreement. *See U.S. Steel Corp.*, 434 U.S. at 486-87 (White, J. dissenting) (noting that majority upheld compact which was a transparent attempt to "bottl[e] up . . . alternative federal legislation," and describing "jealous attempts" to subvert federal regulation on the same issue by states).

126 P.3d 695, 703 n.10 (2006) (concluding that state compact facilitating fuel taxation did not threaten federal sovereignty, even though Canada was a party, because the states had the power to impose the tax absent the compact).

The lack of detriment to federal supremacy is especially apparent because the Agreement contains no enforcement mechanism, either between the parties or between a party and a private entity. It provides only that each will "work cooperatively in applying their respective program requirements" and share information. Agreement Art. II; *see U.S. Steel Corp.*, 434 U.S. at 475 (because compact at issue "ha[d] no power to punish failures to comply," Court rejected claim that it "enhanced state power"). While the Agreement uses the word "shall" repeatedly, it generally expresses the parties' intentions only to discuss, consult, or provide notice before any party takes a particular action, and to share certain types of information.[3] The Agreement is not outcome determinative and explicitly recognizes that it does not "require or commit the Parties . . . to create new statutes or regulations." Agreement Art. 14. Nothing in the Agreement prevents a party from eliminating its cap-and-trade system entirely, if it wished, as Ontario recently did without penalty. *See id*. recitals (Agreement "does not . . . prevail over relevant national obligations" or each party's "right . . . to . . . modify, repeal, or revoke any of their respective program regulations."); Wright, *supra*. Federal supremacy is not threatened by an agreement to discuss issues.

What the Agreement truly represents is commitment to a shared aim to "harmoniz[e] and integrat[e]" two preexisting regulatory programs. Agreement Art. 1. The Supreme Court has upheld a strikingly similar agreement intended to "promot[e] uniformity and

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[3] *See, e.g.*, Agreement Art. 3 (parties "shall consult each other regularly" and "shall . . . respect[]" the procedural requirements of each state); *id.* Art. 5 (proposed changes to offset programs "shall be discussed"); *id.* Art. 6 (a party "shall notify" the other if it determines a compliance instrument should not have been issued); *id.* Art. 11 (parties "shall facilitate . . . the sharing of information"); *id.* Art. 13 (parties "shall create a Consultation Committee," which "shall meet as needed").

compatibility in state tax systems," *U.S. Steel Corp.*, 434 U.S. at 456, just as the Agreement here commits the parties "to promote the continued harmonization and integration" of their respective cap-and-trade programs. Agreement Art. 4. Such agreements merely coordinate the regulatory actions among jurisdictions, resulting in efficiencies for both the regulators and regulated entities. They do not create powers greater than the sum of their individual parts or aggrandize the participating jurisdictions' power.

C. The Agreement is not a Treaty.

Similarly, the limited terms of the Agreement confirm that it is not a treaty. Whereas the Compact Clause permits states to enter into compacts if Congress consents (*see* U.S. Const. art. I, § 10, cl. 3), the Treaty Clause bars all treaties, alliances, and confederations. *See* U.S. Const. art. I, § 10, cl. 1. This evinces the framers' understanding that a treaty was the rarest of agreements, so potentially inimical to national unity that even Congress could not consent to a state's execution of one. Indeed, the Supreme Court has only applied the Treaty Clause once since ratification to find a state agreement unconstitutional: the Civil War Confederacy. *See Williams v. Bruffy*, 96 U.S. 176, 182 (1877). Thus, the distinctions between a treaty prohibited by the Treaty Clause and an agreement or compact permissible with congressional assent under the Compact Clause are unclear. *See U.S. Steel Corp.*, 434 U.S. at 463 (noting "[w]hatever distinct meanings the Framers attributed to the terms in Art. I, § 10, those meanings were soon lost."). However, given the absolute prohibition on treaties imposed by the Treaty Clause, the framers must have intended that a treaty embrace something of greater stature and threat to national unity than a compact. To the extent the Court has since suggested a distinction, it is only that treaties are agreements "of a political character," *Virginia*, 148 U.S. at 519, a term which has not been meaningfully clarified.

Whatever the contours of a treaty are, the Agreement does not qualify. First, the Agreement is not a compact for the reasons stated in the preceding section and, because the structure of Article 1, Section 10, evinces the framers' intention that a treaty must be of greater consequence and risk to national unity than a permissible compact, the Agreement cannot, for

those same reasons, amount to a treaty. Second, the Agreement is not political in any meaningful sense: It does not allocate entitlements among groups, pick winners and losers, promise military assistance, or otherwise implicate statecraft. The Supreme Court has concluded that far more political international agreements, including the Litvinov Assignment where the U.S. recognized Soviet Russia as the successor of the prior Russian government, were not treaties requiring advice and consent of the Senate.[4] *See United States v. Belmont*, 301 U.S. 324, 330-31 (1937); *see also Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (upholding, without reliance on treaty power, agreement ending Iranian hostage crisis).

Though the Agreement does announce a shared interest between jurisdictions, it is on a limited subject—literally concerning only greenhouse gas compliance instruments and nothing more. *Cf. Virginia*, 148 U.S. at 519 (noting "alliance[s] for purposes of peace and war" and agreements conferring "*general* commercial privileges" may constitute treaties (emphasis added)). Beyond the announcement of a common goal, the Agreement's functions are largely administrative. As previously discussed, all major components of each jurisdiction's cap-and-trade programs described by the Agreement—the accounting mechanism for greenhouse gases; the method for distribution of allowances through auctions; the interoperability of instruments—are independently established by each jurisdiction's respective regulations. A commitment to address a common problem, coordinate responses to it, share information, and facilitate mutually beneficial linkages, which reduce the overall costs to the state and increase the net

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[4] Plaintiff's argument that these precedents "do not carry over to judging what state actions are barred by the Treaty Clause of Article I," Plaintiff's Notice of Motion, Motion for Summary Judgment and Brief in Support Thereof 15-16 (Dec. 11, 2019), ECF No. 12, because they concern the Treaty Clause in Article II is specious. It cites no case which has ever held that the two clauses have different meanings, and thus cannot overcome the normal presumption that drafters use "the same words in the same [document] to mean the same thing." *U.S. Commodity Futures Trading Comm'n v. Monex Credit Co.*, 931 F.3d 966, 974 (9th Cir. 2019) (internal quotation marks omitted). This presumption is especially appropriate here because, as the Supreme Court has suggested, "the Framers used the word[] 'treaty[]' . . . as [a] term[] of art," *U.S. Steel*, 434 U.S. at 461-62, meaning its definition would not vary without explanation.

environmental benefits, does not render an agreement a treaty. This is not the kind of foreign engagement the framers sought to prohibit. *Rocky Mountain Farmers Union*, 913 F.3d at 46 (framers respected the right of individual states to combat problems, such as climate change).

CONCLUSION

California has adopted a market-based mechanism to address an issue that poses a severe threat to its inhabitants in an unquestioned exercise of its regulatory authority. Properly administered, this mechanism can simultaneously promote commerce and environmental aims. The linkage with Quebec facilitates a more robust and healthy market, without contravening the supremacy of the federal government. Plaintiff's motion for summary judgment should be denied, and Defendants' motion should be granted.

Respectfully submitted,

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Dated: February 18, 2020

CERTIFICATE OF SERVICE

I, Kevin Poloncarz, certify that, on February 18, 2020, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: February 18, 2020 /s/ Kevin Poloncarz

Kevin Poloncarz