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7
8 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
9

10 THE UNITED STATES OF AMERICA,)

11 Plaintiff,)

12 v.)

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

22 Defendants.)

Civil Action No. _____

COMPLAINT

23
24 Plaintiff, the United States of America, alleges as follows:

25 **INTRODUCTION**

26 1. The Constitution gives the federal government full and exclusive responsibility to
27 conduct this nation’s foreign affairs, representing as it does the collective interests of all its states
28 and territories.

1 34. The UNFCCC does not set binding limits on greenhouse gas (“GHG”) emissions
2 for individual countries. It contains no enforcement mechanism. Instead, it explains how
3 signatories may negotiate specific international agreements (often referred to as “protocols”) in
4 pursuit of the UNFCCC’s objective.

5 35. One agreement under the UNFCCC is the Kyoto Protocol of 1997. This protocol
6 imposed mandatory GHG emission reduction targets on the United States and other UNFCCC
7 Annex I parties. The protocol placed heavier burdens on the Annex I parties than on
8 economically developing countries.

9 36. Although the United States initially signed the protocol, President Clinton never
10 submitted it to the Senate for ratification. Instead, the Senate passed a unanimous resolution
11 expressing disapproval of this protocol specifically, and generally of any other protocol that
12 similarly provided for disparate treatment of economically developing countries. S. Res. 98,
13 105th Cong. (1997).

14 37. On December 12, 2015, the parties to the UNFCCC agreed to the Paris Climate
15 Accord (the “Accord”).¹

16 38. The Accord sets forth a goal of preventing global temperatures from rising more
17 than two degrees Celsius above pre-industrial levels or, if possible, limiting the increase to 1.5
18 degrees Celsius.

19 39. The Accord tasks each nation with the responsibility to develop its own climate
20 plans, referred to as “nationally determined contributions.” Paris Accord, Art. 4.2. Under its
21 terms, a party may withdraw from the Accord one year after providing notice of intent to
22 withdraw, but such notice may be given no earlier than three years after the Accord has entered
23 into force for that country.

24 40. President Obama accepted the Accord on behalf of the United States by executive
25 action in September 2016.

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28 ¹ We refer to the “Paris Agreement” as the “Paris Accord” to avoid confusion between that agreement and the Agreement that is the main focus of this Complaint.

1 45. Indeed, mere days after President Trump announced the United States’ intent to
2 withdraw from the Paris Climate Accord, Jerry Brown, then-Governor of California, met in
3 Beijing with China’s President Xi Jinping to discuss environmental issues.

4 46. In 2017, in what the states in question called a direct response to the United
5 States’ announcement that it intended to withdraw from the Accord, California and other states
6 entered into the United States Climate Alliance, committing to reducing GHG emissions in a
7 manner consistent with the goals of the Accord. *See* Attachment A at 12 (explaining that the
8 United States Climate Alliance was founded “in response to President Trump’s decision to
9 withdraw from the Paris Agreement”).²

10 47. According to California, the state is a party to 72 active bilateral and multilateral
11 “agreements” with national and subnational foreign and domestic governments relating to
12 environmental policy. *See generally* Attachment A. Additionally, California states that the
13 purpose of these agreements is “to strengthen the global response to the threat of climate change
14 and to promote a healthy and prosperous future for all citizens.” [https://www.climate](https://www.climatechange.ca.gov/climate_action_team/partnerships.html)
15 [change.ca.gov/climate_action_team/partnerships.html](https://www.climatechange.ca.gov/climate_action_team/partnerships.html) (last visited October 22, 2019).

16 48. In 2013, CARB on behalf of California entered into the predecessor of the
17 Agreement with the provincial government of Quebec, Canada. *See* Agreement Between the
18 California Air Resources Board and the *Gouvernement du Québec* Concerning the
19 Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas
20 Emissions. The Agreement, as renegotiated in 2017, obliges California to work with Quebec
21 “toward the harmonization and integration of [their] greenhouse gas emissions reporting
22 programs and cap-and-trade programs for reducing greenhouse gas emissions.” *See* Agreement
23 on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas
24 Emissions at Art. 1 (attached hereto as Attachment B).

25 49. The Agreement facilitates the California Global Warming Solutions Act of 2006,
26 (AB 32), which requires the state to reduce its GHG emissions to their 1990 level by 2020 and to
27 _____

28 ² Attachment A amalgamates text from https://www.climatechange.ca.gov/climate_action_team/partnerships.html (last visited October 22, 2019).

1 “facilitate the development of integrated and cost-effective regional, national, and international
2 greenhouse gas reduction programs.” CAL. HEALTH & SAFETY CODE § 38564 (emphasis added).

3 50. The Agreement facilitates a comparable program in Quebec.

4 51. “Cap-and-trade” refers to a regulatory system that imposes a cap on GHG
5 emissions, grants regulated entities “emission allowances”—entitling them to emit a specified
6 quantity of GHGs—and creates a market in which regulated entities may buy and sell
7 allowances.

8 52. Before entering the Agreement, California had promulgated regulations to
9 establish an internal cap-and-trade system in 2011. *See* 17 Cal. Code Regs. (“CCR”) §§ 95801-
10 96022. However, California’s regulations explicitly contemplated that that “compliance
11 instrument[s] issued by an external greenhouse gas emissions trading system (GHG ETS) may be
12 used to meet” the state’s regulatory requirements. 17 CCR § 95940. By formulating its
13 regulations in this fashion, California built its cap-and-trade system in anticipation of expansion
14 beyond state lines.

15 53. Covered entities include manufacturers, electric power generation facilities,
16 natural gas suppliers, importers of electricity and natural gas, intrastate pipelines and others
17 whose annual GHG emissions equals or exceeds specific thresholds. *See id.* §§ 95811-12. Upon
18 information and belief, many covered entities have substantial interstate or foreign activities.

19 54. The regulations establish three separate compliance periods: (1) 2013-2014; (2)
20 2015-2017; and (3) 2018-2020. *See id.* § 95840. Under a complex formula, each covered entity
21 has a compliance obligation for each compliance period. The obligations call for a steady
22 reduction in GHG emissions for each successive compliance period. *See id.* §§ 95850-95858.

23 55. The regulations establish two types of “compliance instruments”: greenhouse gas
24 emissions allowances (“GHG allowances”) and “offset credits.” *See id.* § 95820. One unit of
25 each instrument authorizes a covered entity to emit up to one metric ton of CO₂ or CO₂-
26 equivalent of any of the GHGs covered by the regulations. *See id.* § 95820(c).

27 56. Under the regulations, CARB distributes GHG allowances to covered entities
28 through various methods. *See, e.g., id.* § 95890. Covered entities may obtain additional

1 allowances by purchasing them during periodic auctions, *see id.* §§ 95910-95915, or from other
2 authorized parties, *see id.* §§ 95920-95922.

3 57. A covered entity alternatively can obtain an offset credit by undertaking a project
4 designed to remove CO₂ from the atmosphere. *See id.* § 95970(a)(1).

5 58. The Agreement obligates California and Quebec to “consult each other regularly”
6 and to “continue to examine their respective [cap-and-trade] regulations . . . to promote
7 continued harmonization and integration of the Parties’ programs.” Attachment B at Arts. 3, 4.

8 59. The Agreement provides that “auctioning of compliance instruments by the
9 Parties’ respective programs shall occur jointly.” *Id.*, Art. 9.

10 60. Under the Agreement, covered entities in California are authorized to trade
11 emission allowances with covered entities in Quebec, and vice-versa, “as provided for under
12 their respective cap-and-trade program regulations.” *Id.*, Art. 7.

13 61. Under 17 CCR § 95940, “[a] compliance instrument issued by an external
14 greenhouse gas emissions trading system (GHG ETS) may be used to meet the requirements [of
15 California’s cap-and-trade program] if the external GHG ETS and the compliance instrument
16 have been approved pursuant to this section and [CCR] section 95941.

17 62. Under 17 CCR § 95941, CARB “may approve a linkage with an external GHG
18 ETS after complying with relevant provisions of [California’s] Administrative Procedure Act
19 and after the Governor of California has made the findings required by [CAL. GOV. CODE
20 § 12894(f)].”

21 63. Under 17 CCR § 95942(a), “[o]nce a linkage is approved, a compliance
22 instrument issued by the approved external GHG ETS . . . may be used to meet a compliance
23 obligation under [California’s cap-and-trade program].”

24 64. Under 17 CCR § 95942(d), “[o]nce a linkage is approved, a compliance
25 instrument issued by California may be used to meet a compliance obligation within the
26 approved [e]xternal GHG ETS.”

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1 65. Under 17 CCR § 95942(e), “[o]nce a linkage is approved, a compliance
2 instrument issued by the linked jurisdiction may be used to meet a compliance obligation in
3 California.”

4 66. Under 17 CCR § 95943(a)(1), “covered . . . entities may use compliance
5 instruments issued by the [Government of Quebec] to meet their compliance obligation under
6 [California’s cap-and-trade program].”

7 67. In sum, under the Agreement, California agrees to accept compliance instruments
8 issued by Quebec to satisfy compliance obligations in California, and Quebec agrees to accept
9 compliance instruments issued by California to satisfy compliance obligations in Quebec. *See*
10 *id.*, Art. 6.

11 68. Under the Agreement, the parties agree to consult with each other before making
12 changes to their respective offset protocols or to their procedures for issuing offset credits. *See*
13 *id.*, Art. 5.

14 69. The Agreement represents that it “does not modify any existing statutes and
15 regulations” of either party. *Id.*, Art. 14.

16 70. The Agreement allows each party to withdraw, but requires a party to “endeavour
17 to give 12 months[’] notice of intent to withdraw” to the other party. *Id.*, Art. 17 (European
18 spelling in original).

19 71. Termination of the Agreement requires “written consent” of the parties and is not
20 legally effective until “12 months after the last of the Parties has provided its consent” *Id.*,
21 Art. 22.

22 72. The Agreement and supporting California law as applied (including CAL. HEALTH
23 & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) have the effect of undermining the ability of
24 the federal government as a whole, and the President in particular, of properly reconciling
25 protection of the environment, promotion of economic growth, and maintenance of national
26 security.

27 73. The Agreement and supporting California law as applied (including CAL. HEALTH
28 & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) have the effect of undermining the ability of

1 the federal government as a whole, and the President in particular, to speak for the United States
2 with one voice on a variety of complex and sensitive subjects of foreign policy.

3 74. The Agreement and supporting California law as applied (including CAL. HEALTH
4 & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) have the effect of undermining the
5 President’s ability to negotiate competitive international agreements in the area of environmental
6 policy. This is particularly true if California were to make similar arrangements with other
7 foreign powers, or if other states were to do so, in the absence of a declaration by this Court that
8 such arrangements violate the Constitution. *See, e.g.*, WCI’s 2018 Tax Return (“Currently, the
9 Board of Directors includes officials from the Provinces of Quebec, Novia [sic] Scotia and the
10 State of California. The support provided can be expanded to other jurisdictions that join in the
11 future.”) (reformatted into sentence case), available at [http://www.wci-inc.org/fr/docs/TaxForm-
12 USA2018-EN-20190514.pdf](http://www.wci-inc.org/fr/docs/TaxForm-USA2018-EN-20190514.pdf) at pt. III, § 4a (last visited October 22, 2019).

13 75. Unless and until this Court declares unconstitutional the Agreement and
14 supporting California law as applied (including CAL. HEALTH & SAFETY CODE § 38564 and 17
15 CCR §§ 95940-43) and enjoins their operation, these provisions will have the effect of harming
16 the United States’ ability to manage its relations with foreign states.

17 **WESTERN CLIMATE INITIATIVE, INC.**

18 76. In the Agreement, the parties acknowledge that they are “participants of [the]
19 Western Climate Initiative, Inc. (WCI, Inc.), a non-profit corporation incorporated in October
20 2011, providing administrative and technical services to its participants to support and facilitate
21 the implementation of their cap-and-trade programs for reducing greenhouse gas emissions.”
22 Attachment B (second “WHEREAS” clause).

23 77. In February 2012, CARB and WCI entered into an agreement that acknowledges
24 that they (and other “[p]artner jurisdictions”) “established [WCI] to provide coordinated
25 administrative and technical support to linked emissions trading programs implemented by the
26 [participating] jurisdictions.” Agreement 11-415 Between Air Resources Board and Western
27 Climate Initiative, Incorporated, Exhibit A (“Agreement 11-415,” attached hereto as
28 Attachment C).

1 78. In Agreement 11-415, CARB and WCI further acknowledge that WCI “enables
2 cap-and-trade programs to be administered at a lower cost than would be possible with
3 independent administration by each of the WCI [p]artner jurisdictions.” *Id.*

4 79. According to Agreement 11-415, WCI “provides a framework that can be
5 expanded as more jurisdictions implement their respective programs.” *Id.* Nova Scotia became
6 a participating jurisdiction in the WCI in 2018. *See* Funding Agreement, available at [http://wci-](http://wci-inc.org/docs/Nova%20Scotia%20Funding%20Agreement_for%20web%20posting.pdf)
7 [inc.org/docs/Nova%20Scotia%20Funding%20Agreement_for%20web%20posting.pdf](http://wci-inc.org/docs/Nova%20Scotia%20Funding%20Agreement_for%20web%20posting.pdf)
8 (last visited October 22, 2019). “Nova Scotia intends to have regulations in effect in 2018 to
9 establish its cap and trade program that could ultimately be linked to those in place in . . .
10 Quebec and California.” *Id.* at 1.

11 80. Upon information and belief, WCI serves California, Quebec, and Nova Scotia
12 jointly, not individually, and thus violates the Constitution by complicating and burdening the
13 United States’ task of regulating foreign commerce and negotiating competitive international
14 agreements. By the nature of its work and its contractual obligations to participants in the
15 Agreement, WCI is an “other person[] . . . in active concert or participation” (within the meaning
16 of the Federal Rules of Civil Procedure) with the other Defendants to this suit and is aiding and
17 abetting the other Defendants’ unlawful actions. As a result, in order for complete relief to be
18 afforded to the United States, WCI must be subject to any injunctive relief that is ordered in this
19 case against the other Defendants.

20 81. Provision of joint service by WCI to its member states occurs because of the
21 stated “integrated” nature of the programs, and the proof of such joint service is in the possession
22 and control of Defendants, most particularly WCI.

23 **DECLARATORY RELIEF**

24 82. The United States incorporates by reference the allegations in Paragraphs 1 to 81.

25 83. There is an actual controversy between the United States and Defendants with
26 respect to the constitutionality of the Agreement, Agreement 11-415, and supporting California
27 law as applied (including CAL. HEALTH & SAFETY CODE § 38564 and 17 CCR §§ 95940-43).

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1 84. This Court has authority under 28 U.S.C. § 2201(a) to declare the legal rights and
2 obligations of the parties with respect to the constitutionality of the Agreement, Agreement 11-
3 415, and supporting California law as applied (including CAL. HEALTH & SAFETY CODE § 38564
4 and 17 CCR §§ 95940-43).

5 85. Because the Agreement, Agreement 11-415, and supporting California law as
6 applied (including CAL. HEALTH & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) violate the
7 Constitution, this Court should declare them unlawful.

8 **FIRST CAUSE OF ACTION—TREATY CLAUSE**

9 86. The United States incorporates by reference the allegations in Paragraphs 1 to 85
10 above.

11 87. The Constitution prohibits states from “enter[ing] into any Treaty, Alliance, or
12 Confederation.” Art. I, § 10, cl. [1].

13 88. The Supreme Court has recognized and held that, “[w]hen a State enters the
14 Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island
15 to force reductions in greenhouse gas emissions [and] *it cannot negotiate an emissions treaty*
16 *with China or India . . .*” *Massachusetts*, 549 U.S. at 519 (emphasis added).

17 89. The Agreement constitutes a “Treaty, Alliance, or Confederation” in violation of
18 the Treaty Clause.

19 **SECOND CAUSE OF ACTION—COMPACT CLAUSE**

20 90. The United States incorporates by reference the allegations in Paragraphs 1 to 85
21 above.

22 91. The Constitution prohibits states, “without the Consent of Congress,” from
23 “enter[ing] into any Agreement or Compact . . . with a foreign Power . . .” Art. I, § 10, cl. [3].

24 92. If the Agreement is not a “Treaty, Alliance, or Confederation” under the Treaty
25 Clause, it is an “Agreement or Compact . . . with a foreign Power” under the Compact Clause.

26 93. Because Congress has not given its consent to the Agreement, nor have
27 Defendants sought such consent, the Agreement and supporting California law as applied violate
28 the Compact Clause.

THIRD CAUSE OF ACTION—FOREIGN AFFAIRS DOCTRINE

1
2 94. The United States incorporates by reference the allegations in Paragraphs 1 to 85
3 above.

4 95. The Constitution provides that “[t]his Constitution, and the Laws of the United
5 States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made,
6 under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in
7 the Constitution or Laws of any State to the Contrary notwithstanding.” Art. VI, cl. [2].

8 96. Even aside from his military powers as the “Commander in Chief of the Army
9 and Navy,” Art. II, § 2, cl. [1], the Constitution vests broad responsibility for the conduct of
10 foreign affairs in the President of the United States.

11 97. The President has “Power, by and with the Advice and Consent of the Senate, to
12 make Treaties, provided two thirds of the Senators present concur.” *Id.* cl. [2].

13 98. The President “nominate[s], and by and with the Advice and Consent of the
14 Senate, . . . appoint[s] Ambassadors, other public Ministers and Consuls.” *Id.*

15 99. The President “receive[s] Ambassadors and other public Ministers.” *Id.* § 3.

16 100. The Constitution authorizes the President to “take Care that the Laws be faithfully
17 executed.” *Id.*

18 101. The Supreme Court has interpreted the provisions of the Constitution that vest
19 authority over foreign affairs in the President to prohibit actions by the states that lie outside their
20 traditional and localized areas of responsibility and instead interfere with the federal
21 government’s foreign policy, or otherwise implicate the conduct of foreign policy. *See*
22 *Garamendi*, 539 U.S. at 418-20.

23 102. The Agreement, Agreement 11-415, and supporting California law fall outside the
24 area of any traditional state interest.

25 103. Defendants’ actions individually and collectively interfere with the United States’
26 foreign policy on greenhouse gas regulation, including but not limited to the United States’
27 announcement of its intention to withdraw from the Accord, and are therefore preempted.

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FOURTH CAUSE OF ACTION—FOREIGN COMMERCE CLAUSE

104. The United States incorporates by reference the allegations in Paragraphs 1 to 85 above.

105. The Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Art. VI, cl. [2].

106. The Constitution gives Congress “Power . . . [t]o regulate Commerce with foreign Nations” Art. I, § 8, cl. [3].

107. The Supreme Court has interpreted the Foreign Commerce Clause to have a negative application, in the sense that state laws that discriminate against, or impose an undue burden upon, foreign commerce, are unconstitutional even in the absence of federal legislation regulating the activity in question. *See Barclays Bank PLC*, 512 U.S. at 310-13.

108. The credits and offsets that covered entities may trade under the Agreement and supporting California law constitute articles of commerce.

109. Under the Agreement, 17 CCR §§ 95940-43, and Agreement 11-415, these credits and offsets may only be imported from Quebec to California or exported from California to Quebec.

110. The Agreement, Agreement 11-415, and supporting California law as applied (including CAL. HEALTH & SAFETY CODE § 38564, and 17 CCR §§ 95940-43) discriminate among categories of foreign commerce on their face or as applied.

111. California has no legitimate public interest in discriminating among categories of foreign commerce.

112. The Agreement, Agreement 11-415, and supporting California law as applied (including CAL. HEALTH & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) impose a substantial and undue burden on foreign commerce.

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PRAYER FOR RELIEF

Wherefore, the United States prays that the Court enter judgment against Defendants and award the following relief:

a. a declaration that the Agreement, Agreement 11-415, and supporting California law as applied (including CAL. HEALTH & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) violate the Constitution of the United States;

b. a permanent injunction against the operation and implementation of the Agreement, Agreement 11-415, and supporting California law as applied (including CAL. HEALTH & SAFETY CODE § 38564 and 17 CCR §§ 95940-43) and against all other persons or entities acting in active concert with Defendants to maintain the force and operation of the Agreement;

c. the costs of suit; and

d. such additional relief as the Court deems just and proper.

Respectfully submitted,

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