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16 Attorneys for Proposed *Amicus Curiae* The Nature Conservancy

17  
18 IN THE UNITED STATES DISTRICT COURT  
19  
20 FOR THE EASTERN DISTRICT OF CALIFORNIA

21 THE UNITED STATES OF AMERICA,

22 Plaintiff,

23 v.

24 THE STATE OF CALIFORNIA; GAVIN C.  
25 NEWSOM, in his official capacity as the  
26 Governor of the State of California; THE  
27 CALIFORNIA AIR RESOURCES BOARD;  
28 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

**NOTICE OF MOTION AND  
MOTION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF OF THE  
NATURE CONSERVANCY IN  
SUPPORT OF DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Hearing Date: February 24, 2020  
Time: 1:30 PM  
Location: Courtroom 5, 14th Floor  
Judge: Hon. William B. Shubb  
Action Filed: Oct. 23, 2019

**NOTICE**

TO THIS HONORABLE COURT AND COUNSEL FOR THE PARTIES:

PLEASE TAKE NOTICE, pursuant to Local Rule 230(b), that on February 24, 2020, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable William B. Shubb, at the Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, California 95814, The Nature Conservancy will and hereby does move the Court for leave to file the attached *amicus* brief.

**MOTION**

The Nature Conservancy (“TNC”) respectfully moves the Court for leave to submit the attached *amicus* brief in connection with the Court’s consideration of defendant’s Motion for Summary Judgement.

The Court should grant leave to file an *amicus curiae* brief because *Amicus* has a substantial interest in the case and will provide unique information to assist the Court in resolving the issues raised by Plaintiff’s motion to dismiss. This Motion is based upon the Notice, the Memorandum of Points and Authorities in support, the proposed brief attached hereto, and any further evidence and argument that the Court may receive at or before the hearing.

Counsel for *Amicus* conferred with counsel for the parties to this action before bringing this Motion. All parties have consented to TNC filing an *amicus* brief in this matter.

WHEREFORE, TNC prays that the Court grant the instant motion, and thereby authorize filing of the attached *amicus* brief.

Respectfully submitted this 18th day of February, 2020.

/s/ Kevin Poloncarz

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ATTORNEYS FOR Proposed *Amicus Curiae*  
The Nature Conservancy

Dated: February 18, 2020

## MEMORANDUM OF POINTS AND AUTHORITIES

The Nature Conservancy hereby requests leave to file the attached *amicus curiae* brief in support of defendants.

### **I. LEGAL STANDARD.**

A “district court has broad discretion to appoint *amici curiae*.” *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). “Generally, courts have exercised great liberality in permitting an *amicus curiae* to file a brief in a pending case . . . . [A]n individual seeking to appear as *amicus* must merely make a showing that his participation is useful to or otherwise desirable to the court.” *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)). The “classic” role of an *amicus* brief is to “assist[] in a case of general public interest, supplement[] the assisting in a case of general public interest, supplement[] the efforts of counsel, and draw[] the court's attention to law that might otherwise escape consideration.” *Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n.*, 801 F.2d 1120, 1125 (9th Cir. 1986). The Nature Conservancy has extensive experience that is directly relevant to the legal and policy issues before this Court, particularly those that relate to the cap-and-trade system’s offset program. As a result, The Nature Conservancy is uniquely able to assist the Court in resolving the case.

### **II. AMICUS HAS A SIGNIFICANT INTEREST IN THIS CASE.**

The Nature Conservancy is a global environmental nonprofit organization working to create a world where people and nature can thrive. The Nature Conservancy makes it a priority to tackle climate change, protect land and water, provide food and water sustainably, and build healthy cities. The Nature Conservancy has long supported the creation of cap-and-trade programs, which provide businesses with an economic incentive to lower greenhouse gas emissions. Since at least 1994, The Nature Conservancy has worked to foster the system by which the California Air Resources Board issues offset credits to landowners and farmers for

conserving or augmenting forest carbon storage capacity or implementing sustainable agricultural practices that reduce greenhouse gas emissions. Under the offset program, California companies subject to the state's cap and trade scheme can use these offset credits to satisfy up to eight percent of their respective compliance obligation. In 2014, The Nature Conservancy launched its first project to earn and sell forest-carbon offset credits under California's cap-and-trade program. In 2018 alone, The Nature Conservancy verified 158,905 tons of carbon captured, which is equivalent to the emissions from consumption of nearly 18 million gallons of gasoline. The organization promotes and implements carbon offset products around the world and has also partnered with private companies to launch voluntary carbon offset programs.

**III. THE PROPOSED *AMICUS CURIAE* BRIEF WILL ASSIST THE COURT IN RESOLVING THIS CASE.**

The Nature Conservancy's proposed brief focuses on three issues that the parties' briefs do not discuss in detail. *Amicus* has endeavored to complement Defendants' and Intervenors' briefs and avoid overlapping with their presentation of issues.

*First, Amicus'* brief provides factual background about the functioning of cap-and-trade programs, particularly California's, and the role of offsets within them. The brief is informed by The Nature Conservancy's unique perspective as an entity that both helped develop the state's offset program and actually generates offset credits within it. As described in the brief, offsets represent measurable emissions reductions that not only reduce greenhouse gas emissions, but present opportunities for additional environmental benefits to California and its citizens. The brief provides examples of how specific offset projects have benefitted the state and how expansion of the program to include offsets produced elsewhere in the United States and, through linkage, in Canada, improves the efficiency of the carbon market and allows California to achieve its environmental objectives at a lower cost to California businesses and consumers. It therefore provides necessary factual context for the dispute. *See Cmty. Ass'n for*

*Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (amicus brief “should normally be allowed” when it provides “unique information or perspective”).

*Second*, *Amicus*' brief addresses in detail California's legitimate state interest in protecting California residents from the threat to health and welfare posed by climate change, and in promoting an efficient carbon market for all participants. The Nature Conservancy's experience protecting and rehabilitating forests through its participation in the carbon market and its research into the role that natural and working lands and sustainable management practices can play in California's efforts to reduce greenhouse gas emissions<sup>1</sup> provide it with significant insight into how linking parallel cap-and-trade programs is an eminently reasonable means of achieving superior climate mitigation outcomes and a quintessential exercise of the state's police powers.

*Third*, *Amicus*' brief explains how California's effort to capture the benefits afforded by linking its program with Quebec's program does not amount to a treaty, compact, or intrusion into foreign policy that the founding fathers intended the Constitution to prohibit.

### CONCLUSION

In light of *Amicus*' history and experience with implementing carbon offset programs and because the proposed brief provides perspective and context that the previously submitted briefs do not, *Amicus* believes that its brief will aid this Court in considering the Motions for Summary Judgement, and respectfully request that the Court grant *Amicus*' Motion for Leave to File the proposed *Amicus Curiae* brief attached hereto as Exhibit A.

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<sup>1</sup> See, e.g., Ecosystem Management and land conservation can substantially contribute to California's climate mitigation goals, D. Richard Cameron, David C. Marvin, Jonathan M. Remucal and Michelle Passero, *Proceedings of the National Academy of Sciences of the United States of America* (PNAS), 114 (48) 12833-12838 (Nov. 28, 2017), available at: <https://www.pnas.org/content/114/48/12833>.

Dated: February 18, 2020

/s/ Kevin Poloncarz

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Nature Conservancy

**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

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**[PROPOSED] AMICUS CURIAE  
BRIEF OF THE NATURE  
CONSERVANCY IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Hearing Date: February 24, 2020  
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Judge: Hon. William B. Shubb  
Action Filed: Oct. 23, 2019

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**INTRODUCTION & INTEREST OF *AMICI CURIAE***

1  
2 The state of California has taken decisive action to address the effects of climate  
3 change within the state—described by its governor as posing an “existential threat” to its  
4 citizens—by enacting and implementing several regulatory programs. *See* California Air  
5 Resources Board, *California’s 2017 Climate Change Scoping Plan 1* (Nov. 2017),  
6 [https://ww3.arb.ca.gov/cc/scopingplan/scoping\\_plan\\_2017.pdf](https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf). One of these is a cap-and-trade  
7 program, which uses market mechanisms to address emissions of greenhouse gases. For each  
8 ton of pollutants they emit into the atmosphere, major emitters of greenhouse gases in the state  
9 must obtain and submit compliance instruments issued by California regulators or acquired  
10 through a market. In order to enhance the functioning of this market, better achieve program  
11 objectives, and provide flexibility to regulated parties within the state, California opted to link  
12 its cap-and-trade program with a similar regime administered by the province of Quebec. As a  
13 result of the linkage, California amended its regulation to recognize compliance instruments  
14 issued by Quebec; Quebec regulators did the same with respect to California instruments.

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

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

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**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](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,

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

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

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

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

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

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

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

24 Finally, offsets also allow groups besides electric utilities, petroleum refiners,  
25 and other covered sources to participate in greenhouse gas reduction efforts. *See* Reid Harvey,  
26 Climate Change Division, Office of Air and Radiation, U.S. EPA, *Overview of Cap and Trade*  
27 *and Offsets 7* (Aug. 25, 2009),  
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1 [https://19january2017snapshot.epa.gov/sites/production/files/documents/2009\\_08\\_2527\\_reid-](https://19january2017snapshot.epa.gov/sites/production/files/documents/2009_08_2527_reid-harvey-overview_candt.pdf)  
2 [harvey-overview\\_candt.pdf](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  
3 amenable to trading”). This has significant economic and cultural benefits. For example,  
4 California’s Yurok tribe has created offsets through improved forest management practices on  
5 its lands along the Klamath River and has used proceeds from the sale of those offsets to  
6 repurchase ancestral lands, reclaim cultural heritage resources, and train Yurok fire crews in  
7 traditional fire management practices that will help reduce the risk of catastrophic wildfires  
8 exacerbated by climate change. *See* Ginger Strand, *Carbon Cache: California’s Carbon Market*  
9 *is Helping One American Indian Community Protect its Forests—and its Way of Life—While*  
10 *Fighting Climate Change*, The Nature Conservancy (Oct. 1, 2016), [https://www.nature.org/en-](https://www.nature.org/en-us/magazine/magazine-articles/carbon-cache/)  
11 [us/magazine/magazine-articles/carbon-cache/](https://www.nature.org/en-us/magazine/magazine-articles/carbon-cache/).

12 California’s regulation also allows for offset projects to occur anywhere within  
13 the United States. *See* Cal. Code Regs. tit. 17, § 95972(c). Due to the long-lived and well-  
14 mixed nature of carbon dioxide in the atmosphere and the global nature of harms resulting from  
15 greenhouse gas emissions, reductions occurring outside of California have climate benefits for  
16 California. Providing California emitters access to a broader pool of offsets increases supply  
17 and reduces the cost for emitters to meet their obligations under the cap-and-trade program,  
18 while promoting conservation where it might not otherwise be economically feasible. For  
19 example, Stuart Land & Cattle, founded in 1774 and one of the largest cattle farms east of the  
20 Mississippi River, placed approximately 10,000 acres of its forest land in the Clinch Valley of  
21 Virginia under sustainable management; but the money earned from selling sustainably  
22 harvested timber from those and adjacent lands originally did not cover costs. *See* Brendan  
23 Borrell, *The California Effect*, The Nature Conservancy (Nov. 18, 2017),  
24 <https://www.nature.org/en-us/magazine/magazine-articles/the-california-effect/>. However, the  
25 sale of over 125,000 offset credits from the project to California emitters has put the project  
26 economics right-side up, supporting forest restoration on the western side of the Appalachian  
27 Mountains. *See id.* Despite the project’s location in Virginia, the climate benefits secured by it  
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1 flow directly to California citizens and businesses, providing California emitters access to a  
2 relatively low cost source of reductions to fulfill their respective compliance obligations.  
3 California’s recognition of such instruments is therefore an eminently reasonable exercise of the  
4 state’s police power to protect its citizens against the environmental harms attributable to rising  
5 greenhouse gas emissions and to do so in a manner that minimizes costs to its businesses and  
6 consumers.

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

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

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

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

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26 <sup>1</sup> *See* ECF No. 7-2. The 2017 version of the agreement is the focus of the instant dispute.  
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1 Agreement]. Its terms are quite limited. The Agreement merely effectuates “joint[] and  
2 collaborative[]” work towards “harmonization and integration” of greenhouse gas reporting and  
3 cap-and-trade programs. Agreement Art. 1. The Agreement does not impose new obligations  
4 on any private party, modify the total cap on emissions, or alter the number and initial allocation  
5 of compliance instruments in either jurisdiction. Each party had already “adopted their own  
6 greenhouse gas emissions reduction targets, their own regulation on greenhouse gas emissions  
7 reporting programs and their own regulation(s) on their cap-and-trade programs” before the  
8 Agreement was signed. *Id.*, recitals.

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

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**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.

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

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

19           Because of the benefits to California, and because of the lack of binding  
20 commitments in the Agreement itself, the Agreement does not detract from federal sovereignty  
21 and did not require congressional approval under the Compact Clause. *See* U.S. Const. art. I, §  
22 10, cl. 3.

23           The Supreme Court has made clear that not every “agreement” or “compact”  
24 requires congressional approval. *See Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (noting  
25 “[t]here are many matters upon which different states may agree that can in no respect concern  
26 the United States”); *see also U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-60  
27 (1978) (rejecting the notion that the Compact clause should be “[r]ead literally . . . [to] require . . .  
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1 . congressional approval before entering into any agreement . . . irrespective of form, subject,  
2 duration, or interest”). Instead, the key question for determining whether an agreement is  
3 impermissible is whether it “enhance[s] state power to the detriment of federal supremacy.”  
4 *U.S. Steel Corp.*, 434 U.S. at 460; *Virginia*, 148 U.S. at 518 (prohibiting only compacts that  
5 “increase and build up the political influence of the contracting states, so as to encroach upon or  
6 impair the supremacy of the United States”). The Agreement does no such thing.

7 **1. The harms California is seeking to mitigate are within a state’s**  
8 **traditional powers.**

9 First, as discussed above, the Agreement does not impinge on federal supremacy  
10 because the cap-and-trade program is a clear exercise of California’s police powers to protect its  
11 citizens from the harms caused by pollution and the resulting impacts on its environment. These  
12 harms—reduced Sierra snowpack and the resulting water supply issues for cities and farmers,  
13 worsening air quality, the increasing severity of wildfires, and the devastation evidenced by the  
14 loss of life and property in cities such as Paradise—are the quintessential types of harm that the  
15 state is charged with addressing through its police powers. Agreements focusing on “areas of  
16 jurisdiction historically retained by the states,” such as protecting the well-being of their  
17 citizens, are outside the scope of the Compact Clause. *McComb v. Wambaugh*, 934 F.2d 474,  
18 479 (3d Cir. 1991). As the Supreme Court has repeatedly held, “[t]he States traditionally have  
19 had great latitude under their police powers to legislate as to the protection of the lives, limbs,  
20 health, comfort, and quiet of all persons.” *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724,  
21 756 (1985) (internal quotation marks omitted); *Huron Portland Cement Co. v. City of Detroit*,  
22 362 U.S. 440, 442 (1960) (“Legislation designed to free from pollution the very air that people  
23 breathe clearly falls within the exercise of even the most traditional concept of . . . the police  
24 power.”); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007) (states have “quasi-  
25 sovereign interests” in protecting their territory and populations from climate change). And the  
26 Ninth Circuit has explicitly extended this principle to California’s efforts to combat climate  
27 change: “It is well settled that the states have a legitimate interest in combating the adverse  
28 effects of climate change on their residents.” *See Am. Fuel & Petrochemical Mfrs. v. O’Keeffe*,

1 903 F.3d 903, 913 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2043 (2019); *see also Rocky*  
2 *Mountain Farmers Union*, 913 F.3d at 945-46 (framers “respected the rights of individual states  
3 to pass laws,” such as to combat climate change, “and recognized their broad police powers” to  
4 do so).

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

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

20 Given California’s strong interest in addressing an issue having real impacts on  
21 health and welfare within its own borders, any uncertainty on the scope of the Compact Clause  
22 should be resolved in favor of Defendants. This Circuit has wisely endorsed “new uses” of  
23 compacts to solve difficult and pressing issues; they should be viewed as a flexible tool to allow  
24 states to “adapt[] to new situations.” *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power &*  
25 *Conservation Planning Council*, 786 F.2d 1359, 1364 (9th Cir. 1986) (quoting Felix Frankfurter  
26 & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate*  
27 *Adjustments*, 34 Yale L.J. 685, 688 (1925)). The unprecedented harms associated with climate  
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1 change are just such a new situation and the constitution does not bar California from mitigating  
2 those harms in the most cost-effective manner.

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

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

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

1 126 P.3d 695, 703 n.10 (2006) (concluding that state compact facilitating fuel taxation did not  
 2 threaten federal sovereignty, even though Canada was a party, because the states had the power  
 3 to impose the tax absent the compact).

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

19 What the Agreement truly represents is commitment to a shared aim to  
 20 “harmoniz[e] and integrat[e]” two preexisting regulatory programs. Agreement Art. 1. The  
 21 Supreme Court has upheld a strikingly similar agreement intended to “promot[e] uniformity and  
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 24 <sup>3</sup> *See, e.g.*, Agreement Art. 3 (parties “shall consult each other regularly” and “shall . . .  
 25 respect[.]” the procedural requirements of each state); *id.* Art. 5 (proposed changes to offset  
 26 programs “shall be discussed”); *id.* Art. 6 (a party “shall notify” the other if it determines a  
 27 compliance instrument should not have been issued); *id.* Art. 11 (parties “shall facilitate . . . the  
 28 sharing of information”); *id.* Art. 13 (parties “shall create a Consultation Committee,” which  
 “shall meet as needed”).

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

7 **C. The Agreement is not a Treaty.**

8 Similarly, the limited terms of the Agreement confirm that it is not a treaty.  
9 Whereas the Compact Clause permits states to enter into compacts if Congress consents (*see*  
10 U.S. Const. art. I, § 10, cl. 3), the Treaty Clause bars all treaties, alliances, and confederations.  
11 *See* U.S. Const. art. I, § 10, cl. 1. This evinces the framers’ understanding that a treaty was the  
12 rarest of agreements, so potentially inimical to national unity that even Congress could not  
13 consent to a state’s execution of one. Indeed, the Supreme Court has only applied the Treaty  
14 Clause once since ratification to find a state agreement unconstitutional: the Civil War  
15 Confederacy. *See Williams v. Bruffy*, 96 U.S. 176, 182 (1877). Thus, the distinctions between a  
16 treaty prohibited by the Treaty Clause and an agreement or compact permissible with  
17 congressional assent under the Compact Clause are unclear. *See U.S. Steel Corp.*, 434 U.S. at  
18 463 (noting “[w]hatever distinct meanings the Framers attributed to the terms in Art. I, § 10,  
19 those meanings were soon lost.”). However, given the absolute prohibition on treaties imposed  
20 by the Treaty Clause, the framers must have intended that a treaty embrace something of greater  
21 stature and threat to national unity than a compact. To the extent the Court has since suggested  
22 a distinction, it is only that treaties are agreements “of a political character,” *Virginia*, 148 U.S.  
23 at 519, a term which has not been meaningfully clarified.

24 Whatever the contours of a treaty are, the Agreement does not qualify. First, the  
25 Agreement is not a compact for the reasons stated in the preceding section and, because the  
26 structure of Article 1, Section 10, evinces the framers’ intention that a treaty must be of greater  
27 consequence and risk to national unity than a permissible compact, the Agreement cannot, for  
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1 those same reasons, amount to a treaty. Second, the Agreement is not political in any  
2 meaningful sense: It does not allocate entitlements among groups, pick winners and losers,  
3 promise military assistance, or otherwise implicate statecraft. The Supreme Court has  
4 concluded that far more political international agreements, including the Litvinov Assignment  
5 where the U.S. recognized Soviet Russia as the successor of the prior Russian government, were  
6 not treaties requiring advice and consent of the Senate.<sup>4</sup> See *United States v. Belmont*, 301 U.S.  
7 324, 330-31 (1937); see also *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (upholding,  
8 without reliance on treaty power, agreement ending Iranian hostage crisis).

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

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22 <sup>4</sup> Plaintiff’s argument that these precedents “do not carry over to judging what state actions are  
23 barred by the Treaty Clause of Article I,” Plaintiff’s Notice of Motion, Motion for Summary  
24 Judgment and Brief in Support Thereof 15-16 (Dec. 11, 2019), ECF No. 12, because they  
25 concern the Treaty Clause in Article II is specious. It cites no case which has ever held that the  
26 two clauses have different meanings, and thus cannot overcome the normal presumption that  
27 drafters use “the same words in the same [document] to mean the same thing.” *U.S. Commodity*  
28 *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.

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

4 **CONCLUSION**

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

11 Respectfully submitted,

12  
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The Nature Conservancy

Dated: February 18, 2020

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**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