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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacities as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; 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.	No. 2:19-cv-02142-WBS-EFB **PLAINTIFF UNITED STATES OF AMERICA'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** Date: March 9, 2020 Time: 1:30 p.m. Courtroom: 5 (14th Floor) Judge: Hon. William B. Shubb

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INTRODUCTION

In opposing the United States' motion for summary judgment, California and its allies[1] ask this Court to believe that its Agreement with Quebec, along with its preparatory and post-Agreement implementing activities,[2] are nothing more than a penny-pinching form of parallel action aimed at reducing the costs of their "independent" cap-and-trade policies. But a host of evidence refutes this. This is not mere parallelism. California and Quebec are engaged in premeditated sovereign-to-sovereign political cooperation. They are collaborating in a pattern of behavior California set in motion years ago. It starts with AB 32 "Global Warming Solutions Act of 2006."[3]

California has long sought "its own foreign policy." In 2006, Governor Arnold Schwarzenegger declared that California was, in his words, its own "nation state." Kysar & Meyler at 1622 (Plaintiff United States of America's Statement of Undisputed Facts ("SUF") ¶ 19 (filed concurrently herewith)). He said this with British Prime Minister Tony Blair by his side. He later stated: "Not only can we lead California into the future," but "***we can show the nation and the world how to get there***." Adam Tanner, *Schwarzenegger: California Is 'Nation State' Leading World*, WASH. POST, Jan. 9, 2007 (paragraph break omitted) (emphasis added) (SUF ¶ 20). In 2017, after the United States announced its intent to withdraw from the Paris Agreement, Governor Jerry Brown openly solicited foreign powers to form political alliances against the policies of the United States. Directly flouting

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[1] The United States continues to reserve the right to contest Intervening Defendants' standing under the Constitution.

[2] In this brief, California's and Quebec's "Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions" is referred to as the "Agreement." We also collectively refer to the Agreement, together with its preparatory and implementing activities, as the "Agreement and Arrangements."

[3] Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 U.C.L.A. L. REV. 1621, 1622 (2008) (hereinafter "Kysar & Meyler").

the Constitution's Supremacy Clause, Governor Brown stated: "***It cannot stand.*** [I]t's not right and ***California will do everything it can*** to not only stay the course, ***but to build more support—in other states, in other provinces, in other countries.***"[4] Not long afterward, Brown was in China discussing environmental issues with Xi Jinping: "We have to wake up our countrymen," he said, "in fact the world."[5]

These were not idle remarks. A California pronouncement entitled "Climate Change Partnerships," and subtitled "Working Across Agencies and Beyond Borders," exemplifies California's goal to forge its own foreign policy.[6] This website lists 72 active bilateral and multilateral "agreements" that the state maintains with foreign and domestic governments on environmental policy. *See supra* note 6. The purpose of these agreements is "to strengthen the global response to the threat of climate change and to promote a healthy and prosperous future for all citizens." *Id.* As the Director of California Advocacy for Intervenor-Defendant Natural Resources Defense Council ("NRDC") has noted, "[t]he markings of California climate policy can be seen around the world."[7]

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[4] Georgetown Climate Center, *States React to Trump's Decision to Abandon Paris Climate Agreement*, (June 1, 2017), https://www.georgetownclimate.org/articles/states-react-to-trump-s-decision-to-abandon-paris-climate-agreement.html (last visited Feb. 24, 2020) (emphasis added) (2d. Iacangelo Decl., Exh. 35).

[5] Jessica Meyers, *Jerry Brown in China with a Climate Message to the World: Don't Follow America's Lead*, L.A. TIMES, June 7, 2017, https://www.latimes.com/world/asia/la-fg-brown-china-20170607-story.html (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 36).

[6] California Energy Commission, *Climate Change Partnerships*, https://www.energy.ca.gov/about/campaigns/international-cooperation/climate-change-partnerships (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 37).

[7] Annie Notthoff, *California Sets Stage for Next Generation of Climate Action*, Natural Resources Defense Council, (May 8, 2017) https://www.nrdc.org/experts/annie-notthoff/california-sets-stage-next-generation-climate-action (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 38).

Through its statutes and regulations, California makes an offer to the world. It pursues political cooperation on the regulation of greenhouse gas emissions. For example:

- The Global Warming Solutions Act of 2006 ("AB 32") requires the state to "facilitate the development of integrated and cost-effective regional, national, ***and international*** greenhouse gas reduction programs." CAL. HEALTH & SAFETY CODE § 38564 (emphasis added).[8]
- Later in 2006, Governor Schwarzenegger ordered Defendant California Air Resources Board ("CARB") to "collaborate with the Secretary for Environmental Protection [the position now held by Defendant Jared Blumenfeld] and the Climate Action Team to develop a comprehensive market-based compliance program with the goal of creating a program that permits trading ***with the European Union***, the Regional Greenhouse Gas Initiative and other jurisdictions." Executive Order S-20-06 (Oct. 18, 2006), (emphasis added) (2d. Iacangelo Decl., Exh. 39).
- In 2011, CARB adopted regulations that explicitly contemplate that "compliance instrument[s] issued by an ***external*** greenhouse gas emissions trading system . . . may be used to meet" the state's regulatory requirements. CAL. CODE REGS. 17 § 95940 (2011) (emphasis added).
- And again in 2011, CARB adopted regulations—the "Tropical Forest Standard"—to facilitate links between California's emissions program and initiatives in developing countries to protect tropical forests. *See, e.g.*, CAL. CODE REGS. 17 § 95993 (providing that credits "may be generated from . . .

[8] The actual language of AB 32 is impossible to square with Amici Former Diplomats' claim that it sets forth "a set of local solutions." ECF No. 65-1 at 1.

Reducing Emissions from Deforestation and Forest Degradation (REDD) Plans").”[9]

Similar observations can be made about the Western Climate Initiative, Inc. (“WCI”), the operational center of California’s international and domestic extra-California aspirations:

- Although it has only two fully active participants, WCI’s declared purpose is “to provide technical and scientific advisory services to ***States*** of the United States and ***Provinces*** and ***Territories*** of Canada in the development and collaborative implementation of their respective greenhouse gas emissions trading programs.” Certificate of Incorporation of Western Climate Initiative, Inc., § 3 (emphasis added) (2d. Iacangelo Decl., Exh. 55).[10]
- In its 2018 Tax Return, WCI observes that “[c]urrently, the Board of Directors includes officials from the Provinces of Quebec, Novia [sic] Scotia and the State of California. ***The support provided can be expanded to other jurisdictions that join in the future.***” (Reformatted into sentence case) (emphasis added) (2d. Iacangelo Decl., Exh. 41).[11]

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[9] CARB has yet to formally link with another REDD plan. As one commentator observes, “[t]o accept tropical forest offsets, CARB must follow the time-extensive process of establishing a linkage with another jurisdiction as it did with Ontario and Quebec.” Harjot Kaur, *A Global Standard for a Global Problem*, LEGAL PLANET, (Oct. 30, 2018) https://legal-planet.org/2018/10/30/a-global-standard-for-a-global-problem/ (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 40).

[10] Intervening Defendant International Emissions Trading Association (“IETA”) admits that the very heart of cap-and-trade theory demands the largest possible market. *See* ECF No. 47 at 11. This is consistent with California’s and WCI’s stated objective of expanding the Agreement—and related initiatives, such as REDD plans—as widely as possible. (SUF ¶ 18).

[11] *See also* Frederic Tomesco & Lynn Doan, *California, Quebec Seek Partners to Grow Carbon Market*, BLOOMBERG BUSINESS, Sept. 24, 2014, https://www.bloomberg.com/news/articles/2014-09-24/quebec-california-seeking-to-boost-size-of-carbon-market (last visited Feb. 24, 2020) (“Less than a year after establishing North America’s largest carbon market, Quebec and California are aggressively recruiting the province of Ontario and other U.S. states to join, Quebec’s premier said.”) (2d. Iacangelo Decl., Exh. 42).

The Agreement must be assessed in light of the totality of this history, and not in isolation, as California would have it. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965–84 (9th Cir. 2010) (examining the totality of evidence to conclude that California law extended beyond areas of traditional state competence into foreign affairs); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1076–77 (2012) ("*Movsesian III*") (same). Through the foregoing statutes and regulations, as well as the Agreement itself, California has made an offer to the world. And Quebec has accepted. The consideration for this arrangement is manifold. Most obviously, it lies in the reciprocal recognition of credits.

As the Ninth Circuit has emphasized, a state's interests are at its weakest where—as here—its "real purpose" is foreign in scope. *Movsesian III*, 670 F.3d at 1074 (quoting *Von Saher*, 592 F.3d at 964). It is also at its weakest where—as here—the state has "no serious claim to be addressing a traditional state responsibility." *Movsesian III*, 670 F.3d at 1073 (quoting *Am. Ins. Ass'n. v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)). California may claim that it adopted the Agreement and Arrangements merely to "expand compliance flexibility and cost-reduction opportunities." ECF No. 50-1 at 1. But the excerpts above establish that its "real purpose" is to pursue "its own foreign policy." *See Mosvesian III*, 670 F.3d at at 1072. California pursues this foreign-affairs goal to achieve broader regulation and reduction of greenhouse emissions than California can without political cooperation. To quote *Zschernig v. Miller*, this is California's "real desiderata." 389 U.S. 429, 437 (1968). Even the evidence submitted to this Court by California's witnesses—supposedly to oppose summary judgment—proves this. "[B]y linking California's Program to WCI Partner jurisdictions," Dorsi Decl. Ex. 6 at 2, "the combined Programs will result in more ***emissions reductions*** . . . and will increase opportunities for GHG ***emissions reductions*** for covered sources more than could be realized through a California-only program."

California also tells this Court that all environment matters are "local" in nature. But CARB itself, as an expert body, has conceded that this is scientifically false. California therefore has "no serious claim" that the Agreement and supporting law merely address local conditions. As declared by CARB:

> ***GHGs are global pollutants, unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.*** Whereas pollutants with localized air quality effects have relatively short atmospheric lifetimes (about one day), GHGs have long atmospheric lifetimes (one to several thousand years). ***GHGs persist in the atmosphere for long enough time periods to be dispersed around the globe*** . . . . The quantity of GHGs in the atmosphere that ultimately result in climate change is not precisely known, but is enormous; ***no single project alone would measurably contribute to an incremental change in the global average temperature, or to global, local, or micro climates.***[12]

Similarly, CARB told the Governor of California in a letter of February 22, 2013, that "climate change is a global problem that requires innovative national and international solutions." Letter from James N. Goldstene, Executive Officer of CARB, to Governor Edmund G. Brown Jr., at 1 (2d. Iacangelo Decl., Exh. 43).

Instead, the Constitution assigns the federal government exclusive responsibility for foreign relations. *See Zschernig*, 389 U.S. at 436; *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Pink*, 315 U.S. 203, 233 (1942); *Movsesian III*, 670 F.3d at 1071. This assignment of power ensures that the United States speaks with one voice on the international stage. *See Baker v. Carr*, 369 U.S. 186, 211 (1962). The assignment also best enables the President to negotiate competitive agreements on behalf of the nation as a whole. *Garamendi*, 539 U.S. at 424; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381

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[12] CARB, Final Environmental Analysis for the Strategy for Achieving California's 2030 Greenhouse Gas Target (Nov. 30, 2017) (2017 AB 32 Scoping Plan, Attachment A: Environmental and Regulatory Setting, at 24–25) (emphasis added) (SUF ¶¶ 24–26; Iacangelo Decl., Exh. 16).

(2000); *Dames & Moore v. Regan*, 453 U. S. 654, 673 (1981). As John Jay observed in Federalist No. 4, foreign powers could take advantage of our country if they found "each State doing right or wrong, as to its rulers may seem convenient . . . ." THE FEDERALIST NO. 4, at 44 (Clinton Rossiter ed., Signet 2003).[13]

California's Agreement and Arrangements with Quebec defy the law. Quebec may be only one foreign jurisdiction. But California's state-action partner, WCI, is poised to market California's political alliance to all comers. The United States must have one foreign policy. California is ***decidedly not*** its own nation state. Thus, we respectfully ask this Court to declare that California's emission treaty with Quebec violates the Constitution, and to deny Defendants' cross motions.

ARGUMENT

The United States has standing to bring this suit. The Agreement and Arrangements injure the United States. The redress the United States seeks against Defendants would alleviate that injury. And because WCI is the operational center of the Agreement (the place where Quebec and California's sovereign-to-sovereign "handshake" takes place and credits are exchanged), this applies as much to the WCI Defendants as to the remaining Defendants.

The Agreement violates the Article I Treaty Clause. As the Supreme Court held in *Massachusetts v. EPA*, a state "cannot negotiate an emissions treaty" with a foreign power. 549 U.S. 497, 519 (2007). The Agreement is subject to *Massachusetts* because it is binding and because it addresses emissions. If it is somehow not a treaty—which is not the case—it violates the Compact Clause because it lacks congressional approval. Specifically, the Agreement and Arrangements collectively prevent Quebec from materially altering its regulatory regime without going through elaborate "consultation." California concedes this,

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[13] Ironically, California relies on Federalist No. 4 to argue that its Agreement with Quebec cannot be a treaty. *See* ECF No. 50-1. And yet the undisputed facts reveal that California seeks to go its own way on foreign policy.

and the undisputed facts prove it. This requires summary judgment to be granted to the United States.

I. The United States has standing to bring its claims.

WCI and Intervening Defendants the Environmental Defense Fund ("EDF") and NRDC attack the United States' standing to bring this suit. But the United States has demonstrated injury, fairly traceable to California's and WCI's conduct. Because Court orders that the Agreement and Arrangements violate the Constitution would redress that injury, the United States has standing to pursue its causes of action against Defendants.[14]

To establish standing, a plaintiff must allege a personal injury that is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). The United States meets this test.

EDF and NRDC essentially argue that the United States lacks standing because its injury is speculative. ECF No. 48 at 13–16. In making this claim, they incorrectly assume that the United States must demonstrate an actual conflict between a specific federal-level foreign policy and the Agreement and Arrangements in order for either the Article I Treaty Clause or Compact Clause to apply. They assume that foreign policy is a lane that states share with the United States, unless the United States takes a specific position, defined at a level of detail California will accept as sufficient to oust its international ambitions.

First, the United States has established a variety of conflicts, as this brief explains. More to the point, however, that is not how the Constitution works.

The Constitution simply disables states from having a foreign policy. *See Zschernig*, 389 U.S. at 436; *Hines*, 312 U.S. at 63; *Pink*, 315 U.S. at 233; *Movsesian III*, 670 F.3d at 1071. In *Zschernig*, for example, the Supreme Court struck down an Oregon statute for

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[14] In its Amended Complaint, the United States alleges four causes of action. It stands by them all. It has simply opted to focus at this time on its Article I Treaty Clause and Compact Clause causes of action. And California's cross-motion opted to follow suit; it did not attack the United States' remaining two causes of action.

interfering with foreign relations even though: (1) the executive had pointedly ***not*** asserted a foreign policy interest in the case, *see* 389 U.S. at 434; and (2) Oregon was ostensibly regulating probate, a traditional area of state concern. *See id.* at 430. As Justice Douglas summarized, "[t]he Oregon law . . . illustrate[s] the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy." *Id.* at 441. As *Zschernig* illustrates, the United States' injury lies in California's very involvement in this area of national sovereignty. The undisputed evidence proves that California's "real purpose" in its Agreement and Arrangements with Quebec is foreign in scope, and that California has "no serious claim to be addressing a traditional state responsibility." *Movsesian III*, 670 F.3d at 1074 (quoting *Von Saher*, 592 F.3d at 964 ("real purpose")); *id.* at 1073 (quoting *Garamendi*, 539 U.S. at 419 n.11 ("no serious claim")).

The WCI Defendants do not explicitly deny that the United States has suffered some injury. Instead, they argue that, even if the United States has injury, WCI is not its cause. ECF No. 46-1 at 10. WCI and other defendants claim that, because they did not sign the 2017 Agreement, they are not the cause of the United States' injury. This is not true. The injury to the United States comes not just from the signing of a piece of paper—though that is unquestionably a part. The United States has ongoing injury. It comes from California's offer, Quebec's acceptance, and the parties' actual implementation and exchange of consideration through the Agreement and Arrangements.

Moreover, as the United States explained in its response to the WCI Defendants' Motion to Dismiss, which the United States incorporates fully herein by reference, California controls WCI. WCI "embodies and implements the unlawful agreement" that injured the United States. ECF No. 36 at 11. There is no genuine dispute about the following facts: (1) WCI administers the Agreement, *see* Agreement at Art. 12 (discussing how WCI was created to perform administrative and technical services necessary for the program's operation); (2) California and Quebec dominate WCI's board, *see* By-Laws of Western Climate Initiative, Inc. § 4.2 at 5; (3) WCI's board includes two back channels to

California's legislature, *see, e.g.*, CAL. HEALTH & SAFETY CODE §§ 12894(b)(1)(D), 12894(c), allowing the legislature to directly keep tabs on goings-on inside WCI; (4) WCI, California's program, and Quebec's program have thoroughly integrated histories, ECF No. 36 at 7–10; (5) WCI stands ready to expand its operations to include additional participants, 2d. Iacangelo Decl., Exh. 41; and (6) WCI represents to the world that it constitutes "the largest carbon market in North America, and the only one developed and managed by governments from two different countries."[15] These undisputed facts—which come from Defendants' own representations—prove that WCI and its California directors are state actors implementing the policy of California. *See Evans v. Newton*, 382 U.S. 296, 301 (1966) ("If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment."). It is a state actor subject to the Constitution and one of the instruments by which the United States is injured. *See id.* (noting that the park in *Evans v. Newton* "was an integral part of the City of Mason's activities"); *see also West v. Atkins*, 487 U.S. 42, 55 (1988) (holding doctor contracted to provide prison services to be a state actor because the "function … determines whether his actions can fairly be attributed to the State"). Because the WCI Defendants are instrumentalities of California, implementing California's policy, they are just as responsible for the United States' injury as the remaining Defendants. Orders from this Court that WCI and its board members' implementation—and intended expansion—of California's unlawful Agreement would alleviate that injury.[16]

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[15] In its 2018 Annual Report, WCI uses the present tense to describe the activities of its ostensibly defunct predecessor: "The Western Climate Initiative . . . partnership ***represents*** the largest carbon market in North America, ***and the only one developed and managed by governments from two different countries***." ECF No. 50-4 at 135 (emphasis added). Thus, WCI has itself created an ambiguity of the continuing status of "The Western Climate Initiative," and cannot hide behind this patent ambiguity.

[16] Amici Professors of Foreign Relations Law come close to suggesting that asserted violations of the Compact Clause are not justiciable because the Constitution assigns the

II. The Agreement violates the Article I Treaty Clause.

In 2007, the Supreme Court held that a state "cannot negotiate an emissions treaty" with a foreign power. *Massachusetts*, 549 U.S. at 519. Defendants try to escape this. They argue that the Agreement is somehow not binding. They suggest the "environment" is solely an issue of "local" concern that cannot be the subject of a treaty. And they claim that California's Agreement with Quebec is not a treaty for purposes of Article I. California says "the Treaty Clause is limited to a narrow category of agreements with substantial consequences for our federal structure, including threats to national unity." ECF No. 50-1 at 19. These arguments fail.

A. The Agreement is binding.

California's Agreement with Quebec is obviously binding. It is signed by representatives of both governments. It calls itself an "Agreement." It contains the word "shall" over fifty times. (SUF ¶ 66). The phrase "the parties shall" appears twenty times. (SUF ¶ 66). "Harmonize," etc., appears thirty-seven times. (SUF ¶ 50). The parties obligate themselves to submit any proposed "changes to [their] program[s]" to a complex process of "consultation" that winds up in a "Consultation Committee." Agreement at Arts. 4, 5, 13, 20. If this were an antitrust case, it would be a plaintiff's dream.[17] California and Quebec's

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power of approval to Congress, not the Executive. But this Court is charged with interpreting the Constitution. *See* Memorandum from William H. Taft, IV, Legal Adviser, Dep't of State, to Senator Byron L. Dorgan (Nov. 20, 2001) ("Ultimately, issues concerning the Compact Clause or a particular arrangement by a state with a foreign power may need to be resolved in the courts, either state or federal.") (2d. Iacangelo Decl., Exh. 44). The United States also has broad authority to sue in federal court to protect its sovereign interests. *See* 28 U.S.C. § 1345; *In re Debs*, 158 U.S. 564, 584 (1895); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) ("[T]he United States may sue to protect its interests."). Moreover, the Executive has a duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

[17] The fact that after going through "consultation" the parties might agree to disagree, or withdraw, is beside the point. What matters is that they have committed themselves to the collaborative process in the Agreement and Arrangements. The United States does recognize that Ontario left the Agreement without ceremony, but it never denied that

conduct is the farthest thing from "mere parallelism." *See generally Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007). By design, this is unquestionably bargained-for, sovereign-to-sovereign, coordinated conduct.

In fact, California ***concedes*** that the Agreement and Arrangements enable it to impose limits on Quebec, although sorting through the details takes some work. ECF No. 50-1 at 7 & n.5. Specifically, it acknowledges that, before CARB may "link to another program," the Governor must find "that the '[t]he jurisdiction [in question] has adopted program requirements for greenhouse gas reductions . . . that are ***equivalent to or stricter than*** those required' by California's legislature." ECF No. 50-1 at 7 (quoting CAL. GOV. CODE § 12894(f)) (emphasis added). According to California, the Governor made this finding as to Quebec. *Id.* at 7–8; s*ee also* ECF 50-2 (Sahota Decl. ¶ 33). This means that Quebec's current regulations must satisfy California's requirements. Because of the Agreement, however, Quebec may not now modify these regulations without going through elaborate "consultation." *See* Agreement at Art. 4, ¶ 3; Art. 5, ¶¶ 1 and 2). Thus, the Agreement and California law, operating together, impose real limits on Quebec's freedom of action.

California tries to hide this. California breaks its operation in pieces, housing some in the Agreement, some in statutes, and some in regulations. *See, e.g.*, ECF 50-1 at 20 ("All of those activities are governed by regulations, not the agreement, as the agreement makes clear."); *see also id.* ("[I]t is CARB's regulatory provisions that effectuate the linkage."). (This is precisely why this brief adopts the convention of referring to California's sovereign-to-sovereign suite of conduct with Quebec (expandable to other foreign governments) as the "Agreement and Arrangements." *See supra* note 2. But "[t]he Constitution look[s] to the

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withdrawal is possible. Most critically, California's and Quebec's willingness to accept Ontario's instruments, even after its withdrawal, suggests that the Agreement cannot be walked away from entirely; the economic consequences are too significant.

essence of things, and not to mere form." *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978). The totality of California's laws, regulations, and written instruments with Quebec reveal that its conduct violates the Constitution as a matter of law.[18]

Elsewhere, California acknowledges that, "[b]ecause the linkage of the programs effectively links the markets for offsets, as well as for allowances, ***the agreed upon 'discussion'*** amongst linked jurisdictions regarding these protocols and procedures ***is important to the functioning of all the programs.***" ECF No. 50-1 at 11 (quoting Sahota Decl. ¶¶ 67–68) (emphasis added). How offsets are handled is an important feature of the Agreement and Arrangements. The parties go to significant length to define offsets so as to prevent their use to circumvent emissions limits.[19] Likewise, in a public presentation on

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[18] IETA suggests that the United States has waived its claim that California law other than the Agreement violates the Constitution. *See* ECF No. 47 at 13. This is frivolous. In its opening brief, the United States argued that "California's facially unconstitutional Agreement with Quebec and related public statements ***and documents*** speak for themselves." ECF No. 12 at 3 (emphasis added). That brief also referred to many provisions of California law that support the Agreement. Finally, the United States clearly alleged that the totality of California law on this subject violates the Constitution. *See* Am. Compl. ¶ 155 ("Because the Agreement, Agreement 11-415, ***and supporting California law as applied*** (including CAL. HEALTH & SAFETY CODE § 38564 and 1 CAL. CODE REGS. 17 §§ 95940–43) violate the Constitution, this Court should declare them unlawful.") (ECF No. 7 at 27 (emphasis added)).

[19] The need for integrated action is particularly acute for offsets, which are much more susceptible to manipulation than allowances. An offset might be, for example, the setting aside of a forest to sequester carbon dioxide from the air that would not otherwise have been set aside, and that is kept in that condition for a sustained period of time. Opportunities for manipulation might lie, for example, in identifying a forest for "set aside" that would not have been developed anyway. Another reason that offsets require close scrutiny is because there is no theoretical ceiling on how many offsets can be claimed. Hence the language in the Agreement that offsets must be "real, additional, quantifiable, permanent, verifiable, and enforceable." Art. 5.

In scientific terms, the problem with offsets are that it can be difficult to "falsify" the claims of the proponent of an ostensible offset that the offset actually reduces emissions as opposed to just claiming credit for actions that are not new undertakings. See generally Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993) (citing Karl Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989)); Michael Gillenwater,

linkage in 2009, Defendant CARB acknowledged that "[l]inkage exposes a program to the rules and oversight of other programs [because] ***[c]ompliance mechanisms in one system essentially extend to any linked system*** . . . ." Public Meeting: Linking California's Cap-and-Trade Program to Other Greenhouse Gas Trading Programs (July 27, 2009) (slide 20) (emphasis added) (2d. Iacangelo Decl., Exh. 45). California's own words thus disprove its claim that the Agreement—considered in its full operational context—does not impose real limits on the parties' options.[20]

One of California's canards is the suggestion that California and Quebec can easily exit the deal.[21] Of course, contracts can be breached. Most can be terminated in the future. But that does not change the fact that California's Agreement and Arrangements impose

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What Is Additionality?, GHG Management Institute Discussion Paper, https://ghginstitute.org/wp-content/uploads/2015/04/AdditionalityPaper_Part-2ver3FINAL.pdf (last visited Feb. 24, 2020) (explaining "additionality" is ensuring offsets are truly "additional" in a non-falsifiable way) (2d. Iacangelo Decl., Exh. 46).

[20] IETA's claim that "[t]he Agreement contains no language to suggest that either California or Québec intended for the document to be binding on either party," ECF No. 47 at 15, is hard to square with the Agreement's specification that it "shall enter into full force and effect" and that the English and French version of the text "have the same legal force." Agreement at Arts. 22, 23. In addition, this Court should not be misled by the Agreement's references to the parties' supposed ability to act with complete independence. *See* ECF No. 50-1 at 31 (quoting Agreement, 8th WHEREAS Cl. and Art. 14). The duty to submit proposed changes to consultation, among other duties, exists alongside these mere fig-leaf statements. It is not difficult to imagine that California's counsel insisted on adding such perfunctory statements in anticipation that the United States would eventually challenge the Agreement and Arrangements as violating the Constitution.

[21] IETA's claim that "[t]he Agreement contains no language to suggest that either California or Québec intended for the document to be binding on either party," ECF No. 47 at 15, is hard to square with the Agreement's specification that it "shall enter into full force and effect" and that the English and French version of the text "have the same legal force." Agreement at Arts. 22, 23. In addition, this Court should not be misled by the Agreement's references to the parties' supposed ability to act with complete independence. *See* ECF No. 50-1 at 31 (quoting Agreement, 8th WHEREAS Cl. and Art. 14). The duty to submit proposed changes to consultation, among other duties, exists alongside these mere fig-leaf statements. It is not difficult to imagine that California's counsel insisted on adding such perfunctory statements in anticipation that the United States would eventually challenge the Agreement and Arrangements as violating the Constitution.

binding limitations on California's and Quebec's freedom of regulatory action ***now***—so long as their political alliance and cooperation is in effect.

To paraphrase the baseball movie *Field of Dreams*, "build it and they will come," https://www.youtube.com/watch?v=o3c_pJ_CLJQ. California built it, laying down the rules of its new game in AB 32 and other regulations. Then Quebec came and now abides by those rules. Other foreign governments have not been willing to adhere to California's pre-established rules and other regulatory parts of its Arrangements. Only Quebec has come and stayed. The United States need not prove, however, that California had a meeting of the minds with multiple foreign sovereigns. One will do to show the patent unconstitutionality of the deal.

B. The Agreement regulates emissions.

California cannot seriously claim that the Agreement and Arrangements do not regulate "emissions." The evidence proves that it unquestionably does. The Agreement itself contains this word, or its singular, thirty-eight times, even in the title. And "emissions" appears in many contexts. It is tied specifically to obligations and the processes for undoing such obligations, should the parties wish to do so. The third paragraph of Article 4 offers but one example:

> A party ***may consider*** making changes to its . . . program[], including changes and additions to its ***emissions*** reporting regulation, ***cap-and-trade program regulations***, and program related operating procedures. To support the objective of harmonization and integration of the programs, any proposed changes or additions to those programs ***shall be discussed*** between the Parties.

The first and second paragraphs of Article 5 provide another example as to the tricky category of "offsets." These have the potential, if not carefully policed, to make the compliance obligations of either side far less verifiable (*see supra* n.19):

> In order to achieve harmonization and integration of the Parties' cap-and-trade programs, the offset protocols in each of the Parties' programs ***require*** that all offset ***emission*** reductions, avoidances, removals or removal enhancements achieve the essential qualities of being real, additional, quantifiable, permanent, verifiable, and enforceable.

> A Party ***may consider*** making changes to the offset components of its program, including by adding additional offset protocols, or changing procedures for issuing offset credits. To support the objective of maintaining the harmonization and integration of the programs, any proposed changes ***shall be discussed*** between the Parties.

As these excerpts show, the Agreement forges a political alliance on the regulation of emissions. And it by no means limits itself to aspirations. Rather, California and Quebec have promised not to alter a host of regulations relating to emissions without elaborate consultation. IETA's credulous argument that the Agreement "does not govern emissions at all," ECF No. 47 at 6, 13, defies the evidence.

California tries to suggest that the Agreement is only about "flexibility" and "cost-reduction opportunities." ECF No. 50-1 at 1. But, on their facts, the Agreement does more. California here says that the Agreement does not "address emissions ***levels***." *Id*. This is an obvious attempt at evasion. The undisputed evidence proves that California's goal in pursuing linkage agreements is to reduce emissions—not merely reduce costs—even if the participants do not commit themselves to particular "levels." "[B]y linking California's Program to WCI Partner jurisdictions," one of California's own exhibits admits, "the combined Programs will result in more ***emissions reductions*** . . . and will increase opportunities for GHG ***emissions reductions*** for covered sources more than could be realized through a California-only program." Dorsi Decl. Ex. 6 at 2 ("CARB Resolution 13-7") (emphasis added). In other words, a reason for the Agreement is to reduce emissions—a goal fostered by lowering the cost of such reductions. The Agreement is not solely about reducing costs for their own sake.

C. The Agreement is a treaty.

California also tries to suggest that a "treaty" can—as a matter of law—only cover matters of war, peace, and "threats to national unity." ECF No. 50-1 at 19. Its Agreement with Quebec about the environment therefore cannot qualify. This is easily refuted.

1. International agreements about the environment can be treaties.

First, California's Agreement with Quebec involves the same subject as, and in several respects involves more specific and greater regulatory intertwining than, the United Nations Framework Convention on Climate Change ("UNFCCC"). California cannot dispute the UNFCCC is a treaty of the United States and upwards of two hundred nations.[22] It was signed by the President of the United States and approved by a unanimous United States Senate pursuant to Article II of the Constitution. (SUF ¶¶ 1–2). California's suggestion that environmental matters—and greenhouse gas emissions, specifically—cannot be the subject of a "treaty" is patently frivolous.[23]

In fact, the UNFCCC, unlike California's greenhouse gas emissions treaty with Quebec, does not even require signatories to commit themselves to align and coordinate their regulatory regimes. California and Quebec, by contrast, must engage in formal, advance consultation. *See* Agreement at Arts. 4, 5, 3, 20. The UNFCCC only requires signatories to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change . . . ." Art. IV(1)(b). In addition, the UNFCCC—in this instance ***like*** the Agreement—includes no mandatory means for its own enforcement. Instead, it requires "negotiations or any other peaceful means" the parties may adopt for the settlement of disputes. Art. 14(1). Although the UNFCCC calls for a "conciliation commission" if disputes go unresolved, it goes on to

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[22] In *Massachusetts*, the Supreme Court described the UNFCCC as a "treaty." *See* 549 U.S. at 509. Amici States also refer to the obligations of the UNFCCC as "treaty obligations." ECF No. 62 at 13. In its Answer, California acknowledges that the "the President signed the UNFCCC, and the Senate unanimously ratified the UNFCCC." ECF No. 24 ¶ 34.

[23] The United States is not arguing that the UNFCCC could ***only*** be executed as a treaty under Article II. Instead, it makes the logically distinct argument that, because the UNFCCC ***was set up as a*** treaty, California's Agreement with Quebec cannot be excluded from that category simply because of its subject matter. Moreover, as the United States notes later in this brief, different doctrinal considerations inform the Article I and Article II Treaty Clauses.

provide that "parties shall consider" such commissions' decisions "in good faith." Art. 14(6).[24] These provisions of the UNFCCC are facially parallel to those of California's Agreement with Quebec. If one of the United States' most prominent treaties on greenhouse emissions is ***less restrictive*** in certain respects than that Agreement, and is no more enforceable, the argument that the Agreement cannot be a "treaty" is utterly untenable. This is true even if it is not a "threat to national unity."[25]

Second, contrary to California's protestations, the Agreement is precisely the kind of complex arrangement that, if allowed to proliferate, would render the federal government's exclusive purview of foreign policy either incoherent or impossible to direct and sufficiently control. ***And that effect thus is, no doubt, a "threat to national unity."*** California's clear policy is to form international alliances on greenhouse gases with jurisdictions all over the world, including with China. It touts itself as a "nation state." And, when California objects to federal foreign policy, it seeks to circumvent that unitary policy. "***It cannot stand***," Governor Brown announced when the United States announced its intent to withdraw from the Paris Agreement. 2d. Icangelo Decl., Exh. 36. "[I]t's not right and California will do everything it can to not only stay the course, ***but to build more support—in other states, in other provinces, in other countries***." *Id*. As CARB told the Governor, "climate change is a global problem . . . ." 2d. Iacangelo Decl., Exh. 43 at 1. Admittedly, to date, California has only lured Quebec to its side. But its failure to attract more political allies cannot immunize its unconstitutional acts. For if California may have its Agreement with Quebec, then it may pursue and consummate a similar agreement with any other

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[24] IETA suggests that the absence of "enumerated repercussions for [prohibited] actions" and "binding methods of dispute resolution" suggest that the Agreement cannot be a treaty. ECF No. 47 at 19. The same criticism of the UNFCCC could be advanced, however.

[25] In its Opposition, California emphasizes several differences between its regulatory regime and that of Quebec. *See* ECF No. 50-1 at 11. The UNFCCC allows even greater heterogeneity, yet it is a fully ratified treaty of the United States with many nations of the world.

foreign jurisdiction—indeed with ***every*** other foreign jurisdiction. And any other state—in fact, ***every*** other state—may do the same. In this way, California's arguments constitute an unmistakable *reductio ad absurdum*.

There is thus no limit to the principle that California espouses. And so California's emission treaty with Quebec—and the logic that underlies it—does present precisely the type of potential "threat to national unity" that the Supreme Court had in mind in such decisions as *Crosby* and *Garamendi*. In *Crosby*, the Supreme Court wrote that it "need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for ***enclaves fenced off willy-nilly by inconsistent political tactics.***" *Crosby*, 530 U.S. at 381 (emphasis added); *see also Garamendi*, 539 U.S. at 424 (emphasis added) ("[I]f the [California] law is enforceable the President has ***less to offer*** and ***less economic and diplomatic leverage*** as a consequence."); *Dames & Moore*, 453 U.S. at 673 (describing the President's control of funds valuable to another country as a "bargaining chip").

Contrary to California's protestations, *Medellin v. Texas*, 552 U.S. 491 (2008), does not preclude reliance on *Garamendi*. First, both *Garamendi* and *Medellin* addressed foreign affairs preemption. In this motion, the United States sues on the Article I Treaty Clause and the Compact Clause. It relies on *Garamendi* for its analogous conclusion that too many cooks spoil the broth. More importantly, the Ninth Circuit has interpreted *Garamendi*—post *Medellin*—to apply where, as here, "a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Movsesian III*, 670 F.3d at 1074. California cannot credibly claim that its Agreement with Quebec "reaches deep into the heart of the State's police powers," as was the case in *Medellin*. 552 U.S. at 532. As we have seen, Defendant CARB describes

climate change as "a global problem."[26] "GHGs are global pollutants," it admits. These are "***unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.***" SUF ¶¶ 24–26 (emphasis added.)

Amicus Nature Conservancy ("TNC") agrees with CARB that "[c]limate change is a global problem." 2d. Iacangelo Decl., Exh. 43 at 1. But TNC seeks to invert the logic of that point: "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," it writes, "reductions occurring outside California have climate benefits for California." ECF No. 59-1 at 6 (emphasis added). This argument tries to merge the global and the local. Even if, as TNC argues, climate change affects California, it is still "a global problem," as CARB admits. 2d. Iacangelo Decl., Exh. 43 at 1. *See also Am. Elec. Power v. Connecticut*, 564 U.S. 410, 422 (2011) ("[E]missions in New Jersey may contribute no more to flooding in New York than emissions in China."). The fact that California may have a legitimate interest in the effects of climate change does not render the problem or its causes "local" in nature. As the Supreme Court noted in *Zschernig*, the fact that the Cold War affected probate matters did not entitle Oregon to fight the Cold War through its probate laws. *See* 389 U.S. at 435–36. Nor did California's statute to regulate the traditional state area of "insurance" regulation pass muster in *Garamendi*, 539 U.S. at 401, 425–27, making decisions like *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019), inapposite. Put another way, "the required inquiry cannot begin and end, as [California] suggest[s], with the area of law that the statute addresses." *Movsesian III*, 670 F.3d at 1075.

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[26] *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), on which Amici Professors of Foreign Relations Law put considerable stress, was in fact about a local pollutant with local effects, "sulphurous acid gas." *Id.* at 238. This contrasts strongly with CARB's admission that "GHGs are global pollutants, ***unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.***" CARB, Final Environmental Analysis for the Strategy for Achieving California's 2030 Greenhouse Gas Target (emphasis added) (SUF ¶¶ 24–26).

Instead, "[c]ourts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs." *Id*. (citing *Von Saher*, 592 F.3d at 964).

The argument that California addresses a "local" problem by addressing climate change beyond its borders also leads to absurdity. By this theory, the more global California's foreign policy becomes, the less vulnerable it is to attack. Under this upside-down logic, California's Agreement with Quebec would be even more constitutional if included China and India—contrary to what the Supreme Court said in *Massachusetts v. EPA*. *See* 549 U.S. at 519.

2. The Agreement encroaches on federal conduct of foreign affairs.

The environment—and greenhouse gas emissions in particular—is a permissible subject for an international treaty. And the Agreement, in particular, encroaches on the federal government's conduct of foreign affairs.

First, the evidence proves that the Agreement enables a form of regulatory arbitrage. The existence of this—and the potential replication of it—is obviously problematic as a matter of foreign policy. As one of California's declarants observes, Quebec imposes stricter limits on regulated entities than California. ECF No. 50-2 at 9 (Sahota Decl. ¶ 35). Yet compliance instruments are sold at joint auction for both jurisdictions. The laws of economics therefore expect a net flow of instruments from California to Quebec. And, in fact, CARB has admitted this:

> [T]he projected macroeconomic effect of linking with Québec is that some additional investment will flow into the state, *as a result of Québec paying for lower cost reductions in California*. At allowance prices of $15.75 and $34.50, the modeling indicates that Québec could purchase about 18.3 and 14.4 million allowances, respectively, from California ***resulting in a flow of revenue into California of about $287 and $498 million***.

CARB, Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments

Issued by Linked Jurisdictions, Staff Report: Initial Statement of Reasons at 91–92 (2012) (bold emphasis added) (2d. Iacangelo Decl., Exh. 47). At least one commentator notes the same dynamic:

> All of this was expected early on by both parties. ***California in fact saw the potential in-flow of revenue from Québec as one of the most important reasons to go through with linking***. And while this potential for a net outflow of capital from Québec caused some hesitation in the province, the attractiveness of lower private sector compliance costs ultimately carried the day.

Jason Dion, *Unpacking the WCI: Thinking Linking*, *available at* https://ecofiscal.ca/2016/06/29/unpacking-wci-thinking-linking/ (last visited Feb. 24, 2020) (emphasis added) (2d. Iacangelo Decl., Exh. 48). California thus admits that money largely flows from Quebec to California. Regulatory relief largely flows the other way. In other words, California appears to be enabling Quebec to have stricter regulations than its regulated entities can actually stand. Quebec emitters buy relief from California.

The political nature of exporting regulatory relief, particularly if replicated to other jurisdictions and by other states, is evident.[27] Can California provide such cover to the entire world? If not, to borrow a phrase from Amicus TNC, how would it avoid "pick[ing] winners and losers"? ECF No. 59-1 at 16. This evidence disproves California's protestations—supported by no citations—that the Agreement and Arrangements are solely about "flexibility" and "costs." Instead, California's treaty creates a market for excess credits that it generates, which otherwise would go unused or sell for less.

Second, WCI's unlawful carbon market has other potential complications for foreign policy. Article 6 of the Paris Agreement—to which Canada is a party—contemplates

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[27] The Environmental Commissioner of Ontario similarly concluded that $250-300 million per year might flow from Ontario to California were Ontario to join the Agreement. *See* 2016 Annual GHG Report: Chapter 4: Cap and Trade, at 71, *available at* https://media.assets.eco.on.ca/web/2016/11/2016-Annual-GHG-Report_Chapter-4.pdf (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 49).

voluntary cooperation between nations to achieve nationally determined contributions ("NDC"s) through market and non-market mechanisms. *See* Art 6.1-2. On this cooperative front, Article 6 contemplates the use of emissions credit trading schemes, using linkages through which internationally transferred mitigation outcomes ("ITMO"s) would flow. These are like the net flow of emissions reductions transferred through compliance allowances in the WCI carbon market. *See* Art. 6.2.

Use of such transfers requires the authorization of participating parties, *see* Art. 6.3, and in principle such transfers could come from non-parties. Thus, California's linkage with Quebec has a material impact on the United States' foreign policy. If Canada can use California allowances to meet its Paris Agreement obligations, this could affect any climate negotiations between Canada and the United States. Also, if Canada can use California allowances, the United States' policy on addressing global climate change, as reflected in its withdrawal from the Paris Agreement, could be undermined. California is pursuing a foreign policy that supports an international regime deemed currently unacceptable by the federal government. In this way, California directly supports a foreign power that pursues California's preferred policy objectives. This lends the state's political power and economic resources to a foreign nation at the expense of the United States. And even if the United States would need to authorize Canada in order for it to use ITMOs from California to satisfy its NDC, *see* Art. 6.3, this only proves the United States' point. This could put the federal government in the position of having to take a certain action that could be in tension with its foreign policy or deny an important benefit to a neighboring country.

Third, Defendants and Amici Former Diplomats assert that the United States must show a specific federal initiative that the Agreement and Arrangements frustrate. *See* ECF No. 50-1 at 37; ECF No. 65-1 at 7.[28] That is not correct. As the United States has just

[28] This Court should note that Amici Former Diplomats make numerous factual claims without attestation or demonstration of personal knowledge. *See, e.g.*, ECF No. 65-1

explained, multiple conflicts are present. But this misses the point. The Constitution does not require the federal government to take a specific position on the world stage to preclude states from acting in the international arena. *See Zschernig*, 389 U.S. at 436; *Hines*, 312 U.S. at 63; *Pink*, 315 U.S. at 233; *Movsesian III*, 670 F.3d at 1071; c*f. U.S. Steel*, 434 U.S. at 472 ("Appellants further urge that the pertinent inquiry is one of ***potential, rather than actual***, impact upon federal supremacy. We agree."). This is especially true where, as here, a state is operating out of its constitutional lane. *See Movsesian III*, 670 F.3d at 1073.[29] It is also especially true where, as here, the arrangement at issue—if replicated with other foreign powers or by other states—would prevent the United States from enjoying the freedom of operation that the Constitution ordains and could undermine the United States' chosen means for implementing the UNFCCC treaty to which the United States is already a party.

Contrary to Amici Former Diplomats' claims, the United States does not advert to the President's decision to withdraw from the Paris Agreement simply to show a conflict between federal foreign policy and California's Agreement with Quebec. This is part of our argument, but not its main point. Instead, the President's decision shows that the federal government is active in this area. Often in negotiations, the best deal is obtained by not immediately grasping the first offer made. Thus, Defendants overlook the possibility that the federal government's preferred negotiating position may be simply not to have cap-and-trade at the international level. If so, California's and WCI's infinitely replicable arrangement with Quebec in fact poses an obstacle. *See Arkansas Elec. Coop. Corp. v.*

("[T]he Administration has taken no steps to renegotiate the Paris Agreement or to negotiate a successor agreement."); *id.* at 7 ("[T]here are no ongoing climate negotiations to disrupt."). This Court should disregard all such claims.

[29] The forbidden lane, of course, is foreign policy. Thus, decisions upholding the strictly internal aspects of California's regulations, such as *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018), and *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), are inapposite.

Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1982). California itself concedes that cap-and-trade is simply an option. See ECF No. 50-2 at 3 (Dorsi Decl. ¶ 7).

3. The text and history of the Constitution reject California's attempt to narrow the Article I Treaty Clause.

California argues that the Article I Treaty Clause is limited to "threats to national unity," such as the Civil War. This is both atextual and ahistorical. ECF No. 50-1 at 16. *Williams v. Bruffy*, 96 U.S. 176 (1877), is a case about debts of the Confederacy. It contains only passing mention of the Treaty Clause.

First, California's theory is atextual because nothing in the words of the clause—beginning "[n]o State shall enter into any Treaty, Alliance, or Confederation"—limits the clause to matters of war and peace. In fact, the adjective "any" supports the opposite conclusion. It is also atextual because much of Article I, Section 10, Clause 1—the part of the Constitution that contains the Article I Treaty Clause—addresses commercial issues:

> No State shall enter into any ***Treaty, Alliance, or Confederation***; grant Letters of Marque and Reprisal; ***coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts***; pass any Bill of Attainder, ex post facto Law, or ***Law impairing the Obligation of Contracts***, or grant any Title of Nobility.

(Emphasis added.) Under the maxim of *noscitur a sociis*, on which California as well relies, *see* ECF No. 50-1 at 16, the Article I Treaty Clause should be construed in light of the provisions with which it is associated. *See Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Many of these speak to commerce. To be sure, the Marque and Reprisal Clause speaks to war. But it too has a commercial dimension. A ship taken as a prize had real value in the late eighteenth century. But four of the other provisions of Clause 1—the Coining of Money Clause, the Bills of Credit Clause, the Legal Tender Clause, and the Contract Clause—speak clearly to commercial matters.

Second, the historical context surrounding the clause also makes California's construction untenable. After the Battle of Yorktown, and before the Constitution was

adopted, our country negotiated a treaty with Great Britain. A major sticking point was whether we would frustrate attempts by British subjects to collect on loans they had made to people and entities in the United States. As one commentator has noted, "Lord Shelburne [who led the British delegation] instructed the British peace commissioners that the debts require the most serious attention,—that honest debts be honestly paid in honest money,—no Congress money. ***Sterling was the currency demanded . . . .***"[30] As a consequence of his efforts—in which John Adams concurred—Article IV of the Treaty of Paris guaranteed that "creditors 'shall meet with no lawful impediment to the recovery of the full value ***in sterling money***, of all bona fide debts heretofore contracted.'" *Id.* (quoting Definitive Treaty of Peace, Gr. Brit.-U.S., art. IV, Sept. 3, 1783, 8 Stat. 80, 82 (emphasis added)).

This exchange of understandings reveals the conceptual connection between the Article I Treaty Clause and the commercial provisions that follow it. By prohibiting states from coining money (which could be debased), from emitting bills of credit (which could float on thin air), from designating anything but gold or silver as legal tender, or from passing a law impairing an obligation of contracts (such as loans), the authors of the Constitution ensured that international commercial matters—not simply military matters—were handled strictly at the federal level.

Nor were these provisions adopted exclusively to facilitate relations with Great Britain. Those who negotiated this treaty had an eye not simply on resolving differences with that country. They also sought to establish a solid basis for commercial relations with the rest of the world. "For them," this commentator writes, "the treaty's financial guarantees

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[30] Daniel J. Hulsebosch, *Being Seen like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239, 1252 (2018) (footnote omitted) (quoting LORD EDMOND FITZMAURICE, LIFE OF WILLIAMS, EARL OF SHELBURNE, AFTERWARDS FIRST MARQUESS OF LANDSDOWNE, WITH EXTRACTS FROM HIS PAPERS AND CORRESPONDENCE 282–83, 285 (1876) (emphasis added)).

. . . provided ground rules by which the imperial connection became an international one, and those rules would apply to other relationships, too." *Id.* at 1253. As Madison wrote in Federalist No. 44:

> Had every State a right to regulate the value of its coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus the citizens of other States be injured, and animosities be kindled among the States themselves. ***The subjects of foreign powers might suffer from the same cause, and hence the Union be discredited and embroiled by the indiscretion of a single member.***

(Emphasis added.)

Justice Story's account of the Article I Treaty Clause also reflects this broad history. It confirms that a "treaty" transcends the distinction between military and commercial matters. In his *Commentaries*, Justice Story observed that the Clause refers to "treaties ***of a political character***, such as [among other things] treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, ***political cooperation*** [and] treaties . . . conferring . . . general commercial privileges . . . ." *Virginia*, 148 U.S. at 519 (emphasis added) (quoting Justice Story). *See also U.S. Steel*, 434 U.S. at 464 (same).

California's Agreement with Quebec falls neatly within Justice Story's taxonomy. It has a definite "political character" and involves enormous "political cooperation." California and Quebec have committed themselves to negotiating significant differences between their programs on a continuous basis, and not to depart from their regimes without thorough consultation. *See* Agreement at Arts. 4, 5, 13, 20. And we know from California's own words that its collaboration with Quebec in the past has been extensive. As CARB stated in its 2013 *Linkage Readiness Report*, "California and Québec have a long track record collaborating on their respective program regulations and regulatory changes, dating

back to the 2008 and 2010 WCI program design recommendations . . . and the regulatory actions that followed." *Id.* at 13–14 (2d. Iacangelo Decl., Exh. 50).

And even if Justice Story's taxonomy for a treaty does not capture the Agreement—which it clearly does—Justice Stevens removed all doubt in *Massachusetts*. In holding that States must be afforded "special solicitude" to petition ***the United States*** to address greenhouse gas emissions, 549 U.S. at 520, the Supreme Court relied upon States' surrender of certain sovereign rights when they entered the Union. The Court explicitly relied upon the fact that States could not enter into an "emissions treaty" with a foreign power in affirming that a state had standing to sue. 549 U.S. at 519.

Third, this Court should not follow California in conflating the Article I and Article II Treaty Clauses. *See* ECF No. 50-1 at 23–24. These clauses address completely different concerns. The Article I Treaty Clause consolidates foreign policy at the federal level. It enables the United States to speak with one voice on such matters. *See Baker*, 369 U.S. at 211. The Article II Treaty Clause, meanwhile, speaks to separation of foreign affairs powers. This is at the federal level of government, once Article I had fully husbanded that power to the federal government alone. As this Court is no doubt well aware, many agreements at the federal level—such as the recent United States-Mexico-Canada Agreement—are enacted as positive law by legislation or executed by the President alone. They are not necessarily presented by the President to the Senate for approval. *See generally Made in the USA Found. v. United States*, 242 F.3d 1300, 1305 (11th Cir. 2001). But such instruments, which often turn on the President's unique role in foreign affairs, *see, e.g*, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948), or on the interest in having the House of Representatives on board for a particular initiative, do not

implicate the acute concerns that drove the founding generation to reserve foreign policy to the federal level in Article I.[31]

In *Massachusetts v. EPA*, the Supreme Court wrote, "Massachusetts cannot invade Rhode Island to force reduction in greenhouse gas emissions [and] it cannot negotiate an emissions treaty with China or India." 549 U.S. at 519. But California has negotiated just such an emissions treaty with Quebec. It must be declared unlawful.

III. The Agreement and Arrangements, at a minimum, violate the Compact Clause.

Even if California's Agreement and Arrangements do not constitute a "treaty" for purposes of the Article I Treaty Clause—which they surely do—it is a "Compact." This is forbidden by the Compact Clause—and, indeed, the Clean Air Act—because there is no question that Congress has not approved California's agreement with Quebec. *See* U.S. CONST. art. I, § 10, cl. 3; *see also* 42 U.S.C. § 7402.

A. Compact Clause Jurisprudence Itself Demonstrates the Invalidity of the Agreement and Arrangements.

The words of the Compact Clause admit of no exception: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power." U.S. CONST. art. I, § 10, cl. 3. On its face, "any Agreement" with

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[31] EDF and NRDC (and to some extent California) also rely on *Wharton v. Wise*, 153 U.S. 155 (1894), to argue that the Agreement and Arrangements are not a treaty. In *Wharton*, the Court upheld a 1785 "compact" between Maryland and Virginia that had recognized reciprocal fishing rights in border waters. *See id.* at 162, 164. This case is inapposite for several reasons. ***First***, the Court analyzed this agreement almost entirely under the Articles of Confederation, given its date of execution. *See id.* at 167. ***Second***, it did so under the predecessor to the Compact Clause, not the Article I Treaty Clause. *See id.* (describing the relevant provision of the Articles and the Compact Clause as "similar"). ***Finally***, because of its obviously local nature, the agreement in *Wharton* would easily have passed muster under the Compact Clause. *See infra* Part III. California's Agreement with Quebec bears no relation to the "compact" at issue in *Wharton*. As noted above, the Agreement is international, it does not speak to local matters, and its "real purpose" is to make and express California's foreign policy toward Quebec ***and beyond***.

"a foreign Power" is prohibited without consent. Congress did not consent to California's Agreement and Arrangements with Quebec. They are unlawful.

In *Virginia v. Tennessee*, however, the Supreme Court described the clause as "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." 148 U.S. at 519. Notably, however, the Supreme Court has never applied *Virginia v. Tennessee* to compacts with foreign governments. California does cite to two decisions that do so. One is by the Supreme Court of North Dakota, over a hundred years ago. A second comes from an intermediate appellate court in California. *See* ECF No. 50-1 at 26 (citing *McHenry v. Brady*, 163 N.W. 540 (N.D. 1917); *In re Manuel P.*, 215 Cal. App. 3d 48 (1989)). But this Court should be wary of transposing a standard that may work in the domestic context to the international arena as these state courts did.[32]

The Constitution vests exclusive authority over foreign affairs in the federal government. *See Zschernig*, 389 U.S. at 436; *Hines*, 312 U.S. at 63; *Pink*, 315 U.S. at 233; *Movsesian III*, 670 F.3d at 1071. It obviously does not do the same with respect to domestic matters. *See* U.S. CONST. amend. X. California presents no logical reason why there should be a "third category" of agreements between states and foreign powers that is not subject to either the Article I Treaty Clause or the Compact Clause. ECF No. 50-1 at 1.[33] The

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[32] Broadly speaking, this case concerns California's encroachment on the federal government's foreign affairs powers. The Executive Branch's views on issues of foreign policy are entitled to substantial weight. "[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); c*f. Republic of Austria v. Altmann*, 541 U.S. 677 (2004). California and interveners therefore bear the burden of making a strong showing that no encroachment has occurred. They cannot meet that burden.

[33] Contrary to Amici States' implication, the United States did not concede in its opening brief that *Virginia v. Tennessee* applies in the international context. *See* ECF No. 12 at 20 ("Even if [*Virginia v. Tennessee*] applies beyond the domestic arena . . . .").

relationship between states is obviously different from the relationship between states and foreign powers.

In addition, in the only Supreme Court case that came close to resolving this issue, *Holmes v. Jennison*, 39 U.S. 540 (1840), five Justices concluded that the clause forbids all manner of agreements between states and foreign powers. This included even an oral agreement between state and foreign officials with respect to a governmental function. In *Holmes*, the Governor of Vermont had given orders for Holmes to be extradited to Quebec to face criminal charges. The Supreme Court of Vermont denied habeas. The case then came before the Supreme Court of the United States on two issues. Those were whether the Supreme Court had jurisdiction to review the decision below, and whether the Governor's orders violated the Constitution. Because the Court split evenly on the first issue, the Justices could not technically resolve the case on the merits. (Justice McKinley was absent.) But writing for himself and three others, Chief Justice Taney expressed no doubt that the Governor's act was forbidden:

> [I]t was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it ***as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.***

Id. at 572 (Taney, C.J., joined by Story, McLean, and Wayne, JJ.) (emphasis added).[34]

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[34] Entirely consistent with the statements and import of Federalist Papers 3 and 4 (Jay), referenced by the United States throughout the cross-motions here, this opinion also concluded that "[e]very part of [the Constitution] shows, that our whole foreign intercourse was intended to be committed to the hands of the general government: and nothing shows it more strongly than the treaty-making power …." *Holmes*, 39 at 575. This is entirely consistent with our main point that, however the apple of California's Agreement and Arrangements is diced, it embodies action that at its core boils down to one or more types of action forbidden to a mere state by our Constitution. *See also* THE FEDERALIST No. 42,

Importantly, a ***fifth*** Justice—one of the four who found no jurisdiction, Justice Catron—wrote that, had there been jurisdiction, there would have been a violation:

> We will assume, for the present, and for the purposes of the argument, that an agreement to surrender, on which the arrest was founded, existed between the executive chief magistrate of Vermont, and the Queen of Great Britain; that William Brown was the agent of Great Britain, and represented that kingdom; that Governor Jennison represented Vermont; and that the arrest was made in part execution of such previous agreement.
>
> ***In such case, I admit***, the act would have been ***one as of nation with nation***, and governed by the laws of nations; ***that the agreement would have been prohibited by the Constitution***, and the arrest, in part execution of it, void; and that the judgment of the state Court in favour of the validity of the arrest should be reversed.

Id. at 595 (Catron, J.) (emphasis added).[35] Moreover, the Supreme Court of Vermont then granted habeas relief to Holmes. That Court concluded that, had Justice Catron been more fully apprised of the facts, and had the Court had jurisdiction, he would have provided the vote necessary to hold a constitutional violation had occurred. On this basis, that the Vermont Supreme Court—which did have jurisdiction over the case—held that the Governor's agreement violated the Constitution. *See Ex Parte Holmes*, 12 Vt. 631, 641 (1840).

Although not technically binding, Chief Justice Taney's opinion—written within sixty years of the founding—historically has been treated as authoritative both by the Supreme Court and the Attorney General. *See United States v. Rauscher*, 119 US 407, 414 (1886); 3 Op. Att'y Gen. 661 (1841); 27 Op. Att'y Gen. (1909). Also noteworthy is that the Court went out of its way in *United States Steel* to reconcile *Virginia v. Tennessee* with

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at ¶ 1(Clinton Rossiter ed., Signet 2003) ("If we are to be one nation in any respect, it clearly out to be in respect to other nations.").

[35] Justice Catron emphasized the distinction between a unilateral decision to extradite and an agreement to do so. He noted that Governors often made unilateral decisions to render individuals to other states. *See Holmes*, 39 U.S. at 597 (Catron, J.)

Holmes. *See* 434 U.S. at 465 n.15; *see also id.* at 466 n.18. The application of *Virginia v. Tennessee* to foreign—as opposed to domestic—compacts is therefore not conceded.

Even if *Virginia v. Tennessee* applied in the foreign context, however, California's Agreement with Quebec fails such review. As the United States has noted, the Agreement and Arrangements are about as "local" as the United Nations. ECF No. 12 at 20. They offer to the world California's conception of what the foreign policy—its *Field of Dreams*—for addressing greenhouse gas emissions should be. As noted above, it resembles the UNFCCC, a "treaty" both clothed as a treaty and operating as a treaty (a wolf in wolves' clothing). And both California and WCI—and perhaps other states—stand ready to replicate it on a multilateral basis. As Defendant WCI admits, although its current board "includes officials from the Provinces of Quebec, Novia [sic] Scotia and the State of California, ***[t]he support provided can be expanded to other jurisdictions that join in the future.***" 2d. Iacangelo Decl., Exh. 41 (reformatted into sentence case) (emphasis added). The Agreement and supporting law therefore fall squarely within the category of "combination[s] tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Virginia*, 148 U.S. at 519.

Notably, California's Agreement with Quebec bears no relation to the four examples Justice Field gave in *Virginia v. Tennessee* for agreements that would not implicate the clause. As the United States has explained, each of these examples simply involved "intensely local cooperation between states." ECF No. 12 at 19. They were: (1) Virginia's sale of "a small parcel of land" in New York to that state; (2) Massachusetts' contract with New York to ship goods via the Erie Canal; (3) the draining of a "malarious and disease-producing district" at the border of two states; and (4) a joint response to a "threatened invasion of cholera [or] plague." *Virginia*, 148 U.S. at 518. These are unremarkable examples of states exercising their truly traditional and local police powers, often in the mere capacity of a market participant, not as a regulator. *Cf. Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008). California and Quebec, meanwhile, are addressing no

such concerns. Again, Defendant CARB says that "[c]limate change is a global problem." 2d. Iacangelo Decl., Exh. 43. At their closest, California and Quebec are approximately 2,500 miles apart.[36] And the cap-and-trade aspects of the Agreement and Arrangements are clearly designed to create an extra-market artificial scarcity by means of regulatory authority. Tradeable credits are created only by that foundational regulatory step.

Amici Professors of Foreign Relations Law largely overlook the distinction Justice Field emphasized in *Virginia v. Tennessee*. Of the six examples they give of agreements that were never submitted to Congress for approval, four fall neatly into Justice Field's taxonomy.[37] Their first example, a "Mercury Action Plan" adopted by contiguous states and provinces, involves a contaminant with demonstrable local effects. *See* ECF No. 54 at 11. As CARB itself observes, "GHGs are global pollutants, ***unlike criteria air pollutants and toxic air contaminants, which are pollutants of regional and local concern.***" (SUF ¶ 24) (emphasis added.) Their second example—an understanding between New York and Quebec respecting "drivers' licenses exchanges" and the "reporting of certain traffic-related infractions"—is a conventional example of two contiguous jurisdictions responding to a common concern. ECF No. 54 at 11. Their fourth example, the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, involves contiguous jurisdictions and a common body of water. *See id.* at 12. Their fifth example, a memorandum of agreement between Mexico and North Carolina, does not involve contiguous jurisdictions. But it does

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[36] Contrary to the claim of Amici States, Justice Story's last two examples do not encompass California's Agreement with Quebec. His examples of "public health emergenc[ies]," ECF No. 62 at 18, were precise and local.

[37] Of course, the fact that states failed to submit these foreign agreements for approval does not mean that they need not have done so. Inaction can create no estoppel against the federal government, especially not as to entirely separate state actions. *See, e.g., Office of PErs. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990) (discussing how estoppel against the United States might require a showing of "affirmative misconduct" by an agent of the United States). Additionally, Congress would presumably approve *pro forma* agreements that address truly local issues and do not implicate foreign relations.

involve a phenomenon of addressed by local governments—deciding what to do if a minor comes into a state's custody. *See id*. To be sure, their third example, the Pacific NorthWest Economic Region ("PNWER"), is not limited to strictly local concerns. But PWNER also appears to involve only the sharing of information to secure funding and preferred policies from the United States and Canada. *See id.* at 11–12; *see also* Pacific NorthWest Economic Region, "Accomplishments," *available at* http://www.pnwer.org/accomplishments.html (discussing, among other things, PNWER's recommendations for a new trade agreement between the United States, Mexico, and Canada and funding to preserve freshwater mussel species) (2d. Iacangelo Decl., Exh. 51). Finally, the International Association of Insurance Supervisors, their sixth example, describes itself as a "voluntary membership organization." About the IAIS, *available at* https://www.iaisweb.org/page/about-the-iais (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 52). Nothing in the IAIS' public profile suggests that members may not reject its standards.[38]

Much the same can be said about the examples provided by Amici States. Their first example is *United States Steel*. There—unlike here—no state exercised a power that it could not otherwise exercise.[39] The many reciprocity agreements that Amici States go on to describe—about the carrying of firearms, about professional licensure, about liability for hunting and fishing—implicate obvious local interests. To give one example, a state may regulate professional licensure within its borders with broad latitude. It therefore has unremarkable authority to modulate its rules to reflect an arrangement with another state. The "Oil Spill Memorandum" appears to involve nothing more than the sharing of resources, like one city lending its fire engine to another. Moreover, the fact that Oregon, Washington,

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[38] Amici States suggest that the Regional Greenhouse Gas Initiative ("RGGI") is both constitutional and indistinguishable from California's Agreement with Quebec. *See* ECF No. 62 at 16. The very fact that RGGI has no foreign partners makes it obviously and materially distinguishable.

[39] This case is discussed at length *infra* at 36–38.

California, Hawaii, and Alaska "do not share a common border," ECF No. 62 at 20, seems a little off the mark with respect to what would probably be marine spills.

Virginia is at liberty to share information with the United Kingdom, or Idaho with British Columbia. And, according to the article that Amici States cite, the "agreements" between the Governor of Nebraska and Cuba were merely memoranda of understanding to memorialize the intent of a Cuban commodity importer, Alimport, to buy goods directly from Nebraskan producers. *See* ECF No. 62 at 21–22 (citing Press release, Nebraska Governor Dave Heineman, *Gov. Heineman Signs Amended Agreement with Cuba for $30 Million* (Aug. 22, 2005)). The article further notes that Congress had amended the embargo with Cuba to allow these sales. *Id*. Finally, attention to a pollutant in a common marine resource would certainly qualify as local under *Virginia v. Tennessee*, even assuming *arguendo* that that case applies in the international context.

Citing *United States Steel*, California also argues that the Agreement and Arrangements do not expand California's power at the expense of the federal government. California says: (1) they do not allow California to exercise any powers it could not exercise in their absence; (2) there has not been a delegation of sovereign power to an organization; and (3) California is free to withdraw at any time. ECF No. 50-1 at 29–33.

Not so. The *United States Steel* factors actually tip decisively in the United States' favor:

First, as the United States has explained, the interaction of the Agreement and Arrangements compels Quebec to leave its regime in place, without material changes, or submit proposed changes to elaborate "consultation" under the Agreement. *See supra* Part II-A. And CARB itself acknowledges that "[l]inkage exposes a program to the rules and oversight of other programs [because] [c]ompliance mechanisms in one system essentially extend to any linked system . . . ." 2d. Iacangelo Decl., Exh. 45. Thus, under the Agreement and supporting California law, California in fact can do things that it could not do in their absence, satisfying the first factor of *United States Steel*. *Cf. Int'l Paper Co. v. Ouellette*,

479 U.S. 481, 495 (1986) (precluding states from using their common law to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources"). There is also strong evidence that the Agreement and Arrangements actually enable California to supply ***regulatory relief*** to Quebec—in exchange for millions of dollars— which is surely not something a state could do in their absence.

Second, California has delegated certain sovereign powers to WCI—a state actor that it controls jointly with Quebec. California and Quebec created WCI to administer auctions and keep an eye on the emissions market. Anyone seeking to buy, sell, or "bank" credits must do so under the auspices of WCI. In fact, these credits exist only as entries in WCI's database.[40] And the regulatory relief that these credits represent are inherently sovereign. To put the matter simply, each credit constitutes a license for a regulated entity to emit one metric ton of carbon dioxide (or an equivalent) into the atmosphere from either California or Quebec without fear of legal liability.

Third, although non-consensual withdrawal from the Agreement is theoretically possible—witness Ontario—it would not be easy for California. The Agreement requires unanimous consent of the parties before it can be terminated. And termination is not legally effective until "12 months after the last of the Parties has provided its consent to the other Parties." Agreement at Art. 22. More to the point, many entities hold "banked" credits, with an eye toward trading them or using them to cover future emissions. These holdings reflect California's and Quebec's contributions to the mix, but the entities that hold them are blind to their origin. Were California to withdraw from or terminate the Agreement, it would have to decide whether to accept banked credits in full or discount them to reflect

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[40] WCI's Compliance Instrument Tracking System Service ("CITSS") is home to the unique serial numbers that represent and effectively are the compliance allowances. *See* CAL. CODE REGS. 17 § 95820(a)(1)-(3)), 95831; Sahota Decl. ¶ 51. CITSS "serves as a single registry" for California and Quebec's compliance instruments. ECF No. 50-4 at 135 (WCI's 2018 Annual Report).

Quebec's contribution. Its decision to wrap itself around Ontario's credits indicates that it would choose the first option. This demonstrates the "stickiness" of the Agreement, despite California's statements to the contrary.

Moreover, *United States Steel* factors are just that: factors. They do not establish definitive legal elements for what constitutes an unlawful compact. Instead, ultimately, "the test is whether the Compact enhances state power *quoad* the National Government." 434 U.S. at 473.[41] California implies that the United States must satisfy each factor that the Supreme Court considered relevant in *United States Steel* for the Agreement to constitute a forbidden compact. *See* ECF No. 50-1 at 29 n.23. But this is not so. The *United States Steel* Court merely laid out these factors—immediately after reiterating the actual "test" from *Virginia v. Tennessee*. These factors illustrated why the Court considered the actual "test" of *Virginia v. Tennessee* met on the facts of the *United States Steel* case. Confirming this, the Court connected the first and second of its factors with the word "[n]or," and the second and third with the word "[m]orever." *Id.* This settles that the factors are illustrative and disjunctive. In any case, the United States satisfies them all.

Despite California's protestations, the arrangement at issue in *United States Steel* comes nowhere near the Agreement with Quebec, coupled with the related *ex ante* and *ex post* Arrangements. To be sure, California has long-planned the defense it mounts here of its foreign policy and treaty. As Defendant CARB Chairwoman Mary Nichols has stated, California sought out legal opinions "at all levels" on this subject. Kevin Stark, *California's Top Air Regulator Is Scathing in Response to DOJ Climate Suit*, KQED Science, Oct. 23, 2019, https://www.kqed.org/science/1949823/doj-sues-california-over-its-climate-agreement-with-quebec (last visited Feb. 24, 2020) (2d. Iacangelo Decl., Exh. 57). Its goal has plainly been to make its foreign arrangement appear as benign as the "Multistate Tax Commission" in *United States Steel*. But pulling back the curtain on California's scheme

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[41] "*Quoad*," now archaic, means simply "with respect to."

reveals an unquestionable—and fully intended—intrusion into the power of the United States federal government. To be sure, the Multistate Tax Commission could audit corporations, "define business income," "impose [certain] filing requirements," and "resort to courts for compulsory process." 434 U.S. at 474–75. Importantly, however, the states that were members of this Commission could exercise these powers in their own right. *See id.* at 474–76. Critically, there is no claim that the participating states in *United States Steel* were required to have in place any minimal threshold or aligning standards to utilize the Commission for support. *See id.* at 457. Thus, participants in the Commission did not enhance their authority at the expense of the federal government. Precisely the same can be said about the Tobacco Master Settlement Agreement ("TMSA"). As the Fourth Circuit observed in that case, the TMSA "[did] not purport to authorize the member States to exercise any powers they could not exercise in its absence." *Star Sci., Inv. v. Beales*, 278 F.3d 339, 360 (2002) (quoting *U.S. Steel*, 434 U.S. at 473).

Here, by contrast, California cannot deny—and in fact has conceded—that the Agreement and its own supporting law, operating together, in fact constrain Quebec, which is obviously not a power that California would otherwise possess. *See supra* Part II-A. Moreover, California's Governors and policy makers have made crystal clear that it ***intends*** to have its own foreign policy, to "show the nation and the world how to get there," (SUF ¶ 20), and to "build more support—in other states, in other provinces, in other countries." 2d. Iacangelo Decl., Exh. 36. Only by ignoring the undisputed evidence of California's openly declared intent of its Agreement with Quebec and others could this Court credit and conclude that the Agreement is merely about enhancing "flexibility" and lowering "costs." Governors Schwarzenegger, Brown, and Newsom did not make their pronouncements on the world stage about their complex trading program and their capacious international ambitions for it, along with hostility to this suit (in the case of Newsom), because their principal aim was to be known as fiscal hawks saving money for California.

The Agreement is also a compact under *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159 (1985). The story behind this case began in 1982. A Massachusetts statute allowed bank holding companies in other New England states to acquire banks (or bank holding companies) in Massachusetts, provided the state in question afforded similar privileges to a bank holding company in Massachusetts. *See id.* at 164. Once Connecticut passed a similar statute, a bank holding company in each state took steps to acquire a bank holding company in the other. One issue on writ was whether these statutes constituted a forbidden compact. The Supreme Court said no, noting that "several of the classic indicia of a compact [were] missing." *Id.* at 175. It then went on to apply *Virginia v. Tennessee* to conclude that the statutes "[could not] possibly infringe federal supremacy." *Id.* at 176.

The "indicia" of *Northeast Bancorp* were as follows: (1) whether a "joint organization or body [had] been established to regulate regional banking or for any other purpose"; (2) whether "[]either statute [was] conditioned on action by the other State"; (3) whether "each State [was] free to modify or repeal its law unilaterally"; and (4) whether "[]either statute require[d] a reciprocation of the regional limitation." *Id.* at 175. California's Agreement with Quebec similarly satisfies these indicia.

First, California and Quebec operationalize the Agreement through WCI, and the Agreement expressly refers to WCI. *See* Agreement at Art. 12. The Agreement also sets up a "Consultation Committee" to "resolve . . . differences" between the parties. *Id*. at Art. 13. California may protest that WCI does not "enforce[]" the Agreement, but *Northeast Bancorp* asks whether a "joint organization" is established "for any . . . purpose." 472 U.S. at 175. WCI is the operational center, a "joint organization" to implement the Agreement and Arrangements. WCI is an arm of California, a state actor for the Golden State, and simultaneously the place of the "handshake" and passing of money with Quebec. Because buyers and holders of credits are blind to their origins, California and Quebec have essentially issued a joint currency. This is then administered by WCI. WCI also presents

itself to the world as "the . . . market," not as a mere vendor. And the fact that the Consultation Committee has never met only establishes that "workgroups," Agreement Art. 3, are generally able to resolve differences. But these "workgroups" surely qualify as a "joint organization" for purposes of *Northeast Bancorp*. Otherwise, the Constitution could be avoided through clever nomenclature.

Second, because neither California nor Quebec may change its regulatory regime in any material respect without going through elaborate "consultation," *see* Agreement at Arts. 3, 4, 5, 13, the Agreement in fact makes action by either participant "conditioned on action by the other [participant]." ***Third***, and relatedly, California and Quebec are obviously not "free to modify or repeal [the provisions of their regimes] unilaterally," given the Agreement's elaborate requirements for "consultation." ***Fourth***, unlike in *Northeast Bancorp*, the Agreement requires many "reciproca[l]" commitments. In *Northeast Bancorp*, the Massachusetts statute dated to December 1982 and Connecticut's dated to June 1983. *See id.* at 164. The two statutes interacted, but each was valid with or without the other. The Agreement, however, would be mere paper if it did not bear signatures from California and Quebec.

All four indicia from *Northeast Bancorp* are met here. Even if they were not, once again, nothing in *Northeast Bancorp* says that the United States must show that all of these factors are all met. In addition, because the *Northeast Bancorp* Court went on to apply *Virginia v. Tennessee* to the facts of the case, *see* 472 U.S. at 175–76, there is every reason to conclude that *Northeast Bancorp*, like *United States Steel*, is merely an adjunct to *Virginia v. Tennessee*. As we have seen, the Agreement qualifies as a compact under that case, even assuming for the sake of argument that *Virginia v. Tennessee* applies in the international context.[42]

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[42] IETA suggests that the Agreement cannot be a compact because it lacks consideration. *See* ECF No. 47 at 20–21. Assuming *arguendo* that this is a valid requirement for a compact,

Because the only real Supreme Court "test" of whether a compact exists under *Virginia v. Tennessee* is whether an agreement encroaches into the federal sphere, the Supreme Court's decisions in *Crosby* and *Garamendi* are highly relevant. They illustrate other devices of state origin that the Supreme Court has held "enhance[] state power *quoad* the National Government." California attempts to dismiss their teaching because they "addressed the Foreign Affairs Doctrine and statutory preemption." ECF No. 50-1 at 33. But the analyses of those questions is conceptually the same as that required to determine if California's putative compact undermines federal power. Clearly it does. By its emissions treaty with Quebec, California undermines federal power by independently entering into an international cap-and-trade program that the United States has not yet concluded is in the national interest to join. This encroaches into a field that the federal government has carved out to implement through the UNFCCC. In fact, President Trump announced the United States' intention to withdraw from the Paris Agreement because it "disadvantages the United States to the exclusive benefit of other countries, leaving American workers—who I love—and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production." Statement by President Trump on the Paris Climate Accord, Jun. 1, 2017, available at https://www.whitehouse.gov/briefings-statements/statement-president-trump-parisclimate-accord/. (SUF ¶ 9). And the documentation to formally withdraw from the Paris Agreement has now been submitted. (SUF ¶ 11). California undermines federal authority by adopting, as a matter of both intent and effect, a discordant approach to greenhouse gas emissions.

But that is not all. Defendant CARB has recognized the substantial financial benefits that California derives from its treaty with Quebec. At least hundreds of millions of dollars

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the Agreement satisfies it. Among other things, California and Quebec agree to accept each other's compliance instruments. *See* Agreement at Art. 6. They also agree to joint auctions. *See id.* at Art. 9. And they agree not to effect material changes in their regulatory regimes without going through elaborate consultation. *See id.* at Arts. 3, 4, 5, 13.

flow into the State. More apparently would have arrived had Ontario remained a partner. Because the undisputed facts establish that California's Agreement with Quebec, to say nothing of the preparatory and implementing Arrangements that accompany the Agreement, materially enhances the power of the state relative to the federal government—because, in fact, that is California's point—California's arrangements are prohibited by the Compact Clause.

B. The Clean Air Act confirms that California cannot enter into an international emissions agreement.

In the end, however, it is irrelevant whether California's emissions-related agreement with Quebec enhances the state's power vis-à-vis the federal government. *United States Steel*, *Northeast Bancorp*, and other cases and examples California and its allies deal with application of the Compact Clause in the face of Congressional *silence*. They have no application here. Congress *expressly* addressed the authority of states to "enter into agreements or compacts" regarding air pollution in the Clean Air Act. 42 U.S.C. § 7402(a). Such "agreements or compacts" are barred with foreign countries.

The Clean Air Act has long contained statutory suspenders to the belt around interstate agreements embodied in the Article I Treaty Clause and Compact Clause. Under CAA § 102(c):

> two or more ***States*** [can] negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of air pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts.

42 U.S.C. § 7402(c) (emphasis added). But Section 102(c) goes on to mandate that "[n]o such agreement or compact shall be binding or obligatory upon any State a party thereto ***unless and until it has been approved by Congress***." *Id.* (emphasis added).

California's Agreement and Arrangements with Quebec unquestionably fall within the scope of this provision. Defendants do not dispute their Agreement is an "agreement." *See id.* And they concede it is for "cooperative effort" and "mutual assistance" to, at a minimum, enhance compliance flexibility reduce the costs to parties. ECF No. 50-1 at 1. There is also "the establishment of such agencies, joint or otherwise" to implement the Agreement and Arrangements: Defendant WCI and its board members. 42 U.S.C. § 7402(c).

But fatal for California: Quebec is not a "State." So by giving the "States" explicit preliminary authority to form compacts with other States—subject to subsequent approval—Congress necessarily foreclosed the additional option of States to even "negotiate" any such "agreements" with foreign powers—let alone enter and bring them into effect. 42 U.S.C. § 7402(c).

Under the canon of *expressio unius est exclusio alterius*, the express reference to one alternative implies the exclusion of all others. *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."); *see also Wheeler v. City of Santa Clara,* 894 F.3d 1046, 1054–55 (9th Cir. 2018) ("the doctrine expressio unius est exclusion alterius 'as applied to statutory interpretation creates a presumption that when a state designates certain person, things, or manners of operation, all omissions should be understood as exclusions.'" (citations omitted)). Congress would have written "States" and "foreign countries" if it intended the meaning that California argues for. But it did not.

And the presumption established by the interpretive rule of *expressio unius* fully applies here. The Clean Air Act is a comprehensive statute that even considers air pollutants outside the United States. *See* Clean Air Act Section 115, 42 U.S.C. § 7415, entitled "International air pollution." The concept that a single state (or multiple states for that matter) can strike out on their own is anathema to the approach Congress chose. Instead,

CAA § 115—which was enacted by Congress at roughly the same time as CAA § 102—differentiates between the "States" and the air pollutants from "a foreign country." 42 U.S.C. § 7415 (first enacted in 1965, *see* P.L. 89-272, 79 Stat. 995; Section 102 dates to 1963, *see* P.L. 88-206, 77 Stat. 393). The statute makes provision for the Administrator of EPA and for the Secretary of State to act, not the governor or legislature of a state. 42 U.S.C. § 7415. Through § 102, Congress has expressly spoken to the question of whether States can even "negotiate" air pollution control "agreements" with foreign countries. They cannot. As such, California cannot seek solace from cases like *United States Steel* dealing with the exemption from the literal sweep of the Compact Clause in the presence of Congressional silence.

CONCLUSION

California's Agreement with Quebec threatens the founders' firm intention to set the Constitution up in a way that, via multiple provisions including the Article I Treaty Clause and Compact Clause, entirely fenced the states out of intruding into the federal sphere of foreign policy. "Each State doing right or wrong, as to its rulers may seem convenient" may be true of some dysfunctional federalist-style systems of government but it is decidedly not our constitutional system. THE FEDERALIST NO. 4, at 44. This was necessary, because "[i]f we are to be one nation in any respect, it clearly out to be in respect to other nations." THE FEDERALIST NO. 42, at ¶ 1. And, as Alexander Hamilton wrote in Federalist No. 80, "the peace of the WHOLE ought not to be left at the disposal of a PART." THE FEDERALIST NO. 80, at ¶ 6. As the Supreme Court held in *Massachusetts v. EPA*, a state "cannot negotiate an emissions treaty" with a foreign power. 549 U.S. 497, 519 (2007). California's Agreement with Quebec cannot be sustained.

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Respectfully submitted,

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