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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity 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 capacity 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.	2:19-cv-02142-WBS-EFB **STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT** Date: March 9, 2020 Time: 1:30 PM Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: 10/23/2019

[1] The State Defendants are 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 capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

The Constitution and the Supreme Court recognize that agreements between States and other governments fall into three categories: (1) the substantial array of agreements "that can in no respect concern the United States;" (2) the rare "compact" or other agreement that "increase[s] [the] political power in the states" and "encroach[es] upon … the just supremacy of the United States," which requires congressional consent under the Compact Clause; and (3) the rarer still "Treaty, Alliance, or Confederation," which threatens such serious harms to our federal structure that not even Congress may approve it. *See Virginia v. Tennessee*, 148 U.S. 503, 518, 519 (1893). As State Defendants established in their opening brief, the 2017 agreement and linkage regulations fall into the first category—and, thus, raise no constitutional concerns—because neither is a Compact, let alone a Treaty. Indeed, the linkage regulations simply determine how *California businesses* may comply with *a California regulatory program* and how the California Air Resource Board (CARB) auctions the *California-issued* compliance instruments. And the 2017 agreement merely expresses California's and Quebec's intentions to continue consulting with each other to ensure proper functioning of the linkage between their programs. Nothing about the 2017 agreement or linkage enhances California's powers or threatens our federal structure and consequently, there is no Treaty or a Compact under Article I of the Constitution.

Plaintiff has no persuasive answer to these arguments. Plaintiff neither analyzes the scope of the Article I Treaty Clause nor disputes Defendants' demonstration that the text of this Clause, its relationship with the Compact Clause, and its underlying purpose all show that only an agreement with substantial national consequences, including threats to national unity, qualifies as an Article I Treaty. Rather than attempting to show such significance here, Plaintiff adopts a scattershot approach, abandoning arguments debunked by Defendants and making a series of conclusory, and often contradictory, assertions that are unsupported by precedent or evidence. None of these arguments or assertions show that the 2017 agreement has the substantial national consequences of an Article I Treaty, an agreement of such import that not even Congress may authorize it.

Plaintiff's Compact Clause claim is just as, if not more, clearly without merit because it is foreclosed by the Supreme Court's decision, in *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978). Plaintiff makes only a passing, and entirely unsuccessful, attempt to distinguish *United States Steel*. Neither the 2017 agreement nor the linkage regulations grant California any new political power, much less the power encroaching upon federal supremacy required by the Supreme Court's functional test for the Compact Clause. Plaintiff's equally passing attempt to establish the indicia of a Compact, under *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), also fails. Plaintiff tries to save its Compact Clause claim by advancing a new "test" for Compacts involving foreign governments, invoking the foreign affairs preemption doctrine, and unveiling a new Clean Air Act preemption theory not raised in the amended complaint. Far from saving Plaintiff's Compact Clause claim, these arguments, including the two new ones raised in Plaintiff's reply, highlight Plaintiff's inability to satisfy the Supreme Court's functional test for a Compact, let alone establish an Article I Treaty.

Because Plaintiff's Article I Treaty Clause and Compact Clause claims fail as a matter of law, its motion for summary judgment should be denied and Defendants' cross-motion granted.

ARGUMENT

I. PLAINTIFF'S ARTICLE I TREATY CLAUSE CLAIM FAILS AS A MATTER OF LAW

Although Plaintiff acknowledges that its Article I Treaty Clause claim is utterly unprecedented, it offers no analysis of the Clause. Instead, Plaintiff relies on mischaracterizations of secondary authority, quoting phrases like "political cooperation" out of context and then purporting to apply them as standalone "tests." Plaintiff's analysis of the 2017 agreement is equally deficient. Plaintiff now admits that regulations, not the agreement, effectuate the link between the two cap-and-trade programs (ECF 78-1 at 53 (Fact 17)) but continues to assert that the agreement somehow regulates emissions without identifying any way in which it could do so. And Plaintiff's arguments that the agreement is binding ignore that the parties have an unfettered ability to withdraw, as evident from the plain text of the agreement and as demonstrated by Ontario's abrupt, unilateral exit. Plaintiff's Treaty Clause claim fails.

A. Plaintiff Offers No Analysis of the Article I Treaty Clause, Its Relationship with the Compact Clause, or Its Purpose, and Continues to Misquote Justice Story

Defendants showed in their opening brief that the text of the Article I Treaty Clause, its relationship with the Compact Clause (also in Article I), its purpose, historical understandings, and the Supreme Court's functional view of the Compact Clause all show that the Treaty Clause covers only a narrow range of agreements with "such substantial consequences for the Nation, such as threatening national unity, that Congress may not authorize them." Memo. in Support of Def. Cross-Motion for Summ. Judgment & Opp. to Plaintiff's Summ. Judgment Motion (Def. MSJ) at 15:18-20 (ECF 50-1). While Plaintiff denies that the Treaty Clause is limited to agreements threatening national unity, it does not otherwise dispute this analysis. Plaintiff' Reply in Support of Its Motion for Summ. Judgement & Opp. to Def. Cross-Motion (Pl. Reply) at 25:5-6 (ECF 78).

Indeed, notably absent from Plaintiff's reply is any discussion of the language in the Treaty Clause describing the prohibited agreements, the Clause's relationship with the Compact Clause, or its purpose. Defendants' opening brief showed that, by distinguishing between treaties, alliances and confederations—which are absolutely prohibited—and compacts—which are allowed if Congress consents—the Constitution indicates that Article I Treaties are "very rare agreements of such unusual importance and substantial consequence for the Nation that Congress should not be permitted to authorize them." Def. MSJ at 15:21-16:1. This conclusion is supported by the language of the Treaty Clause, which includes two exceptionally important types of treaties (confederations, and alliances), along with the general term treaties. *Id*. at 16:1-6. Far from disputing this analysis, Plaintiff simply ignores this key language and the Treaty Clause's relationship with the Compact Clause. Plaintiff similarly ignores the Supreme Court's functional interpretation of the Compact Clause and the Treaty Clause's underlying purpose of preserving the national government, both of which confirm that the Treaty Clause is limited to agreements addressing matters of great national consequence. *Id*. at 16:12-17:19, 17 n.14.

Rather than analyzing the typical sources of constitutional interpretation, Plaintiff attacks a straw man, arguing for pages that the Treaty Clause is not limited to "matters of war and peace" and covers commercial matters as well. Pl. Reply at 25:9-27:9. Defendants, however, expressly acknowledged that the Treaty Clause covers commercial privileges agreements that have "substantial consequences, such as those that could impair national unity." Def. MSJ at 18:11-21. Plaintiff also attacks a straw man when it claims (erroneously) that Defendants suggested "that environmental matters—and greenhouse gas emissions, specifically—cannot be the subject of a 'treaty.'" Pl. Reply at 17:7-9. Neither Plaintiff's straw man arguments nor any of its other arguments suggest, let alone establish, that the Treaty Clause applies to agreements lacking substantial national consequences. Indeed, Plaintiff points to the 1783 Definitive Treaty of Peace that formally ended the Revolutionary War, Pl. Reply at 25:26-10, which plainly had substantial consequences (and also involved matters of war and peace).

Plaintiff purports to rely on Justice Story's interpretation of the Treaty Clause in his *Commentaries*, but here again Plaintiff's discussion is most remarkable for what it omits. Defendants' opening brief showed that each of Justice Story's examples of agreements covered by the Treaty Clause—"treaties of alliances for purposes of peace and war," "treaties of confederation," and "treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges" (*Commentaries*, § 1397, at 271)—concerned matters of substantial national consequence. Def. MSJ at 17:20-18:10. Plaintiff does not, and cannot, deny this.

Nor does Plaintiff deny that it asserted, based on Justice Story's *Commentaries*, that the 2017 agreement is an alliance, without acknowledging that Story referred to "'treaties of alliance *for purposes of peace and war*.'" Def. MSJ at 18 n.17 (quoting *Commentaries* § 1397, at 271) (emphasis added). Instead, Plaintiff doubles down, noting that Story used the phrase "political cooperation," Pl. Reply. at 27:19, without acknowledging that Story did so in referring to "treaties *of confederation*, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty." *Commentaries*, § 1397, at 271 (emphasis added).

In addition, the Treaty Clause plainly cannot cover all state agreements involving "political cooperation" with foreign jurisdictions. Such a sweeping interpretation would cast into doubt hundreds of agreements between States and foreign governments, including ubiquitous agreements to promote trade.[2] It would also swallow the Compact Clause whole, turning on its head the structure that Article I creates of Compacts requiring congressional consent and categorically barred treaties. And a phrase as vague as "political cooperation" cannot provide the judicially manageable standard required by decisions such as *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), which Plaintiff cites but fails to apply to the interpretation it asks the Court to adopt. *See* Pl. Reply at 28:19-20.

Finally, Plaintiff asks the Court to ignore the Executive Branch's practice of not considering important environmental agreements, such as the Paris Agreement, to be treaties. Plaintiff's claim that the Treaty Clauses of Articles I and II "address completely different concerns," Pl. Reply at 28: 11-12, is belied by Plaintiff's reliance on treaties ratified by the Senate under Article II to argue that the 2017 agreement is a treaty under Article I. Notably, Plaintiff makes these arguments without explaining why Article II treaties may be used to support *its* arguments but not Defendants'. Pl. Reply at 17:2-18:6, 25:26-26:10. In asserting that the Article II Treaty Clause is narrower than its Article I counterpart, Plaintiff also ignores the well-established principle that when identical words are used in different parts of the same document, they are presumed to have the same meaning. *See, e.g.*, *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995); *see also NLRB v. Noel Canning*, 573 U.S. 513, 535-38 (2014). Moreover, other canons of construction suggest that, if anything, the Article II Treaty Clause is *broader*. As the foreign affairs law professors amici point out, in Article I the word "treaty" accompanies the words "alliance" and "confederation," two "particularly robust" forms of international agreements, suggesting that in Article I the word "treaties" is restricted to similarly robust and consequential agreements. Brief of Amici Professors of Foreign Relations Law (ECF 54) at

[2] Michael Glennon & Robert Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* 60 (2016). The relevant excerpt of this book is provided in the Declaration of Michael S. Dorsi in Support of State Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion (Dorsi Decl.), Exh. 15 (ECF 50-3).

16:11-18; *see also Virginia*, 148 U.S. at 519 (applying this *noscitur a sociis* rule of construction to Article I).

In short, it is not seriously contested that an Article I Treaty is an agreement of substantial national consequence.

B. The 2017 Agreement Does Not Regulate Emissions and Is Not an Emissions Treaty

As previously shown, far from addressing a matter of substantial national consequence, the 2017 agreement merely expresses California's and Quebec's intentions to continue consulting with each other to ensure that the linkage between their respective cap-and-trade programs continues to function properly. ECF 7-2 at 2 ("[T]his Agreement is intended to facilitate continued consultation…"); *see also* Def. MSJ at 10:1-11:12, 19:21-20:26. Notably, linkage itself does not involve emissions levels (the "cap" part of the cap-and-trade programs). Rather, linkage expands the "trade" portion of cap-and-trade, permitting businesses regulated under one program to trade compliance instruments with businesses regulated under the other. Def. MSJ at 8:5-7. It does so through the linkage regulations, under which CARB accepts compliance instruments issued by Quebec as essentially equivalent to CARB-issued instruments. Def. MSJ at 7:3-8. Far from suggesting that any of the matters actually at issue in the agreement are of sufficient national importance to constitute a treaty under Article I, Plaintiff contends that the agreement somehow regulates emissions. Pl. Reply at 15:12-16:22.[3] This assertion is baseless and does not raise any genuine issue.

Plaintiff now admits that "CARB can only link California's cap-and-trade program with a cap-and-trade program in another jurisdiction *through an amendment to the Cap-and-Trade Regulation*." ECF 78-1 at 53 (Fact 17) (emphasis added). Plaintiff, thus, concedes that, far from

[3] In making this argument, Plaintiff references the "Agreement and Arrangements." Pl. Reply at 1:23-25, 12:4, 12:23, 13:9, 14:10, 15:7, 15:12, 22:18, 23:23. Other than noting that they involve "preparatory and implementing activities," Plaintiff never identifies what the "Arrangements" are, nor does Plaintiff explain how "preparatory and implementing activities" can be considered part of a treaty. The Court need not reach this question because Plaintiff's amended complaint alleges only that the 2017 agreement is an Article I Treaty, ECF 7 at ¶¶ 159, 160, and Plaintiff cannot change the scope of its claim in summary judgment briefing. *Best Buy Stores, L.P. v. Manteca Lifestyle Center, LLC*, 859 F. Supp. 2d 1138, 1152 n.6 (E.D. Cal. 2012).

regulating emissions, the 2017 agreement does not even effectuate the link between the two cap-and-trade programs. Moreover, on its face, the 2017 agreement does not regulate emissions, set emissions levels, or determine anything about how either California or Quebec will regulate emissions in their respective jurisdictions. Def. MSJ at 19:21-20:15; ECF 7-2, Art. 14. The regulatory provisions adopted by each jurisdiction do that (and do it differently) for each program. Rajinder Sahota Declaration in Supp. of State Defendants' Opposition to Plaintiff's Summary Judgment Motion and State Defendants' Cross-Motion for Summary Judgment (Sahota Decl.), ¶¶ 21-22, 34-35, 66 (ECF 50-2). As noted above, the 2017 agreement simply reflects the parties' interest in continuing to consult with each other to ensure that the linkage between their respective programs continues to operate as intended. *Id*., ¶¶ 67-68; Def. MSJ at 22:12-23:9. This is not emissions regulation.

The agreement provisions Plaintiff quotes at length only confirm that the agreement does not regulate emissions. Article 4 of the agreement simply states that each party may consider making changes to its own "emissions reporting regulations" and that the parties intend to "discuss[]" those changes if they are being considered. Pl. Reply at 15:16-21 (quoting Article 4). This confirms that the regulation of emissions reporting is done by each party by way of its own regulations, not by way of the agreement. Likewise, Article 5 confirms that regulation occurs through each party's respective regulations when it acknowledges that "protocols *in each of the Parties' programs*" impose certain requirements on offsets and that each party "may consider making changes to the offset components of its program." ECF 7-2 at 6 (Art. 5) (emphasis added); *see also* Pl. Reply at 15:22-28; Def. MSJ at 11:13-20.[4] Unable to point to any text in the 2017 agreement that purports to regulate emissions, Plaintiff simply counts the number of time the word "emissions" appears in the document. Pl. Reply at 15:13-14. It is hardly surprising that an agreement to continue consulting regarding the linkage of two air pollution control programs contains the word "emissions." And, of course, the use of that word, however many times, does not establish that the agreement *regulates* emissions.

[4] An offset is a type of compliance instrument that may be used for a small portion of a regulated party's compliance obligation. *See* Def. MSJ at 6 n.4.

Reaching further afield, beyond the text of the agreement itself, Plaintiff points to a quotation from a 2013 CARB Board Resolution. Pl. Reply at 16:15-20. This "evidence" does not support Plaintiff's claim that the agreement regulates emissions. The Board Resolution states:

> WHEREAS, by linking California's Program to WCI Partner jurisdictions, the combined Programs will result in more emission reductions, generate greater potential for lower cost emissions reductions, enhance market liquidity, and will increase opportunities for GHG emissions reductions for covered sources more than could be realized through a California-only program.

Dorsi Decl., Exh. 6 at 2. This is a general statement about the potential beneficial effects of linking multiple cap-and-trade programs together—which, notably, include several economic benefits Plaintiff misleadingly omits from its quotation. This statement does not amount to regulation of emissions or anything else. Indeed, CARB regulates through provisions in the California Code of Regulations, not through preamble clauses in Board Resolutions. Moreover, it is hardly surprising that CARB's Board would anticipate that linked programs, collectively, would "result in more emissions reductions" than a single program standing alone. This does not suggest, let alone establish, that linkage regulates emissions. And it certainly does not establish that the 2017 agreement, *which does not even effectuate linkage*, somehow regulates emissions.[5]

Plaintiff also argues, for the first time, that the 2017 agreement is more consequential than the United Nations Framework Convention on Climate Change (UNFCCC). Pl. Reply at 17:2-18:6. However, as previously shown (Def. MSJ at 31:26-28), the Supreme Court has expressly rejected this sort of comparative analysis under the Compact Clause, and Plaintiff offers no explanation for why it would be appropriate under the Treaty Clause. *See U.S. Steel*, 434 U.S. at 471 n.24 ("We have no occasion to decide whether congressional consent was necessary to the[] constitutional operation [of other agreements], nor have we any reason to compare those Compacts to the one before us."). Plaintiff's claim is also unsupported by any allegation in Plaintiff's complaint and should be rejected on that basis alone. *La Associacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir. 2010).

[5] Plaintiff has admitted that "CARB can only link California's cap-and-trade program with a cap-and-trade program in another jurisdiction *through an amendment to the Cap-and-Trade Regulation*." *See* ECF 78-1 at 53 (Fact 17) (emphasis added).

In any event, the UNFCCC is plainly far more significant than the 2017 agreement. The UNFCCC commits the parties to a highly consequential goal—to stabilize greenhouse gas concentrations "at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system" and establishes a substantial framework structure, with mandatory procedures, in anticipation of the development of more specific protocols to achieve that goal. S. Treaty Doc. No. 102-38, Art. 2 (1992). The 2017 agreement's goal of ensuring the continued functioning of the limited linkage between two locally adopted and locally applicable cap-and-trade programs pales in comparison. ECF 7-2 at 2, 5 (Art. 3); *see also* Sahota Decl., ¶¶ 65-68.

Plaintiff argues as well that California's agreement with Quebec is somehow an environmental treaty because in 2017 then-Governor Brown objected to the "United States announc[ing] its intent to withdraw from the Paris Agreement" on climate change. Pl. Reply at 18:12-18. A governor's objection to an action of the federal government cannot establish that a separate state action is an Article I Treaty. Nor is there any merit to Plaintiff's assertion that statements by past and present governors run afoul of the Constitution and show that California has an illicit foreign policy. *See* Pl. Reply at 1:17-2:5. "[C]ities, counties, and states have a long tradition of issuing … statements of principle on a wide range of matters of public interest, including … foreign policy and immigration." *Gingery v. City of Glendale*, 831 F.3d 1222, 1230 (9th Cir. 2016) (internal quotation marks omitted). "For example, local governments have established memorials for victims of the Holocaust and the Armenian genocide, and leaders of local governments have publicly taken positions on matters of foreign affairs, from South African apartheid in the 1980s to the recent actions of Boko Haram." *Id.* Similarly, many Republican governors publicly expressed their opposition to the Obama Administration's negotiation of a nuclear agreement with Iran and stated that they would "maintain and strengthen" state-level sanctions against Iran despite the President's commitment to encourage States to lift such sanctions.[6] State officials do not "flout[] the Constitution's Supremacy Clause" or establish an

[6] Governor Abbott Rejects Obama Administration's Request to Lift Iran Sanctions (press release with link to letter), *available at*

unlawful foreign policy simply by expressing their differences of opinion with the federal government. *See* Pl. Reply at 1:19-2:2. [7]

None of Plaintiff's arguments comes close to establishing that the 2017 agreement is an Article I Treaty.

C. Plaintiff Fails to Show that the 2017 Agreement Is Binding

Plaintiff also argues at length that the 2017 agreement is binding. Pl. MSJ at 16:13-18:14, Pl. Reply at 11:10-15:10. This argument fails, providing a second, independent basis for dismissing Plaintiff's Article I Treaty Clause claim.

Plaintiff's arguments cannot overcome the simple fact that the 2017 agreement expressly states that "[a] Party may withdraw from this Agreement by giving written notice of intent" to do so. ECF 7-2 at 11 (Art. 17). Because, under the 2017 agreement, the parties are only supposed to "endeavour" to provide 12 months notice, *id.*, a party may withdraw at any time of its choosing. By definition, this means the parties are not bound, as analogous principles of contract law demonstrate. *See* Restatement (Second) of Contracts § 77 (1981) ("A promises to act as B's agent for three years … on certain terms," and "B agrees … but reserves the power to terminate the agreement at any time. B's agreement is not consideration, since it involves no promise by him."); *see also* 1 Witkin, Summ. of Cal. Law (Contracts) § 231 (11th ed. 2019) (A contract is illusory "where one party reserves the unqualified right to cancel or withdraw from an agreement at his or her pleasure."). Ontario's unilateral and abrupt effective withdrawal confirms the point. Sahota Decl., ¶76.[8]

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https://gov.texas.gov/news/post/governor_abbott_rejects_obama_administrations_request_to_lift_iran_sanction, last visited February 29, 2020; *see also* "15 GOP Governors Oppose Nuclear Deal," *available at* https://iranprimer.usip.org/blog/2015/sep/09/15-gop-governors-oppose-nuclear-deal, last visited February 29, 2020.

[7] Plaintiff also argues that the 2017 agreement is a Treaty because it purportedly encroaches on the federal conduct of foreign affairs. Pl. Reply at 21:10-25:2. Even assuming that these arguments, which were not raised in connection with the Treaty Clause in Plaintiff's opening brief, are properly before this Court, they lack factual or legal bases. *See, infra*, Sec. III.

[8] Plaintiff's "build it and they will come" analogy to *Field of Dreams* (Pl. Reply 15:3-7) does not support Plaintiff's claim because in that scenario no one is *bound* to come play baseball, nor is anyone *bound to continue* doing so once he or she started. In addition, extending the Treaty Clause's categorical ban to a regulatory scheme simply because it is attractive contravenes a core tenet value of our system of federalism: that each State may act as a laboratory for the Nation so that States may benefit from each other's experiments *if they so choose*. In any event,

Unable to show that the agreement is binding based on its plain text, Plaintiff resorts to introducing new allegations, which appear nowhere in Plaintiff's Amended Complaint or moving papers, based on a 2009 PowerPoint slide presented by CARB. Pl. Reply. at 14:1-7. In addition to being procedurally improper, this new material actually contradicts Plaintiff's contention that the agreement "impose[s] real limits on the parties'" abilities to modify their respective programs. *Id.* at 14:6-7. The slide states that "[l]inkage exposes a [cap-and-trade] program to the rules and oversight of other programs." 2d. Iacangelo Decl., Exh. 45, slide 20. In other words, linkage creates a risk that changes to one program might affect the other program indirectly. *See also* Sahota Decl., ¶¶ 49, 67-68. That risk *would not exist* if Plaintiff were correct that the agreement prevented the parties from making changes to their respective programs.[9] It does not.

In short, Plaintiff cannot show that the 2017 agreement is binding or of sufficient national significance to constitute an Article I Treaty. Plaintiff's Treaty Clause claim fails as a matter of law.

II. PLAINTIFF'S COMPACT CLAUSE CLAIM FAILS AS A MATTER OF LAW

Plaintiff's defense of its Compact Clause claim is, if anything, even weaker. It fails to distinguish the Supreme Court's decision in *United States Steel* or to show how the 2017 agreement or the linkage regulations could satisfy the Supreme Court's functional test for the Compact Clause—how either confers political power on California that encroaches upon federal supremacy. Plaintiff's failure to satisfy the *Northeast Bancorp* compact indicia provides an additional ground for rejecting its Compact Clause claim. And Plaintiff's last-minute assertion of a different, sweeping test for agreements with foreign governments is not only improper; it also contradicts the text of the Clause, the case law, and the United States' own longstanding interpretation. It would also call into question countless existing agreements that have heretofore raised no constitutional flags. Finally, because an agreement that is not a Compact (which

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Plaintiff does not explain how a unilateral decision to "come" could constitute a Treaty under Article I.

[9] Plaintiff's characterization of the consultations as "elaborate" is equally unsupported. Sahota Decl., ¶¶ 36-37, 47, 67 (describing consultations).

Congress may approve) cannot be an Article I Treaty (which Congress is powerless to approve), the Court can resolve Plaintiff's claims under both Clauses based on the Compact Clause alone.

A. Plaintiff Fails to Distinguish the Supreme Court's Decision in *United States Steel*

First and foremost, Plaintiff's Compact Clause claim fails because Plaintiff is unable to distinguish *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978). As Defendants' opening brief demonstrated, all three factors that the Supreme Court considered in finding no compact there support the same conclusion here. Def. MSJ 29: 16-32:24. Although Plaintiff contests this conclusion, its arguments are unpersuasive.

1. The first factor considered in *United States Steel* was whether the agreement there authorized the parties "to exercise any powers they could not exercise in its absence." 434 U.S. at 473. Plaintiff contends that this factor is satisfied because the agreement here makes Quebec "leave its regime in place, without material changes, or submit proposed changes to elaborate 'consultation' under the Agreement." Pl. Reply 36:20-22.[10] The agreement does not require anything of the sort. The parties expressly retain their full sovereign rights to change their respective cap-and-trade programs, and both California and Quebec have repeatedly exercised those rights. Def. MSJ at 31:14-32:11 (citing ECF 7-2 at 2 & Art. 14; Sahota Decl.¶¶ 78-79).[11] Moreover, as shown above, Quebec, like California, may withdraw from the 2017 agreement simply by giving written notice of its intent to do so (or even without giving written notice, as Ontario did). ECF 7-2 at 11 (Art. 17); Sahota Decl., 70-76. Quebec is, thus, not compelled to consult at all with California, since *it may discontinue doing so at any time* by simply withdrawing. Plaintiff also fails to explain how *consultation* provisions could provide any "powers" relevant to the Compact Clause, much less power "which may encroach upon or interfere with the just supremacy of the United States." *U.S. Steel*, 434 U.S. at 471.

[10] Plaintiff also makes this claim about "the Arrangements," an undefined term that appears nowhere in its Amended Complaint. Pl. Reply at 36:21; *see also, supra,* at 6 n.3.

[11] Like California, Quebec has amended its regulations multiple times since the programs were linked. *See* http://www.environnement.gouv.qc.ca/changements/carbone/documentation-en.htm#registration (listing "Previous Amendments" toward the bottom of the page), last visited February 29, 2020.

Nor do the parties' intentions to consult distinguish this case from *United States Steel*. In *United States Steel*, the Supreme Court considered an agreement that formed the Multistate Tax Commission, which, among other things, promulgated uniform regulations for taxation of interstate corporations for consideration by its member States. 434 U.S.at 456-57. The development of these uniform regulations would, by necessity and design, have involved consultations, giving member states considerable influence over each others' treatment of interstate corporations. Nevertheless, the Supreme Court found no enhancement of state power material to the Compact Clause. *Id*. at 472-73. Plaintiff has now abandoned, as Defendants' opening brief showed it must, its claim that the consultations between California and Quebec have led to uniform regulations, Def. MSJ at 8:8-12 (citing Sahota Decl., ¶¶ 42-43), underscoring what is plain from the text of the agreement: consultation is not control. Thus, the practical impact of the consultation provisions cannot distinguish this case from *United States Steel*.

Plaintiff also asserts that California's agreement with Quebec enables it to supply what Plaintiff terms "regulatory relief" to Quebec. Pl. Reply 37:2-4 (emphasis omitted). This regulatory relief is in fact nothing more than trading of allowances by private parties. Plaintiff now contends that, on balance, the allowances will flow towards Quebec, but this contention is based upon *projections made in 2012*, before any linkage occurred, and thus cannot raise a genuine issue concerning how the linkage actually works more than seven years later. *McSherry v. City of Long Beach*, 584 F.3d 1129, 1138 (9th Cir. 2009) ("Summary judgment requires facts, not simply unsupported denials or rank speculation.").[12] Plaintiff's new contention also flatly contradicts a key premise of Plaintiff's opening brief—that California and Quebec are operating a seamless regulatory apparatus (Pl. MSJ at 7:18-19, 16:16-17, 24:12-14)—because there would be no "net flow" of compliance instruments in one direction or the other if that were true. Further, even if it were true that Quebecois companies purchase more compliance instruments from

[12] Plaintiff also purports to support this argument with a 2016 blogpost. Pl. Reply at 22:2-10 (citing 2d Iacangelo Decl., Exh. 48). But Plaintiff cannot rely on "factual allegations presented for the first time" in its summary judgment reply. *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006). Moreover, the post is inadmissible, especially as Plaintiff relies on a quote purporting to describe a document that Plaintiff has not provided and is not available at the post's hyperlink.

California companies than vice versa, that would simply suggest that linkage produces economic benefits for private businesses in both jurisdictions, not that it confers power upon California that it did not previously possess.

2. The second factor considered by *United States Steel* was whether the agreement at issue contained any "delegation of sovereign power" to an organization. 434 U.S. at 473. Plaintiff contends that this factor is satisfied here because California and Quebec have given WCI, Inc. authority to administer a tracking system for compliance instruments, which allegedly represent "regulatory relief" that is "inherently sovereign." Pl. Reply 37:6-13.[13] But, as WCI, Inc. itself observes, this system merely "provides accounts for market participants to hold and retire compliance instruments and to record transactions of compliance instruments with other account holders." Dorsi Decl., Exh. 14 at 3 (ECF 49-3 at 137). In other words, WCI, Inc. administers a system analogous to banking software that tracks customer account balances and transactions. Plaintiff does not even begin to explain why allowing WCI, Inc. to track state-issued compliance instruments in a way typical of the banking industry constitutes a delegation of sovereign power. Moreover, in conducting audits for its member states, the Multistate Tax Commission was performing administrative services relating to taxation, which is a sovereign power. Nevertheless, the Supreme Court found no delegation of sovereign power in *United States Steel*, and Plaintiff offers no explanation how anything here is meaningfully different.[14]

3. The final *United States Steel* factor was whether the States were "free to withdraw at any time." 434 U.S. at 473. Although Plaintiff concedes, as it must, that California and Quebec can withdraw unilaterally from the 2017 agreement, Pl. Reply 37:14-15; *see also* ECF 7-2, Art.

[13] Plaintiff has dropped its meritless contention that California has delegated sovereign authority to the Consultation Committee described in the 2017 agreement—a Committee that has never formed or met. *See* Pl. MSJ at 24:10-12.

[14] Plaintiff's conclusory statement that WCI, Inc. is "a state actor that [California] controls jointly with Quebec" does nothing to establish a delegation of sovereign authority. Pl. Reply at 37:6-7. Plaintiff included no joint control allegations in its amended complaint and offers no authority suggesting that two governments can *jointly* control a private actor and transform it into a state actor. Finally, even where, unlike here, membership consisted largely of representatives of "the same sovereign," the Supreme Court's state action decisions examine numerous factors, including the delegation of rulemaking, enforcement, and revenue collection authorities, the performance of non-ministerial functions by government officials, and the availability of state employee benefits. *Brentwood Academy v. Tennessee*, 531 U.S. 288, 299-, 301 (2001) (internal quotation marks omitted). Plaintiff cannot establish any such facts, much less as a matter of law.

17, it asserts that withdrawal "would not be easy for California" for practical reasons. Pl. Reply 37:15-38:3. Ontario's unilateral effective withdrawal belies this assertion. Moreover, similar practical concerns undoubtedly would have made withdrawal from the Multistate Tax Commission no easier. Nevertheless, as amici point out, *United States Steel* found that members of the Commission were free to withdraw based on a provision similar to the one in the 2017 agreement. ECF 54 at 15:15-17.

Thus, Plaintiff is unable to persuasively distinguish any of the findings in *United States Steel* from this case, and for that reason alone its Compact Claim fails as a matter of law.

B. Plaintiff Fails to Otherwise Satisfy the Supreme Court's Functional Test

Plaintiff argues that it can still prevail even though it is unable to distinguish *United States Steel*. Pl. Reply at 38:5-15. But, as Defendants' opening brief established, Plaintiff cannot satisfy the Supreme Court's functional test for the Compact Clause, which requires an "increase of [state] political power" that encroaches upon federal supremacy. *U.S. Steel*, 434 U.S. at 471. Plaintiff's arguments that the agreement and linkage regulations interfere (in unidentified ways) with the federal government's foreign affairs power fail because Plaintiff has not shown any conflict with that power and also because the doctrine Plaintiff invokes has never previously been applied in the Compact Clause context and is the subject of a separate claim not raised in the pending summary judgment motion. Def. MSJ at 33:17-37:11. And Plaintiff's argument that only "intensely local" agreements escape the Compact Clause directly contradicts Supreme Court precedent. Def. MSJ at 28:26-29:22. Plaintiff has no persuasive response.

First, Plaintiff attempts to lower the bar by changing the Supreme Court's functional test in hopes of satisfying this lesser standard. Plaintiff asserts that the only "real" test is "whether an agreement encroaches *into the federal sphere*." Pl. Reply at 42:1-3 (emphasis added). The Supreme Court has already flatly rejected this lower bar, recognizing that "every state cooperative action touching interstate or foreign commerce implicates some federal interest" and holding that "the existence of a federal *interest* is irrelevant." *U.S. Steel*, 434 U.S. at 479 n.33 (emphasis added). The test is not about encroachment into some "sphere" that the federal government might

claim for itself. Rather, "[t]he relevant inquiry must be one of *impact on our federal structure*," *id.* at 471 (emphasis added), and the test is whether the agreement "enhance[s] the political power of the [participating] States in a way that encroaches upon the supremacy of the United States." *Id.* at 472.

Second, ignoring Defendants' demonstration that foreign affairs preemption and statutory preemption cases cannot support Plaintiff's Compact Clause claim, Plaintiff simply states, without authority, that the analyses are "conceptually the same." Pl. Reply at 42:7. They are not, no court has ever held that they are, and Plaintiff itself pleaded a separate cause of action for foreign affairs preemption in its complaint. Moreover, in the face of Defendants' response, Plaintiff has abandoned the theories of interference asserted in its summary judgment motion. Plaintiff no longer asserts that California has walled off a portion of its economy from the federal government's diplomatic leverage, as Massachusetts had in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Nor does Plaintiff maintain that California has established an alternative claims-settlement mechanism that, as in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), conflicts with the federal government's preferred mechanism. Plaintiff has likewise abandoned its argument that the agreement or linkage regulations prevent the federal government from speaking with "one voice" on matters of foreign affairs, now wanly asserting California's approach is "discordant" in unidentified ways, Pl. Reply at 42:21. *See also* ECF 65-1 at 3:23-7:16 (Amici Brief of Former Diplomats & Officials).

In place of these arguments, Plaintiff relies on one of its oft-repeated assertions: that "California has long sought 'its own foreign policy,'" Pl. Reply at 1:10, contending now that the alleged existence of this "foreign policy" suffices for its Compact Clause claim, *id.* at 38:16-39:2, 39:17-26. While Plaintiff misleadingly uses quotation marks to suggest otherwise, Plaintiff has provided no evidence that a California official has asserted that the State has a foreign policy. Plaintiff quotes a 2008 law review article in which the authors describe remarks made in 2006 by then-Governor Schwarzenegger as "emphasiz[ing] that, as a 'nation state,' California maintains

its own foreign policy." *See* ECF 12-1 at 7 (Fact 19).[15] Plaintiff's evidence indicates that Governor Schwarzenegger used the phrase "nation state" to describe the size of California's population and economy, ECF 78-1 at 13 (Fact 20). But it is the authors of the article, *not Governor Schwarzenegger*, who said California "maintains its own foreign policy." This gloss on the Governor's remarks is not a party admission and does not show that Governor Schwarzenegger claimed to have his own foreign policy, let alone that any current state official holds that view.

Moreover, as shown above, state officials can, and do, disagree with the President on matters of foreign policy and may express that disagreement publicly without infringing on the foreign affairs power of the federal government. *Gingery*, 831 F.3d at 1230. And, as shown in Defendants' opening brief and in the amici briefs submitted by 14 States and 13 professors of foreign affairs, States routinely enter into agreements with foreign governments, and there is nothing unusual about California having done so. ECF Nos. 54 at 9:2-13:20 (Amici Professors' Br.), 62 at 16:6-17:16, 19:9-21:4 (Amici States' Br.). Plaintiff's unsupported claim that California has a "foreign policy" does nothing to establish any encroachment on federal supremacy. Indeed, if entering into agreements with foreign governments and making statements about the federal government's foreign policy establish a state-level foreign policy, then most States in the Union have such policies.

Third, Plaintiff tries to establish encroachment on federal supremacy by arguing that "California derives" "substantial financial benefits" from the 2017 agreement which would increase if more jurisdictions were linked. Pl. Reply at 42:22-43:1. This is yet another new argument improperly offered for the first time in reply, and it appears to directly contradict Plaintiff's prior argument that California has no "proprietary or quasi-proprietary interest" at stake. Pl. MSJ at 14:26-27. Plaintiff offers no evidence to support this new argument. Plaintiff does refer to the revenues California collects from allowance auctions, Pl. Reply at 42:22-43:1, but those revenues do not result from linkage. Indeed, California auctioned allowances before

[15] Douglas A. Kysar and Bernadette A. Meyler, *Like a Nation State* (2008) 55 U.C.L.A. L. Rev. 1621, 1622 (2008); *see also* Iacangelo Decl., Exh. 13.

linkage with Quebec and would continue to do so if that linkage were discontinued, *see* Sahota Decl., ¶¶ 20, 54-55. Plaintiff has not shown that the 2017 agreement or linkage have *any* effect on auction revenues that flow to California, much less explained how changes in California's auction revenues encroach on federal supremacy.

Finally, Plaintiff reiterates its argument that only "local" agreements can be constitutional without congressional consent. Pl. Reply at 33:3-35:13. As Defendants and amici explained, the Supreme Court's decisions do not discuss geographic scope as a factor in the Compact Clause analysis and have affirmed agreements with regional, national, and even international scopes. *Northeast Bancorp.*, 472 U.S. at 164-65, *U.S. Steel*, 434 U.S. at 454 n.1 (noting membership included 19 members from across the country, including Alaska and Hawaii), 476 (discussing taxation of "foreign corporate taxpayers"); *see also* Def. MSJ at 28:26-29:13, ECF No. 54 at 16:20-20:28 (Amici Professors' Br.). Unable to reconcile its argument with these Supreme Court precedents, Plaintiff simply ignores them.

Plaintiff's claim that the 2017 agreement and the linkage regulations involve no local interests is also false. It is true that CARB has recognized the well-accepted understandings that greenhouse gas emissions occur around the globe, that those emissions mix and persist in the atmosphere, and that reductions in global emissions are necessary to protect the climate. Pl. Reply at 6:1-15. But these understandings do not change the fact that California emissions contribute to the problem, that California experiences severe impacts from climate change, or that California has local interests in its own contributions and impacts. *See* ECF 59-1 at 3:3-27 (Amici Brief of The Nature Conservancy). Contrary to Plaintiff's claims, the 2006 Global Warming Solutions Act made these local concerns and the State's intended local actions clear, describing numerous impacts on the State's people, natural resources and economy and requiring reductions in "*statewide*" emissions. Cal. Health & Safety Code §§ 38501(a), (b), 38562(a) (emphasis added). Concerns about those local impacts and efforts to reduce California's local emissions have only increased since then. *See, e.g.*, Dorsi Exh. 2 at ES-1, 10. And it is "well settled," by both the Supreme Court and the Ninth Circuit, that "states have a legitimate interest in combating the adverse effects of climate change on their residents." *Am. Fuel &*

Petrochemical Mfrs v. O'Keeffe, 903 F.3d 903, 913 (9th Cir. 2018) (citing *Massachusetts v. EPA*, 549 U.S. 522-23 (2007)).

Further, the 2017 agreement and the linkage regulations implicate interests even more local than climate change: how the State's own cap-and-trade regulation functions. The linkage regulations permit *California* regulated businesses to use Quebec-issued instruments for compliance with *California's* regulatory requirements, thereby expanding the compliance instrument markets and cost-reduction opportunities available to regulated businesses. *See, e.g.*, Sahota Decl., ¶ 24, Dorsi Decl., Exh. 6 at 2. And the 2017 agreement reflects California's interest in continued consultation with Quebec to support the continued functioning of both cap-and-trade programs and the linkage between them. *See* Sahota Decl., ¶¶ 67-68. California's interests in the way its own regulatory program functions fit easily within the State's broad and traditional police powers, and Plaintiff does not argue otherwise. *See Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) ("Environmental regulation traditionally has been a matter of state authority."); *see also Cal. Tow Truck Ass'n v. Cty and Cnty of San Francisco*, 807 F.3d 1008, 1019 (9th Cir. 2015) (recognizing that traditional state police power includes the means of exercising that power, such as delegating it to local governments).

In short, Plaintiff has failed to establish that California's power is enhanced at the expense of the federal government's, and, indeed, Plaintiff's shifting theories underscore the absence of any encroachment. For this reason, Plaintiff's Compact Clause claim fails as a matter of law.

C. Plaintiff Fails to Satisfy the *Northeast Bancorp* Indicia

Plaintiff's Compact Clause claim also fails as a matter of law because, as previously shown, neither the 2017 agreement nor the linkage regulations bear the indicia of a Compact articulated in *Northeast Bancorp*. Def. MSJ at 38:12-41:17. Plaintiff now argues only that the 2017 agreement satisfies these indicia, Pl. Reply at 40:1, but these arguments, which are based on mischaracterizations of the indicia as well as the facts in this case, fail.

To start, Plaintiff concedes that no joint organization *with a regulatory purpose* has been established, arguing instead that any organization, established for any purpose, suffices. Pl.

Reply 40:21-22. That is not the test. While the Court in *Northeast Bancorp* stated that the statutes at issue did not form any joint organization "to regulate regional banking or for any other purpose," *Northeast Bancorp*., 472 U.S. at 175, it is the *regulatory purpose* of the joint organization that matters, as subsequent, controlling opinions have made clear. *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conserv. Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986). And this focus makes sense because the overall Compact Clause inquiry concerns the "impact on our federal structure," and the creation of a joint organization with no regulatory authority or purpose would have no such impact at all. *See U. S. Steel*, 434 U.S. at 471. No regulatory joint organization exists here. Plaintiff's arguments that WCI Inc.'s tracking system for compliance instruments qualifies is wrong because CARB maintains regulatory control over the instruments (and its entire program). *See* Pl. Reply at 40:25-27; Sahota Decl. at 57.[16] Moreover, Plaintiff's new argument—that "working groups" can constitute a joint regulatory organization, Pl. Reply at 41:2-4—was not alleged in its Amended Complaint, contradicts the evidence, and improperly conflates collaboration with regulation. *See* Sahota Decl., ¶ 69. Plaintiff cannot identify a joint regulatory organization that satisfies the first indicia.

Next, Plaintiff repeats the incorrect assertion found across its filings—that because California and Quebec intend to consult each other regarding possible changes to their respective programs, neither jurisdiction is free to modify or repeal its laws unilaterally. Pl. Reply at 41:6-11. As shown above, Plaintiff is wrong. California and Quebec retain all of their sovereign authority to amend or repeal their respective laws and have done so repeatedly. *See, supra*, at 12:12-17; *see also* ECF No. 7-2, at 2, 10 (Art. 14), 11 (Art. 17). And Ontario repealed its program entirely. Sahota Decl., ¶¶ 74-75.

Finally, Plaintiff concedes it cannot satisfy the third indicia—reciprocal limitations on regulated parties. *See* Def. MSJ. at 40:15-41:11. Indeed, Plaintiff completely abandons its prior

[16] Plaintiff's claim that WCI, Inc. "presents itself to the world as 'the … market'" continues Plaintiff's erroneous conflation of WCI, Inc., a non-profit corporation that provides support services for remuneration, with the Western Climate Initiative (WCI) which was a loose collection of States and Canadian provinces that produced cap-and-trade design recommendations. *See* Order re: Motion to Dismiss (ECF Doc. 79) at 4 n.1, Dorsi Decl., Ex. 12 (WCI, Inc. 2018 Annual Report) at 1. Plaintiff also cannot establish that WCI, Inc. is a state actor. *See, supra*, 14 n.14.

argument that the consultation provisions in the 2017 agreement constitute reciprocal limitations. *Compare* Pl. MSJ at 24:12-21 *with* Pl. Reply at 41:11-16. Instead, Plaintiff argues that the 2017 agreement satisfies the third indicia because it "bear[s] signatures from California and Quebec." Pl. Reply at 41:15-16. That argument misses the mark by miles; signing a piece of paper does not impose reciprocal limitations.

Because Plaintiff cannot establish that any of the Compact indicia are present here, its Compact Clause claim fails as a matter of law.

D. Plaintiff's New Compact Clause Test Argument Is Both Improper and Meritless

Unable to support its claim under *United States Steel* and *Northeast Bancorp*, Plaintiff advances a radical argument that it did not raise in its opening brief, that no Court has endorsed, and that would cast into doubt the constitutionality of hundreds, if not thousands, of current agreements—namely, that the Compact Clause requires congressional approval for *every* agreement between a State and a foreign power. Pl. Reply at 29:15-30:2. The court should reject this argument simply because it is improper to raise entirely new arguments on reply, *e.g.*, *Pac. Dawn, LLC v. Pritzker*, No. 3:13-cv-1419, 2013 WL 6354421, at *15 (N.D. Cal. Dec. 5, 2013), especially where, as here, this argument asserts an entirely new legal test based on a novel interpretation of a constitutional provision on which the United States has publicly taken the opposite position for decades.

Plaintiff's argument should also be rejected on its merits because it purports to distinguish interstate agreements from those involving foreign governments, despite the absence of any textual distinctions between these types of agreements and any suggestion from the Supreme Court that such a distinction should be made. Pl. Reply at 33:3-4, 35:14-16; *U.S. Steel*, 434 U.S. at 465 n.1; *see also* Art. I, § 10, cl. 3. Notably, state courts and the State Department have consistently applied *Virginia*'s functional test for interstate agreements in their analysis of agreements between States and foreign powers. *See, e.g.*, *In re Manuel P.*, 215 Cal. App. 3d 48, 67 (1989); *McHenry County v. Brady*, 163 N.W. 540, 544 (1917), Dorsi Decl., Exh. 13 at 183

(State Dept. Memo). And, as Foreign Relations Professor Amici indicate, Plaintiff's new position has been rejected by nearly all scholars in this field. ECF No. 54 at 16:21-17:7.

Plaintiff's reliance on the plurality opinion in *Holmes v. Jennison*, 39 U.S. 540 (1840), is misplaced. Pl. Reply at 31:3-32:17. As Plaintiff concedes, the plurality's literal reading of the Compact Clause is not binding. Pl. Reply at 32:18. And Plaintiff's assertion that Justice Catron provided a "fifth Justice" in support of the plurality's (and Plaintiff's) literal reading is simply wrong. In fact, on the very page Plaintiff cites in its reply, the Supreme Court expressly recognizes that Justice Catron expressed "disquiet over…Justice Taney's literal reading of the Compact Clause." *U.S. Steel Corp.*, 434 U.S. at 465; Pl. Reply at 33:1. Justice Catron did say that if Vermont had entered into an agreement with a foreign government to extradite one of its citizens, "the act would have been one as of nation with nation" and "the agreement would have been prohibited by the Constitution." *Holmes*, 39 U.S. at 595. But this statement does not reflect a generalized position opposed to all agreements between States and foreign governments; rather, it reflects that the subject matter of the alleged agreement—extradition—is a "particularly sensitive" one, indeed one "the Court subsequently held is 'a national power [that] pertains to the national government and not to the states.'" ECF No. 54 (Amici Professors' Br.) at 16-17 n.5 (quoting *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936)). Plaintiff's new "test" is unsupported and should be rejected.[17]

The Supreme Court's functional test is the operative test, has been followed by every court to consider Compact Clause claims, including claims involving agreements with foreign governments, and should be followed here. Defendants are entitled to summary judgment on Plaintiff's Compact Clause claim because Plaintiff cannot establish that the agreement or the linkage regulations encroach on federal supremacy or satisfy the Compact indicia.

[17] Plaintiff's claim that *United States v. Rauscher*, 119 U.S. 407, 414 (1886) and an 1841 Attorney General Opinion treated *Holmes* as "authoritative" is misleading. *See* Pl. Reply at 32:18-21. Both considered the Justices' views of *extradition*, not the Compact Clause. *See Raushcer*, 119 U.S. at 414; 3 Op. Att'y Gen. 661 (1841). The 1909 Opinion cited by Plaintiff provides no more support because it treats the *Holmes* plurality opinion as a majority opinion without explanation and, in any event, cannot trump the Supreme Court's later recognition that *Holmes* is not authoritative. *See* 27 Op. Att'y Gen. 327, 332, 333 (1909); *see also Montana Wilderness Ass'n v. U. S. Forest Serv.*, 496 F. Supp. 880, 884 (D. Mont. 1980) ("[A]n Attorney General's opinion is not the judgment of a court of law and is not binding on this court.").

III. THE FOREIGN AFFAIRS PREEMPTION DOCTRINE DOES NOT SAVE PLAINTIFF'S ARTICLE I TREATY AND COMPACT CLAUSE CLAIMS

A. Plaintiff Identifies No Support for Conflating Its Treaty and Compact Clause Claims with Its Foreign Affairs Preemption Claim

Defendants' opening brief showed that Plaintiff was improperly relying on foreign affairs preemption and statutory preemption cases in a futile effort to save its Compact Clause claim. Def. MSJ at 33:17-26. In response, Plaintiff identifies no authority supporting this reliance. Instead, Plaintiff claims it is relying on *Garamendi* only "for its analogous conclusion that too many cooks spoil the broth." Pl. Reply at 19:19-20. But that "conclusion" appears nowhere in *Garamendi*, and Plaintiff's claim that it is not attempting to import foreign affairs preemption into its Treaty and Compact Clause claims is belied by Plaintiff's repeated invocation of foreign affairs preemption cases and its (unsuccessful) attempts to establish the elements of a foreign affairs preemption claim. *E.g., id.* at 5:10-20, 9:7-11, 19:21-25, 30:13-16. Indeed, in its reply Plaintiff actually *expands* its conflation of claims, improperly relying, for the first time, on foreign affairs preemption case law to support its *Treaty Clause* claim as well as its Compact Clause claim.

Plaintiff cannot use the foreign affairs preemption doctrine to save either its Treaty Clause or Compact Clause claim. Having moved for summary judgment under the Compact Clause and Treaty Clause, its motion must stand or fall based on the constitutional text, precedent, and other authorities relevant to *those* claims.

B. Plaintiff's Attempts to Vastly Expand the Scope of Foreign Affairs Preemption Should Be Rejected

In addition to being disconnected from the causes of action at issue here, Plaintiff's foreign affairs preemption arguments are also wrong. Plaintiff continues to attempt to analogize to *Garamendi*, even though this case does not involve "the making of executive agreements to settle civil claims" between Americans and foreigners—the context to which the Supreme Court has limited *Garamendi*. *See Medellin v. Texas*, 552 U.S. 491, 531 (2008); *see also* Def. MSJ at

34:25-36:12.[18] Further, this case involves no state-adopted measures conflicting with those endorsed by the federal government. *See Garamendi*, 539 U.S. at 423.[19] Plaintiff simply ignores these distinctions and binding precedent in order to advance a drastic expansion of this preemption doctrine—one that requires no conflict with any federal action before States are preempted from core police power activities. Plaintiff's theory would effectively allow the Executive Branch to invalidate disfavored aspects of state programs just by verbal objection. That is not the law.

1. Plaintiff Identifies No Conflict, and, Contrary to Plaintiff's Claim, It Must Do So

As previously shown, Plaintiff cannot establish infringement on the federal government's foreign affairs powers simply by declaring it so. Def. MSJ at 35 n.27; *see also* ECF 54 at 20:2-28. Plaintiff has no persuasive response. Pl. Reply at 23:22-25:2. Instead, Plaintiff continues to assert a vastly expansive form of field preemption, despite binding precedent disfavoring field preemption under this doctrine and indicating it should be invoked only "rarely" and only "when a state intrudes on a matter of foreign policy with no real claim to be addressing an area of traditional state responsibility." *Movesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1075 (9th Cir. 2012).

First, while Plaintiff purports to claim that some conduct of California's infringes on its foreign affairs powers, it never identifies how. Indeed, Plaintiff's theory of infringement has shifted from a claim of purportedly weakened diplomatic leverage, Pl. MSJ at 21:12-15, to a brand new theory of "regulatory arbitrage" in which "regulatory relief" is purportedly exported, Pl. Reply at 21:14-22:20. As discussed above, this new theory is improper because it appears nowhere in Plaintiff's Amended Complaint, *Pickern*, 457 F.3d at 968, and the only evidence

[18] Plaintiff's claim that "post *Medellin*" cases have applied *Garamendi* is beside the point because the only cases Plaintiff identified involve claims settlement issues. Pl. Reply at 19:20-23 (citing *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1069 (9th Cir. 2012) (challenging California law related to "certain insurance claims brought by 'Armenian Genocide victims'")).

[19] This case is also entirely distinct from *Crosby*, both because statutory preemption is not asserted here and because no state law has "fenced off" part of the State's economy. *Crosby*, 530 U.S. at 381; *see also* Def. MSJ at 34:17-24, 36:2-7.

supporting it is an eight-year-old projection of what *might* happen if linkage occurred, *McSherry*, 584 F.3d at 1138. *See also, supra*, at 13. It also contradicts Plaintiff's now abandoned argument—that California and Quebec had agreed to conform their programs in every material respect (Pl. MSJ at 16)—because, by definition, Plaintiff's "arbitrage" can only occur *if the programs are different*. In addition, Plaintiff does not even attempt to explain how business transactions undertaken by private businesses in California and Quebec, as part of their compliance strategies for locally-applicable regulations, could intrude on any matter of foreign policy. And several expert amici established that there has been, and is, no such intrusion. ECF 65-1 at 3:23-7:16, 9:17-11:12; ECF 54 at 20:2-28.

Second, as discussed above, the 2017 agreement and the linkage regulations address areas at the core of traditional state responsibility. California's consultations with Quebec about changes it may make to its program serve very local purposes and interests—namely ensuring that California's program continues to function as intended and that linkage continues to function properly for parties regulated by CARB as well as for the program itself. Sahota Decl., ¶¶ 47-49, 67-68. The linkage regulations provide a compliance option for California businesses subject to California's cap-and-trade program and describe how the allowances CARB issues and decides to auction will be auctioned. *Id.* ¶ 41. These are classic exercises of police power—designing and enforcing state air pollution control programs. *American Fuel & Petrochemical Manufacturers*, 903 F.3d at 913; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000).

Because Plaintiff cannot satisfy either element required to invoke this rare form of field preemption, it must identify, "with clarity or substantiality," an actual conflict between the challenged conduct and the federal government's foreign affairs power. *Garamendi*, 539 U.S. at 419 n.11. Plaintiff has not come close to satisfying that standard. Indeed, Plaintiff cannot establish a conflict between the United States' foreign policy on climate and the 2017 agreement or linkage regulations because reducing greenhouse gas emissions cost-effectively is entirely consistent both with the UNFCCC, the law of the land, and with statements Plaintiff point to by federal officials in connection with the United States' intended withdrawal from the Paris Agreement. Def. MSJ at 35:7-37:19; *see also* ECF 65-1 at 9:17-11:12.

Plaintiff tries to manufacture a conflict based on Canada's continued participation in the Paris Agreement. Pl. Reply at 22:21-23:21. Plaintiff asserts that Canada *might* seek to treat California allowances as "internationally transferred mitigation outcomes" under Article 6 of the Paris Agreement without establishing what an "internationally transferred mitigation outcome" is, whether an allowance can be one, and how that would be determined. Plaintiff also disregards that Article 6 explicitly provides that "[t]he use of internationally transferred mitigation outcomes … shall be *voluntary* and *authorized by participating Parties*." Paris Agreement to the UNFCCC, Dec. 12, 2015, T.I.A.S. No. 16-1104, Art. 6. Thus, even assuming allowances could be "internationally transferred mitigation outcomes," so long as the United States remains a Party to that Agreement, it could simply opt not to authorize Canada's use of California-issued allowances (preventing the conflict it claims to be worried about), and when the United States is no longer a Party, this provision will not even apply.

Plaintiff also tries to establish a conflict with vague assertions that other jurisdictions might join California and Quebec in the future, claiming, without explication, that this "could undermine the United States' chosen means for implementing the UNFCCC treaty." Pl. Reply at 24:7-11; *see also id.* at 42:11-12. But Plaintiff does not identify any "chosen means." Nor does Plaintiff dispute that, as Defendants established in their opening brief, the cost-effective emissions reductions facilitated by linkage are entirely consistent with the UNFCCC. Def. MSJ at 37:9-19; *see also* ECF 65-1 at 11:3-10.

Thus, Plaintiff cannot establish a conflict with its foreign affairs powers with the high degree of "clarity and substantiality" required where, as here, the State's action falls squarely within its traditional state responsibilities. *Garamendi*, 539 U.S. at 419 n.11.

2. California's Purposes Here Are Local, and Plaintiff Cannot Establish Otherwise

Plaintiff also argues that California's "real purpose" here is "foreign in scope." Pl. Reply at 5:10-11. But, as shown above, California's goals here are very local: to provide compliance flexibility to California businesses subject to a California regulatory program and to consult with

Quebec to ensure that said compliance flexibility does not come at the cost of the program's efficacy. Sahota Decl.,¶¶ 46-47, 67-68.[20] These intensely local focuses contrast sharply with the California laws struck down in *Garamendi* which obligated insurers to disclose details about policies issued "'to persons in Europe, which were in effect between 1920 and 1945.'" *Garamendi*, 539 U.S. at 409 (quoting Cal. Ins. Code Ann. § 13804(a) (West Cum. Supp. 2003)).

Attempting to establish a foreign "scope" here, Plaintiff relies on statements by California Governors, characterizations of such statements by third-parties, a document from a 2011 rulemaking not involving linkage; and statements by WCI, Inc., a non-profit corporation that provides technical and administrative support services for remuneration to CARB, Quebec, and Nova Scotia. Pl. Reply at 1:10-16, 1:15-2:5, 3:7-14, 3:19-4:2, 4:5-15. As discussed above, Governors can and do express disagreement with the federal government's foreign policy without infringing on the federal foreign affairs power. *Gingery*, 831 F.3d at 1230; *see also supra* at 9-10. Further, when inquiring into a State's "real purpose" in the foreign affairs preemption context, courts have relied on statutory text and legislative history. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010); *Garamendi*, 539 U.S. at 425-426. In contrast, most of the materials Plaintiff relies on do not even pertain to linkage or the 2017 agreement, and none of them is the equivalent of statutory text or legislative history. And, in fact, the text of the 2017 agreement and the rulemaking documents associated with the adoption of the linkage regulations confirm that California's "real purposes" are local ones focused on the cost-effectiveness and continued efficacy of its own regulatory program. ECF 7-2 at 2, 6, 10; Dorsi Decl., Exh. 5 at 193; *see also* Sahota Decl., ¶¶ 25-27. Plaintiff's attempt to establish a different purpose fail.

Plaintiff's improperly raised foreign affairs preemption arguments are without merit and cannot save its Treaty Clause and Compact Clause claims.

[20] Plaintiff effectively admits that compliance flexibility for California businesses was a significant goal for the linkage when it concedes, as it must, that regulated California businesses supported it for this very reason. ECF 78-1 at 52 (Fact 15).

IV. PLAINTIFF'S NEW CLEAN AIR ACT PREEMPTION ARGUMENT IS ALSO BOTH IMPROPER AND MERITLESS

At the end of its reply, Plaintiff argues that even if it cannot establish the *Northeast Bancorp* indicia or distinguish *United States Steel* and show an enhancement of state political power that encroaches on federal supremacy, Plaintiff can still prevail on its Compact Clause claim because section 102(c) of the Clean Air Act "forecloses" the 2017 agreement. Pl. Reply at 43:7-45:10. This argument fails for four reasons.

First, this is another new argument that Plaintiff never raised before and has waived. *Officers for Justice v. Civil Serv. Com'n of Cty and Cnty of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992). In addition to omitting the Clean Air Act from its summary judgment motion, Plaintiff failed to allege *anything* about the Clean Air Act in its Amended Complaint. This new claim should be rejected on that basis alone. *La Associacion de Trabajadores de Lake Forest*, 624 F.3d at 1089; *Lund v. Leprino Foods Co.*, No. 06-cv-0431-WBS-KJM, 2007 WL 1775474, at *7 n.8, *9 n.10 (E.D. Cal. June 20, 2007) (rejecting attempt to "raise a new claim" in summary judgment brief where "complaint contains no … reference to this particular statutory provision."). Indeed, it is especially inappropriate for Plaintiff to raise this issue for the first time in its reply, as it appears to be one of first impression and Defendants had only one week to respond to it.

Second, section 102 is irrelevant to Plaintiff's Compact Clause claim because it does not pre-determine which agreements enhance state political power at the expense of federal supremacy and are, therefore, Compacts. Where an agreement does not do so, "*it does not fall within the scope of the Clause* and will not be invalidated for lack of congressional consent." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (internal citations omitted) (emphasis added); *see also U.S. Steel*, 434 U.S. at 471 n.24 (rejecting comparison to agreements that had received congressional consent as a basis for Compact Clause claim). Section 102 does not, and cannot, change this *constitutional* inquiry. Thus, this Court should apply the constitutional inquiry—the Supreme Court's functional test—without regard to Section 102, as discussed above.

Third, because section 102 does not pre-determine that any given agreement is a Compact, the only way it could "foreclose[]" certain agreements, as Plaintiff claims it does, Pl. Reply at

44:10, would be through preemption. Plaintiff has not alleged Clean Air Act preemption and cannot use its brief to rewrite its complaint to add this cause of action. *Rent Information Tech., Inc. v. Home Depot USA, Inc.*, 268 Fed. Appx. 555, 558 (9th Cir. 2008). Further, the Clean Air Act expressly *preserves* state authority from preemption, absent certain specific exceptions not relevant here. 42 U.S.C. § 7416; *Exxon Mobil Corp.*, 217 F.3d at 1255. Section 102 does not even refer to agreements with foreign jurisdictions; it cannot be read to preempt such agreements or to impliedly repeal the Act's savings clause that generally and broadly preserves state authority.[21]

Fourth, in invoking section 102(c)—which is silent about agreements with foreign governments—Plaintiff misapplies the *expressio unius est exclusio alterius* canon of construction. Pl. Reply. at 44:13-45:10. As courts have long recognized, this is one of the most unreliable canons of construction "for it stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen." *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 676 (D.C. Cir. 1973) (internal citations omitted). Accordingly, courts "do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Plaintiff does not, and cannot, assert any basis for supposing that Congress considered state agreements with foreign jurisdictions, much less that it meant to preempt or otherwise prohibit them by *encouraging* interstate cooperation and agreements. *See* 42 U.S.C. § 7402(a) (requiring EPA to "encourage cooperative activities by the States and local governments" and to "encourage the making of agreements and compacts between States").

Indeed, Plaintiff's argument conflicts with the very foundation of the Clean Air Act. "Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy" that begins with "declaring that 'air pollution prevention (that is, the reduction or elimination, through

[21] For similar reasons, and because it is limited to procedures governing U.S. EPA's and States' responses to specified requests or reports concerning international air pollution, Section 115, which Plaintiff also raises, is likewise inapplicable here. *See* Pl. Reply at 44: 24-27. Indeed, it does not even mention state agreements at all.

any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is *the primary responsibility of States and local governments*.'" *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 537 (2014) (quoting 42 U.S.C. § 7401(a)(3)) (emphasis in original). Plaintiff cannot transform an Act that *encourages* state-level action into one that bars such action when it simply seeks to increase the cost-effectiveness of air pollution control programs or to ensure their continued efficacy.

CONCLUSION

Plaintiff's motion for partial summary judgment should be denied, and judgment should be entered for Defendants on Plaintiff's Article I Treaty and Compact Clause claims—Plaintiff's first and second causes of action.

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Respectfully Submitted,

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