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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 RESPONSE TO THE COURT'S FEBRUARY 26, 2020, ORDER FOR SUPPLEMENTAL BRIEFING**

PLAINTIFF'S RESPONSE TO THE COURT'S FEBRUARY 26, 2020 ORDER FOR SUPPLEMENTAL SUMMARY JUDGMENT BRIEFING

On February 26, 2020, this Court ordered the parties "to provide a short supplemental brief explaining the reasons why they have not also moved for summary judgment on the Foreign Affairs Doctrine and Foreign Commerce Clause claims." ECF No. 80. In December, the United States moved for summary judgment only on the first two claims of its amended complaint: Claim One regarding the Article I Treaty Clause and Claim Two regarding the Compact Clause. The United States did so because it believes it can obtain complete relief by a favorable judgment on either of these two claims. And the United States expected that California would try to delay the expeditious resolution of this case. The United States calculated (correctly) that California could not reasonably claim that delay for discovery was necessary to enable the Court to decide these first two claims. And California, in fact, did not make such arguments, but instead cross-moved for summary judgment itself in February. As a result, the claims are fully briefed (as of today), and ready for hearing next week.

Immediate resolution of Claims One and Two at this time would not result in piecemeal litigation. These claims are straightforward. They can be decided without any factual adjudication as to whether the Agreement and Arrangements encroach upon federal prerogatives.[1] As a plain matter of law, California's air pollution control Agreement with Quebec and the related Arrangements do so encroach. Thus, if the Court resolves the pending motions in favor of the United States, the Court need not reach Claims Three and Four. No piecemeal litigation will result. Only the swift resolution of the case—in a very expeditious six months from filing to merits decision. Alternatively, if the Court instead

[1] 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 refer to the Agreement, collectively with its preparatory and implementing activities, as the "Agreement and Arrangements."

grants Defendants' motions, the parties can litigate Claims Three and Four with this Court having substantially narrowed the issues in dispute. One way or the other, a prompt decision by this Court on the cross-motions for summary judgement will advance the expeditious and efficient resolution of this case.

Accordingly, the United States respectfully requests that the current schedule of proceedings be maintained and that the hearing on the cross-motions for summary judgment proceed on March 9, 2020.

I. Supplemental Background.

On October 23, 2019, the United States filed a four-count complaint in this matter, which it amended on November 19, 2019. *See* ECF No. 7. In both its original and its amended complaint, the United States alleged that Defendants have violated and continue to violate the Constitution. It unpacked California's statutory, regulatory, and contractual arrangements to enter into, carry out, and expand an unlawful emissions agreement with a foreign power, Quebec.

Count One alleges that the Agreement is an unlawful "Treaty, Alliance, or Confederation" with a foreign power and therefore violates the Article I Treaty Clause. *See* ECF No. 7 at 27-28 ¶¶ 156-60. Count Two alleges that, if the Agreement is not a prohibited treaty, then it violates the Compact Clause, because it is a compact with a foreign power that Congress has not approved. *See id.* at 28 ¶¶ 161-64. Count Three alleges that the Agreement violates the Foreign Affairs Doctrine. *See id.* at 28-30 ¶¶ 165-78. Count Four alleges that the Agreement violates the Foreign Commerce Clause by unlawfully discriminating among categories of foreign commerce. It also alleges that the Agreement violates the Foreign Commerce Clause by imposing a substantial and undue burden on foreign commerce. *See id.* at 30-31 ¶¶ 179-87.

II. The United States' Motion for Summary Judgment.

On December 11, 2019, the United States moved for summary judgment on its first two causes of action—those based on the Article I Treaty and Compact Clauses. *See* ECF

No. 12. It chose these two causes of action because they present purely legal issues that can be resolved expeditiously. Indeed, as a matter of law, the only (undisputed) fact this Court must find to rule for the United States is that California has an agreement, with a foreign jurisdiction, to cooperate in the control of air pollution. (The various related Arrangements California has established or entered into with Quebec only compound the United States' injury.) The United States has consistently sought expeditious resolution of its claims, owing to the constitutional nature of its grievance and the Agreement's ongoing threat to, and inference with, our nation's foreign policy.[2] The United States moved for summary judgment shortly after Secretary of State Pompeo initiated the United States withdrawal from the Paris Accord. This interference will take on even greater force after November 4, 2020, when the United States is officially withdrawn from that agreement.

The United States' causes of action under the Foreign Affairs Doctrine and the Foreign Commerce Clause are equally clear under the law. But the United States did not move for summary judgment on these claims to avoid any argument by Defendants for ***delay***. The United States was concerned California might (incorrectly) claim that time was needed for discovery before this Court could reach the merits of those two claims. As this Court may recall, Defendants have consistently sought delay in this case. They have submitted two *ex parte* applications to enlarge the schedule. In their first *ex parte* application, they sought to move the United States' motion for summary judgment entirely "off calendar" or at least until June. *See* ECF No. 15. In their second *ex parte* application, they tried to move the hearing ***on the same motion*** to April. *See* ECF No. 39. And Defendants have consistently referred to the supposed "novelty and complexity" of the case, *id.* at 3, even though Defendant CARB Chair Mary Nichols told an audience at Stanford

[2] Consistent with its goal to pursue expeditious resolution of this case, the United States explicitly noted in its motion for summary judgment that "it does not abandon its remaining two causes of action. It simply presents these two causes of action today to promote expeditious resolution of the case." ECF No. 12 at 3 n.1.

that California has had "legal opinions at all levels" that the Agreement is lawful. Kevin Stark, "California's Top Air Regulator Is Scathing in Response to DOJ Climate Suit," KQED Science (quoting Ms. Nichols), *available at* https://www.kqed.org/science/1949823/doj-sues-california-over-its-climate-agreement-with-quebec (last visited Mar. 2, 2020).[3] And California and its allies obviously had no problem preparing and submitting more than a hundred pages of legal briefing to the Court on this issues raised in the summary judgment briefing.

III. Maintaining the Existing Hearing and Deciding the Existing Motions Will Not Result in Piecemeal Litigation.

The United States' decision to move on only its first two causes of action is consistent with both its interest and the Court's interest in expeditious resolution of this case. If the United States prevails on its Article I Treaty and Compact Clause claims, it will achieve relief from its injury in the form of a declaratory judgment that the Agreement is unlawful. It thereafter will be able to obtain all injunctive and other relief that this Court deems just and proper.[4] Notably, the United States does not seek different or greater relief from the Court due to its Foreign Affairs Doctrine or Foreign Commerce Clause claims. Thus, if the Court grants summary judgment to the United States on its Article I Treaty and Compact Clause claims, the Court will not need to reach the merits of the United States' Foreign Affairs Doctrine and Foreign Commerce Clause claims. In other words, the merits portion of these proceedings would be over, leaving only discussions of remedy. Nothing would require this Court to invalidate the Agreement and Arrangements on all possible legal grounds merely for the sake of doing so, after it was already clear that Defendants' actions

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[3] Needless to say, the United States does not concur in Chair Nichols' legal conclusions.

[4] As the United States observed in its opposition to WCI's motion to dismiss, this Court could grant the United States' pending motion for declaratory relief "without deciding precisely what remedy to award against any particular defendant, including the WCI Defendants." ECF No. 36 at 16 n.22.

were unlawful under at least one Count in the First Amended Complaint. The Court could simply provide in its merits or remedy orders that it was unnecessary to reach any remaining, unadjudicated counts as a matter of judicial restraint or judicial minimalism. *See Getz v. Boeing Co.*, 654 F.3d 852, 868 (9th Cir. 2011) (quoting *Morse v. Frederick*, 551 U.S. 393, 431 (2007) ("[T]he cardinal principle of judicial restraint is that if it is not necessary to decide more, it is necessary not to decide more" (Breyer, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted)*; Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1094 (10th Cir. 2010) (Gorsuch, J.) ("Judicial restraint, after all, usually means answering only the questions we must, not those we can."); *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) ("if it is not necessary to decide more, it is necessary not to decide more").

For their part, by filing cross-motions for summary judgment, Defendants have admitted that the Article I Treaty and Compact clause claims are ***now ripe*** for decision**.** ***Defendants, too, concede that there are no genuine issues of material fact on Claims One and Two, but that they can be decided purely on the law.***

Even if Defendants prevail in their cross-motions, leaving only the Foreign Affairs Doctrine and Foreign Commerce Clause claims, this Court's decision on the pending cross-motions for summary judgment will enhance timely and efficient resolution of the rest of the case. It will narrow the proceedings. To begin with, this will enable the parties to focus on issues that the Court has yet to address. As a result, a ruling on the first two counts will likely narrow requests for discovery, if there are any. Thus, although the United States understands the Court's wish to avoid deciding the claims in a piecemeal fashion, it respectfully submits that addressing the pending cross-motions for summary judgment under the current schedule will be the most efficient use of judicial resources. Doing so will either: (1) give the United States the relief it seeks; or (2) narrow the proceedings and inform the parties on whether discovery is needed concerning the remaining two counts in the First Amended Complaint.

Another reason for this Court to adhere to its current schedule is that the United States fully anticipates that Defendants will use this opportunity to request yet more ***delay*** in these proceedings. As noted above, this has been California's consistent tactic. There have already been two *ex parte* filings by California attempting to blunt a single summary judgment motion by the United States—only to have California come in later and then cross-move in direct parallel to the United States' motion.

For all these reasons, the United States respectfully requests that the Court prevent further delay the proceedings, proceed with the hearing on March 9, 2020, and render a decision that will either resolve the merits of the first two counts, rendering further non-remedy merits decision unnecessary, or focus further resolution on the remaining two counts.

Dated: March 2, 2020.

Respectfully submitted,

/s/ Paul E. Salamanca

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