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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

BRIEF OF AMICI CURIAE THE STATES OF OREGON, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, RHODE ISLAND, VERMONT, WASHINGTON, AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION

Date: March 9, 2020
Time: 1:30 PM
Courtroom: 5
Judge: Honorable William B. Shubb
Trial Date: Not Set
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IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae are the States of Oregon, Connecticut, Washington, Illinois, Michigan, Minnesota, Delaware, New Jersey, Maine, Maryland, New York, Vermont, Rhode Island, and the Commonwealth of Massachusetts (collectively Amici States). The Amici States have extensive experience with the issues presented in this case, including experience developing agreements with other jurisdictions that promote efficient environmental protection and that further other important policies in traditional areas of state regulation. The Amici States offer that collective experience to assist the Court in evaluating Plaintiff United States' arguments, which deny California's authority to enter into a cross-jurisdictional agreement that formalizes a communication process between two governments to better manage their respective regulatory programs.

The Amici States have entered into numerous cross-jurisdictional agreements and understandings with other States, and occasionally other nations, that further State and local interests without encroaching on Federal authority. The Amici States have a compelling interest in preserving those existing agreements and their ability to enter into similar agreements in the future. The Amici States also have a compelling interest in upholding their traditional state authority to address environmental harms within their borders and to confront other local threats to their residents' public safety, health, and welfare.

SUMMARY OF ARGUMENT

The agreement between California and the Canadian Province of Québec that Plaintiff challenges (2017 Agreement) simply provides a framework for communicating about the coordination of those governments' respective market-based greenhouse gas pollution-reduction programs, and does not require congressional consent under the Compact Clause of the United States Constitution.

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See U.S. Const. art. 1, § 10, cl. 3. Nor does the 2017 Agreement rise to the level of an impermissible political alliance prohibited by the Treaty Clause of the Constitution. *See id.* art. I, § 10, cl. 1. Formalizing the communication and coordination process between two governments seeking to better manage local environmental harms is an objective squarely within the States' traditional regulatory sphere.

As Plaintiff's brief does not dispute, the Compact Clause test from *Virginia v. Tennessee*, 148 U.S. 503 (1893), applies here. The 2017 Agreement does not require congressional consent under this test because it does not "encroach upon or interfere with the just supremacy of the United States." *Virginia*, 148 U.S. at 519; *see also Northeast Bancorp, Inc. v. Board of Govs. of the Fed. Reserve Sys.*, 472 U.S. 159, 176 (1985); *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 467–68 (1978). States have broad and well-established authority to regulate in order to combat harms—including environmental harms—to their residents. As part of this authority, States have routinely entered into interjurisdictional agreements akin to the one at issue in this case to coordinate solutions to problems that transcend jurisdictional boundaries. States also have adopted and implemented numerous laws to address the substantial local harms of climate change, and to administer interjurisdictional markets to advance environmental and other traditional state interests—none of which interfere with federal prerogatives.

Nevertheless, Plaintiff has taken the position that certain features of the 2017 Agreement make it an illegal treaty or at least a compact requiring congressional consent. Plaintiff argues that the subject matter of the 2017 Agreement is "emphatically non-local [in] character," which Plaintiff takes to be self-evident from the fact that California and Québec do not share a border. Pl.'s Br. Supp. Mot. Summ. J. (DOJ Br.) at 18. Plaintiff also points out that the 2017 Agreement indicates that the parties plan to have discussions with each other on issues relating to the Agreement, highlighting for example, that: the parties will endeavor to give each other notice before withdrawing from the Agreement; the parties express their intent to discuss potential

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changes to each other's regulatory programs; and the Agreement has a kind of dispute resolution clause (establishing a Consultation Committee to resolve differences). *Id.* at 17, 25.

But such features are common to interjurisdictional agreements that, like the 2017 Agreement, do not threaten the "just supremacy of the United States." Indeed, interjurisdictional agreements are widespread, with agreements between States and foreign governments alone numbering in the hundreds or thousands.[1] Few such agreements have been submitted for congressional consent or challenged in court. *See* Hollis, *supra*, at 1075, 1978. And an interjurisdictional agreement that rises to the level of an illegal treaty is rarer still. *See Williams v. Bruffy*, 96 U.S. 176, 182 (1877). Additionally, the purportedly "offending" features of the 2017 Agreement are present in numerous other cross-jurisdictional agreements—covering a range of subject matters—that Plaintiff has never questioned. The extensive history of similar cross-jurisdictional agreements belies Plaintiff's claim in this case that such agreements threaten federal authority.

For these reasons, this Court should deny Plaintiff's motion for summary judgment and grant Defendant State of California's cross-motion for summary judgement.

ARGUMENT

I. The 2017 Agreement Does Not Require Congressional Approval Under the Compact Clause Because It Does Not Increase the Power of the States at the Expense of the Federal Government.

The Compact Clause allows States to enter into many kinds of inter-jurisdictional agreements and arrangements without congressional approval. As the Supreme Court has explained, "[t]he application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which

[1] *See, e.g.*, Michael Glennon & Robert Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* 60 (2016) (noting that "state and local governments have entered into thousands of compacts and agreements with national and subnational governments around the world"); Duncan B. Hollis, *The Elusive Foreign Compact*, 73 Missouri L. Rev. 1071, 1079–80 (2008) (referring to "*hundreds* of written agreements between U.S. states and foreign governmental entities") (emphasis in original).

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may encroach upon or interfere with the just supremacy of the United States.'" *Northeast Bancorp*, 472 U.S. at 175–76 (quoting *Virginia*, 148 U.S. at 503). The 2017 Agreement does not encroach upon federal power because its primary purpose is to formalize the communication process between two governments to better manage an interjurisdictional market relating to an area of traditional state concern—namely, in-state environmental harm. *See U.S. Steel Corp.*, 434 U.S. at 473 (reasoning that an interjurisdictional compact is not subject to the Compact Clause because it "does not purport to authorize the member States to exercise any powers they could not exercise in its absence"). The regulations that link California's program to Québec's allow regulated businesses to use compliance instruments issued by either jurisdiction to satisfy their state-law obligations, which offers opportunities to reduce the overall cost of regulatory compliance.[2] Those regulations simply coordinate programs that are fully authorized under each jurisdiction's traditional regulatory powers. California can operate its cap-and-trade market without the linkage with Québec, and indeed, it did so for a period of time. *Cf. id.* Plaintiff ignores that States, for decades, have acted under their sovereign authority to regulate climate-changing emissions, including by coordinating state-specific actions through longstanding interjurisdictional agreements and market-based mechanisms that in no way intrude on federal supremacy.

A. The 2017 Agreement Assists California in Exercising Its Traditional State Authority to Regulate Pollution and Does Not Interfere with the Just Supremacy of the Federal Government.

Plaintiff's core premise for this action is wrong: States *do* have a compelling "local interest" in addressing the significant harms caused by climate change. DOJ Br. at 12. In fact,

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[2] As California explains, the 2017 Agreement "merely expresses California's and Québec's good-faith intentions to continue communicating and collaborating, as they have been for more than six years, so that the link between the two cap-and-trade programs may continue to function properly." Def. California's Mem. Supp. Cross-Mot. Summ. J.at 19. The coordination contemplated by the Agreement "helps ensure that each party understands what program changes are being considered by the other parties and whether those changes might have indirect effects on the linked programs." *Id*. at 10. The Agreement's provisions and effect are described in further detail in California's brief. See id. at 9-12, 19-21.

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greenhouse gas regulation is firmly within the purview of state and local interests, regardless of the global dimensions of climate change. Greenhouse gases are air pollutants, which states have long regulated, and their dangers, like those of other air pollutants, are affecting States and their residents now. Moreover, States possess the authority to collaborate on market-based approaches to ensure that their environmental regulations are as effective as possible in reducing emissions and addressing other environmental problems while minimizing compliance costs, and they routinely do so. None of these efforts interfere with federal supremacy.[3]

1. States Are Directly Affected by Climate Change and Have Independent Authority to Address Climate Harms.

Plaintiff is simply wrong to suggest that climate change is a uniquely federal problem that, because it purportedly lacks a connection to any "local interest," precludes subnational jurisdictions from engaging in the type of actions and coordination they have long used to address environmental harms. *See, e.g.*, DOJ Br. at 3, 12, 20–21. All Amici States are experiencing profound and costly impacts from climate change.[4] Within our borders, climate change is causing a loss of land due to rising seas; decreased drinking water supply due to diminished snowpack; reduced air and water quality, as well as agriculture and aquaculture productivity; decimation of biodiversity and overall ecosystem health; and increased frequency

[3] *See generally* Sharmila Murthy, *The Constitutionality of State and Local 'Norm Sustaining' Actions on Global Climate Change: The Foreign Affairs Federalism Grey Zone*, U. Penn. J. L. & Pub. Aff. (forthcoming 2020), https://ssrn.com/abstract=3475475 or http://dx.doi.org/10.2139/ssrn.3475475 (last updated Feb. 14, 2020).

[4] *See, e.g.*, U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* (D.J. Wuebbles et al. eds., 2017), https://www.globalchange.gov/browse/reports/climate-science-special-report-fourth-national-climate-assessment-nca4-volume-i (assessing the science of climate change, with a focus on the United States); U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (D.R. Reidmiller et al. eds., 2018), https://nca2018.globalchange.gov/ (assessing the impacts and risks of climate change in the United States).

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and intensity of heatwaves, insect-borne diseases, wildfires, severe storms, and flooding.[5] If climate change continues unabated, the Amici States and other state and local governments will have to spend trillions of dollars in mitigation projects to safeguard our borders and resources, and to protect the health of our residents.[6]

Those harms are exactly the types of local harms that States have authority to address as sovereigns. States have critical interests in combating threats to their residents' public safety, health, and welfare, and States have inherent authority to exercise their police powers to protect those interests. The Supreme Court has recognized state authority in this area for well over a hundred years. *See Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (Holmes, J.). And as the Ninth Circuit has expressly recognized, "[i]t is well settled that the states have a legitimate interest in combating the adverse effects of climate change," and may use their broad sovereign powers "to protect the health of citizens in the state" from the harms of climate-altering air pollution. *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).

[5] *See generally* Appendix A to Comments of the Attorneys General of New York, et al. on EPA's Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, EPA-HQ-OAR-2017-24817 (Oct. 31, 2018), https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-24817 (extensively documenting climate harms to numerous States and localities, including many of the Amici States).

[6] For example, New York City alone has proposed spending over $100 billion on a sea wall that would only partially mitigate the effects of climate-driven sea-level rise for portions of the City. Anne Barnard, *The $119 Billion Sea Wall That Could Defend New York . . . Or Not*, N.Y. Times, Jan. 17, 2020, https://www.nytimes.com/2020/01/17/nyregion/sea-wall-nyc.html. And the City of Boston estimates the costs of actions to address future flood risks created by sea-level rise range from $202 million to $342 million for its East Boston and Charlestown districts alone. *See Coastal Resilience Solutions for East Boston and Charlestown: Final Report* (2017), www.boston.gov/sites/default/files/climatereadyeastbostoncharlestown_finalreport_web.pdf; *see also Massachusetts State Hazard Mitigation and Climate Adaptation Plan* (2018), https://www.mass.gov/service-details/massachusetts-integrated-state-hazard-mitigation-and-climate-adaptation-plan (reporting that the replacement cost of state-owned facilities exposed to a 1% annual chance coastal flood event exceeds $500 million).

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States have exercised their authority by passing and implementing an array of statutes and regulations to reduce greenhouse gas emissions and mitigate climate harms.[7] Those state laws apply traditional policy solutions, including the creation of mandatory market-based programs, that States have long used to address a wide range of transboundary environmental problems that directly harm their residents. For example, States have set benchmarks requiring utilities to transition to renewable energy according to set deadlines,[8] and have enacted an array of other measures mandating emission reductions across their economies.[9] States and localities also have worked with other jurisdictions in the United States and abroad to share emissions data and collaborate on emission reduction strategies.[10]

[7] *See, e.g.*, Ct.r for Climate & Energy Solutions, *State Climate Policy Maps*, https://www.c2es.org/content/state-climate-policy/ (documenting a wide range of state policies to address climate change, including carbon pricing, emission limits, renewable energy mandates, energy efficiency programs, and clean fuels programs).

[8] *See, e.g.*, Conn. Gen. Stat. §§ 16-245a, 16-245n (requiring Connecticut utilities to obtain 25% of their energy from renewable sources by 2020 and 40% by 2030, while also creating funding sources for encouraging private renewable growth); 26 Del. C. § 354 (requiring Delaware utilities to obtain 25% of their energy from renewable sources1 by 2025); Clean Energy Jobs Act, (2019) Md. Laws. ch. 757 (S.B. 516) (to be codified at Md. Code Ann., Pub. Util. § 7-702) (requiring each utility company operating in Maryland to provide at least 50% of its electricity from certain renewable sources by 2030); Or. Rev. Stat. § 469A.052(1)(c), (h) (requiring large utilities in Oregon to achieve 20% reliance on renewables by 2020 and 50% by 2040); *id.* § 757.518(2) (requiring large utilities in Oregon to cease reliance on coal-generated electricity by 2030); Wash. Rev. Code § 19.285.010–19.285.903 (requiring large electric utilities in Washington to meet a series of benchmarks on the amount of renewables in their energy mix, and to achieve 15% reliance on renewables by 2020).

[9] *See, e.g.*, Cal. Health & Safety Code, §§ 38500 *et seq*. (requiring California to reduce emissions 40% below 1990 levels by 2030); Or. Rev. Stat. a§ 468A.265 to 468A.277 (implementing a "Clean Fuels Program" to reduce the carbon intensity of fuel); Mass. Gen. Laws c. 21N, § 4(a) (imposing a legally binding mandate on Massachusetts to reduce its greenhouse gas emissions 25% below 1990 levels by 2020 and 80% by 2050); N.J. Stat. Ann. §§ 26:2C-37 to -58 (requiring New Jersey to reduce carbon dioxide emissions 80% below 2006 levels by 2050 and establishing funding for climate-related projects and initiatives); N.Y. Environmental Conservation Law § 75-0107 (Chapter 106 of Laws of 2019, ECL Article 75) (requiring statewide reduction of greenhouse gas emissions to 60% of 1990 level by 2030 and 15% of 1990 level by 2050).

[10] For example, a bipartisan coalition of governors joined the United States Climate Alliance, under which States have committed to track and report carbon reductions and to achieve certain emission-reduction benchmarks. *See* www.usclimatealliance.org. In addition, the "Under2" Coalition is a broad network of subnational governments whose members have agreed to coordinate on information sharing, and to collaborate in developing best practices and achieving climate targets. *See* Global Climate Leadership Memorandum of Understanding,

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Those state- and local-driven efforts to address climate change present no inconsistency with federal policy. To the contrary, the United Nations Framework Convention on Climate Change of 1992—which Plaintiff refers to as the "law of the land"—requires exactly such cooperation, regional efforts, and other means to address climate change and reduce emissions of greenhouse gases. *See* DOJ Br. At 10 (United States obligated to take action to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (quoting United Nations Framework Convention on Climate Change, art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994))). Alongside those treaty obligations, the federal government has repeatedly affirmed a general policy in favor of reducing climate-altering emissions and mitigating climate harms at the state level. *See, e.g.*, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (finding that greenhouse gases endanger public health and welfare). And the States have broad authority to regulate emissions of air pollution more strictly than minimum requirements under federal law. *See Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151, 1187 (E.D. Cal. 2007) (regulating greenhouse gas emissions remains "within the traditional powers of states to regulate under their own police powers").[11]

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https://www.theclimategroup.org/sites/default/files/under2-mou-with-addendum-english-us-letter.pdf. And ten state governors have committed to coordinated actions to facilitate implementation of state zero-emission vehicle programs and to build a robust market for zero-emission vehicles. *See* State Zero-Emission Vehicle Programs Memorandum of Understanding, https://www.zevstates.us/. Plaintiff criticizes one of these efforts—the Climate Alliance—as part of a purportedly impermissible attempt by California to set "foreign policy." DOJ Br. at 20-21. But not only is state action to address air pollution "well within the traditional responsibilities of state and local governments," *see Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016), Plaintiff also fails to explain how any aspect of the Climate Alliance results in an actual conflict with the federal government's conduct of foreign affairs, *see id.* at 1230-31.

[11] Nothing since this Court's 2007 decision would require a different analysis today. The United States Framework Convention on Climate Change remains the law of the land, continuing to support state efforts to reduce greenhouse gases, and no federal law passed since 2007 is to the contrary.

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Plaintiff is also wrong to suggest that States have no authority to act together using traditional state sovereign powers if doing so could reduce the federal government's "leverage" in international negotiations. DOJ Br. at 21. The federal government's argument is premised on the supposed lack of "access to the entire national economy" caused by the 2017 Agreement. *Id.* at 22 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000)). However, the President does not have "access" to this part of California's economy in any case because California's statewide cap-and-trade program could continue to exist and mandate emission reductions (albeit at greater cost to regulated businesses) independent of any linkage to Québec's program.[12] California's program—like other environmental regulatory programs administered by the Amici States—is authorized under state law and in no way foreclosed by any federal law or by the Constitution. Likewise, in the absence of any federal law that supersedes States' historic authority, general statements by the President about balancing climate aims with economic interests in a future climate treaty, *see* DOJ Br. at 11-12, do not divest the States of inherent authority to reduce emissions and mitigate harms now, and to use traditional tools at their disposal to do so. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (finding foreign affairs preemption only in the presence of a "clear conflict" between state action and a specific foreign policy).

2. States Have Well-Settled Authority to Administer Interjurisdictional Markets that Reduce Costs in Connection with Advancing Environmental and Other Traditional State Interests.

While the asserted focus of Plaintiff's motion is the 2017 Agreement—which merely formalizes communications between California and Québec—Plaintiff's arguments are in fact principally directed at the effects of regulations that link California's cap-and-trade program to

[12] As this court has explained, the type of "bargaining chip" argument now asserted by Plaintiff, *i.e.*, that state-led action to reduce greenhouse gas emissions impermissibly interferes with federal efforts to negotiate an international climate agreement, "only makes logical sense if it would be a rational negotiating strategy to refuse to stop pouring poison into the well from which all must drink unless your bargaining partner agrees to do likewise." *Central Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1187.

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Québec's by allowing regulated businesses to use compliance instruments issued by either jurisdiction to satisfy their state-law obligations. Regardless, California's regulations are consistent with States' well-settled authority to collaborate on interjurisdictional markets to address environmental (and other) problems of local concern.

Amici States have considerable experience developing, facilitating, and participating in regional market-based programs, collaborative auctions, and similar interjurisdictional arrangements that do not encroach upon the just supremacy of the United States. Market mechanisms are a common policy tool to achieve environmental protection or other important public policy goals while reducing costs for regulated parties and administrators.[13] Where jurisdictions share similar goals, harmonized markets—like the linkage of California's cap-and-trade program with that of Québec—are a sensible policy solution. Many of the Amici States have been actively engaged in the development and implementation of such markets since the 1990s.[14] In our experience, harmonized markets offer greater flexibility to regulated businesses, provide opportunities to lower compliance and administrative costs, and promote investment in cost-effective solutions to environmental problems.

[13] *See, e.g.*, U.S. Envtl. Protection Agency, *Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control* 1-1 (2003), https://www.epa.gov/sites/production/files/2016-03/documents/tools.pdf ("[E]mission trading mechanisms are increasingly considered and used worldwide for the cost-effective management of national, regional, and global environmental problems, including acid rain, ground-level ozone, and climate change."); U.S. Envtl. Protection Agency, *Clearing the Air: The Facts About Capping and Trading Emissions* 7 (2002), https://www.epa.gov/emissions-trading-resources/clearing-air-facts-about-capping-and-trading-emissions (reporting that "a cap-and-trade system reduces compliance costs" while "also creat[ing] incentives to reduce emissions below allowable levels" and "spurring technological innovation").

[14] *See* Memorandum of Understanding Among the States of the Ozone Transport Commission on Development of Regional Strategy Concerning the Control of Stationary Source Nitrogen Oxide Emissions (Sept. 27, 1994), https://otcair.org/upload/Documents/Memorandums/att2.htm (documenting agreement among thirteen northeast and mid-Atlantic states to establish a regional cap-and-trade program for emissions of nitrogen oxides).

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A larger market for pollution allowances makes it easier for regulated entities to comply with participating jurisdictions' individual legal requirements to reduce harmful emissions. Broadening regulated entities' options for compliance with state law does not interfere with any federal prerogative. However, in order for a collaborative market to function properly, it is essential to coordinate market rules and procedures across the participating jurisdictions.

Take, for instance, the ten northeastern and mid-Atlantic States (including several of the Amici States) that participate in the Regional Greenhouse Gas Initiative (RGGI), a cooperative effort to reduce carbon dioxide pollution from power plants.[15] The legal basis for the RGGI program is each State's own regulatory power. The RGGI States entered into an agreement memorializing the understanding that each participating State would enact its own statute or regulation establishing a cap-and-trade program, while recognizing that each State could customize essential program elements as matter of state law. Based largely on a model rule, each participating State has adopted independent regulations under its respective state-law authority.[16] Those regulations establish a statewide "budget" for emissions of carbon dioxide pollution from each participating State's electric power plants, govern the issuance by each participating state of pollution allowances (that is, limited authorizations to emit a certain quantity of pollution), and establish participation in regional allowance auctions. The market-based RGGI program, now in its second decade, has dramatically and cost-effectively reduced power-sector carbon dioxide pollution in participating States.[17]

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[15] *See generally* The Regional Greenhouse Gas Initiative (2020), https://www.rggi.org.

[16] *See State Statutes and Regulations*, The Regional Greenhouse Gas Initiative (2020), https://www.rggi.org/program-overview-and-design/state-regulations.

[17] Analysis Group, *The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States* 3 (2018), https://www.analysisgroup.com/globalassets/uploadedfiles/content/insights/publishing/analysis_group_rggi_report_april_2018.pdf. Notably, in recent rulemakings, including a June 2018 draft environmental impact statement for the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, the federal government has expressly relied on the emission reductions projected to occur due to RGGI in measuring and projecting future emissions and climate impacts. *See* National Highway and Traffic Safety Administration's ("NHTSA") Draft Environmental Impact Statement for the "Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule 8-20 to 8-21 (June 2018) (identifying

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Likewise, all of the Amici States have adopted laws establishing "Renewable Portfolio Standard" (RPS) or equivalent programs, which require certain electricity suppliers in each State to provide a minimum percentage of their annual sales from renewable energy sources such as wind or solar. *See, e.g.*, 26 Del. C. §§ 351 *et seq.*; Mass. Gen. Laws ch. 25A, § 11F; N.J. Stat. Ann. § 48:3-87; Or. Rev. Stat. § 469A.052. RPS programs are a prime example of a long-running effort by States to coordinate their individual efforts to solve a common problem. In general, States measure compliance with their policies through use of an accounting instrument called "Renewable Energy Certificates" or "RECs," which represent a unit of renewable energy and are issued by regional tracking organizations.[18] This has facilitated the creation of regional markets for the sale of RECs, where suppliers meet their RPS obligations by acquiring a sufficient quantity of RECs that are traded and tracked within a certain subnational area. Even though there is no formal agreement among States, many States have laws that allow RECs generated outside the State's borders to be used for compliance with the State's RPS laws. The use of regional REC markets lowers compliance costs for electricity suppliers—and, ultimately, electricity consumers—while stimulating greater investment in renewable energy. *See, e.g.*, N.J. Admin. Code. §§ 14:8-2.1, -2.3.

The 2017 Agreement and California's linkage regulations are entirely consistent with Amici States' longstanding experience in designing and administering coordinated markets,

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RGGI and its emissions reductions targets among "actions in the United States [that] are already underway or reasonably foreseeable").

[18] *See generally, e.g.*, Western Electricity Coordinating Council, *WREGIS Frequently Asked Questions* (2018), https://www.wecc.org/Administrative/WREGIS%20Frequently%20Asked%20Questions.pdf (describing the regional platform for issuing and tracking RECs generated in fourteen western States); NEPOOL Generation Information System (2020), https://www.nepoolgis.com/about/ (describing the regional platform for tracking and issuing RECs generated within, or imported into, the six New England States); PJM Environmental Information Services (PJM-EIS), *About GATS [Generation Attribute Tracking System]*, https://www.pjm-eis.com/getting-started/about-GATS.aspx (describing tracking platform for RECs generated and traded within wholesale electricity service area covering all or part of thirteen eastern States).

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which have a proven track record of success at effectively and efficiently facilitating achievement of policy goals in our States, including the goal of reducing greenhouse gas pollution. Such coordination, like other decisions related to market policy architecture, fall well within the States' sovereign and traditional powers to select and implement policy tools that best address local needs. Indeed, in the very examples from *Virginia v. Tennessee* quoted by Plaintiff, Justice Field described examples of "local cooperation between states that would not implicate the [Compact] clause." DOJ Br. at 19. Two of those examples concern jurisdictions uniting to address a public health emergency. *Id.* (quoting *Virginia*, 148 U.S. at 518). As detailed above, climate change is exactly such an emergency directly harming States in both statewide and very localized ways. And California has sought to address this public health emergency in a way consistent with *Virginia*.

B. The Compact Clause Does Not Forbid Agreements Between Jurisdictions Merely Because They Do Not Share a Border.

Instead of focusing on the *Virginia* test as applied in *Northeast Bancorp* and other cases, Plaintiff invents a new test for whether an interjurisdictional agreement requires congressional approval. This test—that only "intensely local cooperation between states" is permissible without congressional approval—finds no support in modern Compact Clause jurisprudence. *See* DOJ Br. at 19. Plaintiff simply ignores a century of regional and nationwide administrative and regulatory agreements between jurisdictions that are unchallenged by the federal government, some of which courts have affirmatively found do not require Congress' approval to be effective.

As evidence that the 2017 Agreement is not sufficiently "local" to meet its artificial test, Plaintiff points out that California and Québec "do not share a border," *Id.* at 21, and that the agreement has an "emphatically non-local character," *Id.* at 18. But the legal question presented here is: does the agreement extend the power of a State in such a manner as to interfere with the

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federal government's authority? Plaintiff is wrong to assert that the answer to that question turns on whether the agreement is between noncontiguous jurisdictions or neighboring jurisdictions, or whether the subject matter of the agreement concerns only a small geographic region.[19]

The fact is that there are numerous agreements between noncontiguous jurisdictions on issues of widespread significance that have never been thought to implicate the Compact Clause. That commonplace feature is found in long-accepted interjurisdictional agreements covering a wide range of topics that have not been approved by Congress. For example:

- *Taxes*: In *U.S. Steel v. Multistate Tax Commission*, 434 U.S. 452 (1978), the Supreme Court upheld the Multistate Tax Compact. That accord included States as geographically diverse as Hawaii, Kansas, Alaska, and Montana,[20] and addressed an issue (taxation of interstate companies) that affects all States, not merely one local area or circumscribed region.

- *Firearms*: Pennsylvania has a "concealed carry" reciprocity agreement with Alaska ("Reciprocity Agreement"). Pennsylvania and Alaska do not share a border.[21] Indeed, the distance between Juneau, Alaska and Harrisburg, Pennsylvania is hundreds of miles greater than the distance between Sacramento, California and Québec City, Québec.[22] The Reciprocity Agreement provides that, just as California and Québec honor each other's carbon allowances, Pennsylvania and Alaska will honor each other's concealed-carry licenses: "The Commonwealth of Pennsylvania shall recognize all valid AK Licenses issued to legal residents of the State of Alaska who are 21 years of age or older … [and] The State of Alaska shall recognize all valid PA Licenses."[23] The Pennsylvania-

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[19] As noted above, Plaintiff does not dispute that the same test—the *Virginia* test—applies to this case as well as interstate agreements. Thus, Plaintiff's "no common border" argument would apply to all interstate agreements.

[20] Council of State Governments, National Center for Interstate Compacts, "Multistate Tax Compact" (listing states joined and year of joinder), http://apps.csg.org/ncic/Compact.aspx?id=122

[21] Under Plaintiff's "no common border" theory, neither Alaska nor Hawaii would be allowed to forge agreements with any other state in the United States, although Alaska could theoretically be allowed to forge agreements with Canadian provinces.

[22] Plaintiff makes much of the fact that "at their closest point, [California and Québec] are separated by approximately 2500 miles." DOJ Br. at 12-13. Harrisburg is over 2700 miles from Juneau.

[23] Commonwealth of Pennsylvania, Office of the Attorney General, Concealed Carry License Reciprocity (updated Oct. 11, 2019), https://www.attorneygeneral.gov/wp-content/uploads/2018/04/Reciprocity-Summary.pdf. Similarly, as noted below, New York and

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Alaska Reciprocity Agreement is, of course, only one of many concealed carry reciprocity agreements between States that do not share borders. For example, Texas has such an agreement with Florida.[24]

- *Oil spills:* The states of Oregon, Washington, California, Hawaii, and Alaska, and the province of British Columbia, do not share a common border, but they are parties to an Oil Spill Memorandum of Cooperation, forged for the purpose of "cooperation in preventing or abating oil spills."[25] Pursuant to the Oil Spill Memorandum, the governments also have an Oil Spill Task Force which has signed a Mutual Aid Agreement to facilitate "rapidly mov[ing] spill response resources from one jurisdiction to another during spill events."[26]

- *Wildlife*: The Interstate Wildlife Violator Compact ("IWVC") includes States spanning from Alaska to the East Coast on an issue (wildlife protection) that crosses all jurisdictions. *See* Alaska Stat. § 16.05.332; Vt. Stat. Ann. tit. 10, § 4451. This accord "establishes a process whereby wildlife law violations by a non-resident from a member state are handled as if the person were a resident."[27] Notably, the IWVC has withstood a legal challenge on Compact Clause grounds, because it does "not encroach upon nor interfere with the supremacy of the United States" and therefore "does not require congressional consent under the compact clause." *Gray v. North Dakota Game & Fish Dep't*, 706 N.W. 2d 614, 622 (N.D. 2005).

- *Professional licensing*: The Interstate Medical Licensure Compact, which has been adopted by 29 States from Maine to Washington,[28] allows licensed physicians to qualify to practice medicine across state lines if they meet agreed-upon eligibility requirements. *See* Wash. Rev. Code § 18.71B (2018); Me. Stat. tit. 32, §§ 18501-18525 (2019).

- *Trade*: The Governor of landlocked Nebraska has signed agreements with the island nation of Cuba under which Cuba—through a state-owned company—

Québec respect each others' driver's licensing procedures, providing an expedited procedure for people moving from one jurisdiction to the other to get a driver's license. Likewise, twenty-nine states respect each other's medical licensing procedures, providing an expedited procedure for a person duly licensed in one state to obtain a license to practice in the others.

[24] Memorandum of Agreement between the State of Texas and the State of Florida, http://www.dps.texas.gov/rsd/ltc/legal/reciprocity/FlaReciprocity.pdf.

[25] Oil Spill Memorandum of Cooperation Between the States of Alaska, California, Hawaii, Oregon and Washington and the Province of British Columbia, June 2001 ("Oil Spill Memorandum"), at 1, http://oilspilltaskforce.org/wp-content/uploads/2014/06/2001-OSTF-Memorandum-of-Cooperation.pdf

[26] Pacific States/British Columbia Oil Spill Task Force Mutual Aid Agreement, original 1976, revised 2011 ("Oil Spill Agreement") at 1, http://oilspilltaskforce.org/wp-content/uploads/2013/12/FINAL-2011-Mutual-Aid-Agreement.pdf

[27] Colorado Parks & Wildlife, "Interstate Wildlife Violator Compact," https://cpw.state.co.us/aboutus/Pages/InterstateViolatorCompact.aspx)

[28] *See* Interstate Medical Licensure Compact, https://imlcc.org/.

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would import $30 million of Nebraska agricultural products over an 18-month period.[29]

- *Climate change:* In 2009, Virginia joined a "Climate Change Action Agreement" with the United Kingdom. Among other provisions, the agreement stated that the two parties will "aim to promote policies that cut greenhouse gas emissions," and that they will "provide information and experience through road shows, high level delegations, educational exchanges and technical assistance." [30]

As demonstrated by the examples above, States have entered into, and continue to enter into, a wide variety of agreements with other States and foreign jurisdictions, covering both environmental and other subject matter, that do not "encroach upon or interfere with the just supremacy of the United States." *Virginia*, 148 U.S. at 519.[31] The fact that states have entered into agreements with foreign governments does not mean that they are establishing their own "foreign policy," as Plaintiff suggests. *See* DOJ Br. at 2 ("California is continuing its own international greenhouse gas Agreement and conducting its own foreign policy"). Moreover, Plaintiff's fulminations about "foreign policy" are irrelevant to the legal standard for applicability of the Compact Clause or the Treaty Clause.

[29] Press release, Nebraska Governor Dave Heineman, *Gov.Heineman Signs Amended Agreement with Cuba for $30 Million* (Aug. 22, 2005), Attachment 1 hereto (stating that the Governor "signed an amendment to the memorandum of understanding that was signed with Cuban officials last week in Havana, which increase the total amount of Nebraska agricultural products Cuban commodity importer Alimport [a state-owned] intends to purchase over the next 18 months from $17 million to $30 million").

[30] Partnership on Global Climate Change Action Between the United Kingdom and the Commonwealth of Virginia (Attachment 2 hereto) at 1 (2009).

[31] And in practice, the Federal government routinely touts States' agreements with foreign jurisdictions as desirable examples of good public policy. *See, e.g.*, U.S. Envtl. Protection Agency, *EPA Collaboration with Canada* (2019), https://www.epa.gov/international-cooperation/epa-collaboration-canada (noting that there are "over 100" agreements between U.S. States and Canadian provinces on issues related to "the management and protection of environmental quality and ecosystems in the border area").

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C. Agreements Do Not Violate the Compact Clause Merely Because the Parties Agree to Discuss Actions Affecting the Agreement, Provide for Dispute Resolution, or Provide for Advance Notice of Withdrawal or Termination.

Another complaint leveled by Plaintiff against the 2017 Agreement is that the parties expressed their intent to "discuss[]" potential changes to each other's regulatory programs (DOJ Br. at 24); that the agreement has a "formal 'withdrawal' provision" (*Id*. 17); and that the Agreement has a kind of dispute resolution mechanism (*Id*. at 24).

However, an agreement does not "impermissibly enhance state power at the expense of federal supremacy," *see U.S. Steel*, 434 U.S. 472, merely because it has language suggesting that the parties will confer about actions relating to the agreement, or that the parties will endeavor to give notice before withdrawing from an agreement. Provisions of this sort are common in interstate agreements that have never been submitted for congressional consent, including many of the agreements already noted above.

- *Firearms.* Texas has a concealed carry reciprocity agreement with North Carolina which states that "the state of Texas and the State of North Carolina will inform each other of any changes to their respective concealed carry weapons statutes that may affect the eligibility of the recognition granted by each state," and which provides that the agreement may be terminated "upon thirty (30) days' written notice."[32] The Pennsylvania–Alaska Reciprocity Agreement states that "[t[his Reciprocity Agreement may be terminated by either Party upon thirty (30) calendar days' written notice."[33] And although the Pennsylvania-Alaska Reciprocity Agreement does not duplicate the "inform each other of any changes" language of the Texas-North Carolina agreement, in practice, the two parties consult about changes to each other's laws. The Attorney General of Pennsylvania explains that, "the Office of Attorney General contacts each state on an annual basis to review their firearms laws and reciprocity status. The Office of Attorney General also conducts a targeted review whenever it becomes aware that another state's laws have changed."[34] When, as in this and other cases, States are relying on each other's licensing procedures, it is only natural that States would inform

[32] Memorandum of Agreement between the State of Texas and The State of North Carolina concerning Concealed Handgun Permit Reciprocity (April 2004). https://www.dps.texas.gov/RSD/LTC/legal/reciprocity/NorthCarolinaReciprocity.pdf

[33] Reciprocity Agreement at 2.

[34] Commonwealth of Pennsylvania, Office of the Attorney General, Concealed Carry License Reciprocity, *supra*, "Review of Reciprocity."

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each other of changes to each other's licensing rules. The 2017 Agreement reflects the same commonsense principle.

- *Oil spills:* In the Oil Spill Agreement, referenced above, between Alaska, California, Washington, Hawaii, Oregon and British Columbia, the government agencies agreed to "[m]aintain relative equivalency among Member Agencies' approaches to mutual aid, to assure effective reciprocity; and [k]eep other Task Force Members apprised of policy and procedural changes affecting this Mutual Aid Agreement." Oil Spill Agreement at 1.

- *Wildlife*: The IWVC states that a "party state may withdraw from the compact by giving official written notice to the other party states. A withdrawal does not take effect until 90 days after the notice of withdrawal is given." Wash. Rev. Code § 18.71B.200. The Compact also has a dispute resolution provision. *Id*. § 18.71B.190.

- *Professional Licensing*: The Interstate Medical Licensure Compact, similarly, provides in Section 21 that "[w]ithdrawal from the Compact shall be by the enactment of a statute repealing the same, but shall not take effect until one (1) year after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other member state."[35] The Compact also has a dispute resolution section, Section 19, which provides that the Interstate Commission established by the Compact "shall attempt, upon the request of a member state, to resolve disputes which are subject to the Compact," and shall "promulgate rules providing for both mediation and binding dispute resolution as appropriate."

- *Drivers' Licenses*: The New York–Québec Reciprocal Agreement Concerning Drivers' Licenses and Traffic Offenses[36] provides, in Article 8, that: "Either jurisdiction may withdraw from this Agreement by written notice to the other jurisdiction, but no such withdrawal shall take effect until 90 days after receipt of such notice."

- *Pollution Prevention*: An environmental protection agreement between Vermont and Québec "Concerning Phosphorus Reduction in Missisquoi Bay" states that either party may terminate the agreement "by sending a written notice at least six (6) months in advance to the other party."[37] The

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[35] Interstate Medical Licensure Compact, https://imlcc.org/.

[36] This agreement provides, for example, that people moving from one jurisdiction to another can exchange their driver's license for one in their new jurisdiction "without an examination other than a vision test," and that "each jurisdiction shall recognize a declaration of guilt in the other jurisdiction concerning one of its residents as if the violation were committed in the home jurisdiction." Agreement, Article 3.3. http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/C-24.2,%20r.%2016/.

[37] Agreement Between the Government du Québec and the Government of the State of Vermont Concerning Phosphorous Reduction in Missisquoi Bay, Que.-Vt., art. 6, Aug. 26, 2002. https://3paj56ulke64foefopsmdbue-wpengine.netdna-ssl.com/wp-content/uploads/2012/08/missbay_agreeEN.pdf.

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agreement also provides for ongoing consultation; it establishes a joint task force that will "meet at least once a year" and will "report annually … on the progress towards attaining the mutually agreed upon target loads." *Id.* at art. IV.

- *Environmental cooperation*: In September 2003 the Governor of Idaho and the Premier of British Columbia signed an Environmental Cooperation Agreement. Pursuant to that agreement, the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land and Air Protection signed a Memorandum of Understanding ("MOU").[38] The MOU provides that the parties will "make every effort to share information, consult with one another, and coordinate their work on environmental issues that affect resources and residents in the border region," and outlines some specifics, such as "establish procedures to cooperatively respond to emergencies that could cause environmental harm or damages." And the MOU states that it may be terminated "upon 30 days written notice."

The above examples illustrate Amici States' point that provisions for consultation between parties on matters relating to interjurisdictional agreements, including dispute resolution and notice of withdrawal provisions, are common features of interjurisdictional agreements and do not render an agreement invalid. Additionally, just as with the "no common border" argument, Plaintiff has not previously sought to invalidate interjurisdictional agreements that contain consultation or "notice of withdrawal" provisions. This fact undermines its allegation that such provisions threaten the "just supremacy" of the United States.

II. The 2017 Agreement Does Not Violate the Treaty Clause.

Despite the many agreements between States and foreign jurisdictions, *see* Glennon & Sloane, *supra*, Plaintiff has not cited a single instance of a court invalidating an interjurisdictional agreement as an unlawful treaty. The only instance where the Supreme Court has identified an illegal "treaty" was the confederate alliance between the Southern States that prompted the Civil War. *See Williams v. Bruffy*, 96 U.S. 176, 182 (1877). An agreement to coordinate on the integration and harmonization of a market for pollution allowances—the form of which has numerous past and present parallels (see *supra* at 12-15)—does not come close to

[38] Memorandum of Understanding between the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land, and Air Protection, https://www.deq.idaho.gov/media/562986-all_bc_idaho_2004_285_286_287.pdf

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the type of "military [or] political accord[]" that, like the confederacy, raises issues under the Treaty Clause. *See U. S. Steel Corp.*, 434 U.S. 452, 464 (1978). Finding the 2017 Agreement to be an impermissible treaty on the grounds argued by Plaintiff here would dramatically expand the scope of the doctrine, extend it well beyond its limited ambit to reach myriad commonplace agreements that in no way threaten the national interest, and upset the balance of state and federal power. Such extraordinary consequences illustrate that Plaintiff's unprecedented claims must fail.

CONCLUSION

For all of the foregoing reasons, this Court should deny Plaintiff's motion for summary judgment and grant State Defendants' cross-motion for summary judgment.

DATED February 18, 2020.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on February 18, 2020, I served the **BRIEF OF AMICI CURIAE THE STATES OF OREGON, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, RHODE ISLAND, VERMONT, WASHINGTON, AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION** upon the parties hereto by the method indicated below, and addressed to the following:

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