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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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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.

No. 2:19-cv-02142 WBS EFB

MEMORANDUM AND ORDER RE:
CROSS-MOTIONS FOR SUMMARY
JUDGMENT

1 Plaintiff United States of America ("United States")
2 brought this action against the State of California¹ and other
3 related individuals and entities² alleging California's cap-and-
4 trade program violates, inter alia, the Treaty Clause and the
5 Compact Clause of the United States Constitution. (First Am.
6 Compl. ("FAC") (Docket No. 7).) Presently before the court are
7 the parties' cross-motions for summary judgment on those claims.
8 (Docket Nos. 12, 46, 50.)

9 I. Facts & Procedural History

10 For over half a century, the United States government
11 has tried to contain air pollution through legislation. It
12 started in 1955, when Congress passed The Air Pollution Control
13 Act of 1955, Pub. L. 84-159, 69 Stat. 322 (1955). The Clean Air
14 Act of 1963, 42 U.S.C. § 7401 et seq., followed, which sought to
15 "protect and enhance the quality of the Nation's air resources"
16 by "encourag[ing] . . . reasonable Federal, State, and local
17 governmental actions . . . for pollution prevention." 42 U.S.C.
18 §§ 7401(b)-(c). Over time, the Clean Air Act expanded its reach

19
20 ¹ State defendants include Gavin C. Newsom, in his
21 official capacity as Governor of the State of California; the
22 California Air Resources Board; Mary D. Nichols, in her official
23 capacity as Chair of the California Air Resources Board; and
24 Jared Blumenfeld, in his official capacity as Secretary of
California's Environmental Protection Agency ("CalEPA"). These
defendants will collectively be referred to as "State defendants"
or "California."

25 ² The Western Climate Initiative, Inc. defendants are the
26 Western Climate Initiative, Inc. ("WCI, Inc."); Mary D. Nichols,
27 in her official capacity as Vice Chair of WCI, Inc. and a voting
28 board member of WCI, Inc.; and Jared Blumenfeld, in his official
capacity as a board member of WCI, Inc. These defendants will
collectively be referred to as "WCI, Inc. defendants."

1 through various amendments, and Congress created an agency
2 charged with its enforcement -- the Environmental Protection
3 Agency. See, e.g., Clean Air Amendments of 1970, Pub. L. 91-604,
4 84 Stat. 1676 (1970); Clean Air Act Amendments of 1977, Pub. L.
5 95-95, 91 Stat. 685 (1977); Clean Air Act Amendments of 1990,
6 Pub. L. 101-549, 104 Stat. 2399 (1990). Then, in the early
7 1990s, the United States took on a new challenge -- combatting
8 greenhouse gas emissions.³

9 The United States and other signatories to the United
10 Nations Framework Convention on Climate Change of 1992 ("1992
11 Convention") sought to "stabiliz[e] [] greenhouse gas
12 concentrations in the atmosphere at a level that would prevent
13 dangerous anthropogenic interference with the climate system" by
14 formulating and adopting "regional programmes containing measures
15 to mitigate climate change." (Decl. of Rachel E. Iacangelo
16 ("Iacangelo Decl.") ¶ 3, Ex. 1 at 4, Arts. 2, 4 (Docket No. 12-
17 2).) It was ratified by then-President, George H.W. Bush, with
18 the advice and consent of the Senate. (Iacangelo Decl. ¶ 4, Ex.
19 2 at D1316.) Following these national and international
20 commitments, the federal and state governments have sought to
21 combat greenhouse gas emissions in a variety of ways, including
22 through the enactment of cap-and-trade programs.

23 Cap-and-trade programs are intended to be a market-
24 based approach to reducing greenhouse gas emissions. (Decl. of
25 Michael S. Dorsi ("Dorsi Decl.") ¶ 3, Ex. 1 at 1-1, 1-2 (Docket
26

27 ³ The Supreme Court made clear in 2007 that greenhouse
28 gases are included in the Clean Air Act's definition of "air
pollutant." Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007).

1 No. 50-3).) Typically, the program's regulating authority
2 imposes a collective "cap" on the amount of pollution a group of
3 emissions sources may emit for a set period. (Id. at 1-2.)
4 Then, the regulator divides the collective cap into individual
5 "allowances," which are distributed among the separate sources.
6 (Id.) These allowances permit the sources to "emit a specific
7 quantity (e.g., 1 ton) of a pollutant" for the compliance period.
8 (Id.) The sources monitor and report their emissions, and at the
9 end of the compliance period, each source surrenders the number
10 of allowances equal to its emissions output. (Id.) If the
11 source's emissions output exceeds the allowances it has, the
12 source may buy additional allowances on a "carbon market" to
13 avoid penalties imposed by the regulator. (Id.)

14 A. The Origins of California's Cap-and-Trade Program

15 In 2006, the California legislature enacted the
16 California Global Warming Solutions Act of 2006, Cal. Health &
17 Safety Code § 38500 et seq. ("the Global Warming Act"), to combat
18 the effects of global warming. The Global Warming Act aimed to
19 assuage the "serious threat to the economic well-being, public
20 health, natural resources, and the environment of California" by
21 adopting a series of programs to limit the emissions of
22 greenhouse gases. See Cal. Health & Safety Code § 38501(a).
23 Specifically, the legislature sought to reduce greenhouse gas
24 emissions to their 1990 levels by 2020 through "facilitat[ing]
25 the development of integrated and cost-effective regional,
26 national, and international greenhouse gas reduction programs."
27 Cal. Health & Safety Code § 38564. This mandate was expanded in
28 2017 to reduce emissions levels to 40 percent below the statewide

1 greenhouse gas emissions limit by December 2030. Cal. Health &
2 Safety Code § 38566.

3 The state legislature vested the California Air
4 Resources Board ("CARB"), an agency within the California
5 Environmental Protection Agency ("CalEPA"), with the power to
6 adopt rules and regulations to effectuate these directives. Cal.
7 Health & Safety Code §§ 38560, 38561(a). The Global Warming Act
8 gave CARB the power to "adopt rules and regulations . . . to
9 achieve the maximum technologically feasible and cost-effective
10 greenhouse gas emissions reductions." Cal. Health & Safety Code
11 § 38560. This included the power to design and adopt a "market-
12 based" program to "achieve the maximum technologically feasible
13 and cost-effective reductions in greenhouse gas emissions." Cal.
14 Health & Safety Code § 38562(c)(2).

15 In its statutorily-mandated 2008 Climate Change Scoping
16 Plan, see Cal. Health & Safety § 38561(a), CARB concluded that
17 the best way to reduce emissions limits would be to enact a "cap-
18 and-trade program that links with other [] programs to create a
19 regional market system." (Dorsi Delc. ¶ 4, Ex. 2 at ES-3.) In
20 CARB's eyes, participating in a regional system had "several
21 advantages" for California, among them greater reduction of
22 emissions, greater market liquidity, and overall more stability.
23 (Id. at 33.)

24 1. The Western Climate Initiative

25 In 2007, the premiers of several Canadian provinces⁴

27 ⁴ The Canadian provinces included British Columbia,
28 Manitoba, Ontario, and Quebec.

1 and the governors of California and numerous other western
2 states⁵ formed the Western Climate Initiative. (Decl. of
3 Rajinder Sahota ("Sahota Decl.") ¶ 13 (Docket No. 50-2); see also
4 Dorsi Decl. ¶ 14, Ex. 12 at 1 n.1.) The Western Climate
5 Initiative was intended to be a "collaboration of independent
6 jurisdictions working together to identify, evaluate, and
7 implement policies to tackle climate change at a regional level."
8 (Sahota Decl. ¶ 13 (quoting
9 <http://westernclimateinitiative.org>.) Among its recommendations
10 was a regional cap-and-trade program. (Id. ¶ 15.)

11 In 2010, the Western Climate Initiative released its
12 design recommendations for a regional program. (Dorsi Decl. ¶
13 14, Ex. 12 at 1 n.1.) The following year, the Western Climate
14 Initiative formed Western Climate Initiative, Inc. ("WCI, Inc."),
15 a separate entity, to "support the implementation of state and
16 provincial greenhouse gas [] emissions trading programs." (Id.
17 at 1.)

18 2. WCI, Inc.

19 WCI, Inc. is a non-profit corporation incorporated
20 under the laws of Delaware. (Decl. of Greg Tamblyn ("Tamblyn
21 Decl.") ¶ 2, Ex. A (Docket No. 46-2).) WCI, Inc.'s board of
22 directors is composed of two Class A voting members and two Class
23 B non-voting members from each participating jurisdiction. (Id.
24 ¶ 4.)

25 WCI, Inc. provides technical support to its member

27 ⁵ Initial member states included Washington, Oregon,
28 Arizona, and New Mexico; Montana and Utah later joined.

1 jurisdictions by hosting joint auctions and maintaining a
2 computer system that tracks emissions allowances and other
3 compliance instruments. (Id. ¶ 5.) These administrative and
4 technological support services are provided under contract and
5 for remuneration. (Id.) However, its services are limited to
6 those alone. (Id. ¶ 6.) WCI, Inc. does not retain any
7 enforcement or policymaking authority and plays no role in
8 whether participating jurisdictions will accept each other's
9 compliance instruments. (Id.)

10 3. California's Cap-and-Trade Program

11 Fulfilling its mandate under the Global Warming Act,
12 CARB proposed a cap-and-trade program for California in October
13 2010. (Sahota Decl. ¶¶ 16, 19-20; Dorsi Decl. ¶ 5, Ex. 3 at 2.)
14 In so doing, it substantially relied upon the design
15 recommendations promulgated by the Western Climate Initiative.
16 (Sahota Decl. ¶¶ 15-16.) CARB formally adopted the cap-and-trade
17 program in October 2011, (Id. ¶ 20), and began using WCI, Inc.'s
18 services to facilitate the program in 2012. (Tamblyn Decl. ¶ 5;
19 see also Agreement 11-415 Between Air Resources Board and WCI,
20 Inc. ("Agreement 11-415") (Docket No. 7-3).) However, California
21 was careful to limit WCI, Inc.'s services to technical and
22 administrative support alone. See Cal. Gov. Code § 12894.5(a)(1)
23 ("Given its limited scope of activities, the [WCI, Inc.] does not
24 have the authority to create policy with respect to any existing
25 or future program or regulation"); see also Cal. Gov. Code §
26 12894.5(b)(3). Under Agreement 11-415, California agreed to pay
27 WCI, Inc. "membership dues" in exchange for its services on a
28 quarterly basis. (Agreement 11-415 at 5.) California paid WCI,

1 Inc. approximately \$3.8 million from 2012-2013. (Id. at 2.)

2 Like the other cap-and-trade programs described, CARB
3 establishes yearly caps, called "budgets," for the total
4 greenhouse gas emissions of all covered entities. (Sahota Decl.
5 ¶ 21); 17 CCR § 95802(a). CARB then issues allowances to the
6 covered entities in quantities equal to the yearly emissions
7 budget. (Sahota Decl. ¶¶ 21-22); see also 17 CCR § 95802(a).
8 Some allowances will be directly allocated to the covered
9 entities, others may be purchased at auction, and still others
10 may be acquired through a secondary market. See 17 CCR §§
11 95890(a), 95910, 95920-21. Each allowance permits covered
12 entities to "emit up to one metric ton in [carbon dioxide
13 equivalent] of any greenhouse gas specified in [the California
14 Code of Regulations]." (Sahota Decl. ¶ 22); 17 CCR § 95820(c).
15 Budgets then decrease each year to encourage covered entities to
16 reduce their emissions. (Sahota Decl. ¶ 21.)

17 At year's end, covered entities are required to acquire
18 and surrender eligible compliance instruments equivalent to the
19 metric tons of greenhouse gas they emit. (Sahota Decl. ¶ 22.)
20 To help regulated businesses mitigate their compliance costs
21 while maximizing impact, CARB adopted several features unique to
22 California's program. (Id. ¶ 24.) For example, covered entities
23 can buy allowances when prices are low and "bank" them for use in
24 future years. 17 CCR § 95922. Covered entities can also
25 "offset" a metric ton of their emissions by sponsoring projects
26 designed to remove carbon dioxide from the atmosphere. 17 CCR §
27 95970(a)(1). Most relevant here, California provided for an
28 opportunity to increase its program's impact and market liquidity

1 by "linking" its market with other jurisdictions. 17 CCR §§
2 95940-43; (Sahota Decl. ¶ 25; Dorsi Decl. ¶ 4, Ex. 2 at 33.)

3 B. The Current Controversy

4 CARB adopted a "framework for linkage" to accept the
5 compliance instruments of other "states and [Canadian] provinces"
6 when it enacted the regulations to establish California's cap-
7 and-trade program. (Dorsi Decl. ¶ 7, Ex. 5 at 193); see also 17
8 CCR §§ 95940-43. After CARB adopted this framework, the
9 California legislature "establish[ed] new oversight and
10 transparency over [cap-and-trade] linkages" and set forth
11 requirements that other jurisdictions must meet before the
12 programs can be linked. Cal. Gov. Code § 12894(a)(2). The law
13 requires CARB to notify the Governor of its intention to link
14 California's market with another jurisdiction, and then "the
15 Governor, acting in his or her independent capacity" must make
16 four findings before linkage can take place. Cal. Gov. Code §
17 12894(f). The Governor must issue findings within 45 days of
18 receiving notice from CARB. Cal. Gov. Code § 12894(g).

19 After a linkage is approved, covered entities can use
20 compliance instruments acquired through linked jurisdictions to
21 satisfy their compliance obligations in California, and vice
22 versa. 17 CCR § 95942(d)-(e). Linked jurisdictions can also
23 participate in California's emissions auctions. 17 CCR §
24 95911(a)(5). However, linking does not substantively alter each
25 individual jurisdiction's cap-and-trade program. (Sahota Decl.
26 ¶¶ 25, 42); Cal. Gov. Code § 12894.5.

27 1. Quebec's Cap-and-Trade Program

28 While CARB was enacting California's cap-and-trade

1 program, Quebec enacted its own. In December 2011, Quebec
2 established its cap-and-trade program. (Iacangelo Decl. ¶ 25,
3 Ex. 23.) Like California, Quebec contracted with WCI, Inc. to
4 provide administrative and technical services for its cap-and-
5 trade program. (Id. ¶ 26, Ex. 24; Sahota Decl. ¶ 55.) However,
6 its program differs from California's in its aims and operation.
7 Among the differences, Quebec's province-wide greenhouse gas
8 emissions target is higher than California's, aspiring to achieve
9 emissions levels 20 percent below 1990 levels by 2020. (Sahota
10 Decl. ¶ 35.) Quebec's program also seeks to reduce certain
11 global warming gases that California's does not. (Id.) Quebec
12 allocates emissions allowances differently, and does not include
13 features in its auctions that California includes in its own.
14 (Id.)

15 2. The Programs are Linked

16 On February 22, 2013, CARB requested that California's
17 Governor, Jerry Brown, Jr., make the findings required by law to
18 link California's cap-and-trade program with Quebec's. (Sahota
19 Decl. ¶ 32.) Governor Brown made the four linkage findings in
20 April 2013. (Id. ¶ 33.) After the programs were linked in
21 September 2013, the parties signed an agreement memorializing
22 their commitment "to work jointly and collaboratively toward the
23 harmonization and integration of [their] cap-and-trade programs
24 for reducing greenhouse gas emissions" ("2013 Agreement"). (Id.
25 ¶¶ 44-49; 2013 Agreement (Docket No. 50-4, Ex. 8).) The 2013
26 Agreement provided in part that the parties would "consult each
27 other regularly" and notify each other of "any proposed changes
28 or additions to [their individual] programs," including if either

1 wished to discontinue using WCI, Inc.'s services.⁶ (2013
2 Agreement at 5, 6, 8.) Additionally, the parties agreed to
3 "endeavor to provide" the other with 12 months' notice if one
4 wished to withdraw from the Agreement and to terminate the
5 agreement only upon "unanimous consent of the Parties" in
6 writing. (2013 Agreement at 11, 13.)

7 The linkage between the two became operational by
8 regulation on January 1, 2014. 17 CCR § 95943(a)(1).
9 Thereafter, CARB began accepting Quebec-issued compliance
10 instruments, and California and Quebec began hosting joint
11 auctions for covered entities to purchase compliance instruments.
12 17 CCR §§ 95940, 95911(a)(5). At joint auctions, "California and
13 Quebec make their respective allowances available at the same
14 time, and in the same auction venue, and conform their bidding
15 and winning parameters." (Sahota Decl. ¶ 52.) There have been
16 21 joint auctions over a six-year period, grossing approximately
17 \$12 billion for California. (Id. ¶¶ 58-59.) This money is used
18 "to reduce greenhouse gas emissions and to benefit vulnerable
19 communities in the State." (Id. ¶ 59.)

20 3. National Policy Changes & California's Program
21 Expands

22 While California developed its cap-and-trade policy,
23 the national government was also taking affirmative steps to
24 mitigate greenhouse gas emissions. In 2016, various parties to
25

26 ⁶ Despite the 2013 Agreement's terms, California has
27 modified its cap-and-trade program several times. (Sahota Decl.
28 ¶ 78.) Through all of these modifications, "Quebec's approval or
consent was neither sought nor required in order for California
to amend its [program]." (Sahota Decl. ¶ 80.)

1 the 1992 Convention -- including the United States -- entered
2 into the Paris Agreement of 2015 by executive order ("Paris
3 Accord"). (Iacangelo Decl. ¶ 5, Ex. 3 at 3.) In furtherance of
4 the 1992 Convention, the Paris Accord aims to "hold[] the
5 increase in the global average temperature to well below 2
6 degrees Celsius" and "pursu[e] efforts to limit the temperature
7 increase to 1.5 degrees Celsius above pre-industrial levels."

8 Id.

9 On August 2, 2016, CARB initiated a rulemaking to link
10 California's cap-and-trade program with Ontario's program.
11 (Sahota Decl. ¶ 62.) On January 30, 2017, CARB provided the
12 required notice to Governor Brown, and he made the requisite
13 findings to link the jurisdictions on March 16, 2017. (Iacangelo
14 Decl. ¶ 27, Ex. 25; Sahota Decl. ¶ 63.)

15 On March 28, 2017, President Donald Trump issued
16 Executive Order 13,783. (Iacangelo Decl. ¶ 6, Ex. 4.) This
17 Order declared it was "in the national interest to promote clean
18 and safe development of our Nation's vast energy resources, while
19 at the same time avoiding regulatory burdens that unnecessarily
20 encumber energy production, constrain economic growth, and
21 prevent job creation." (Id.) Agencies were ordered to review
22 all of their actions that "unnecessarily obstruct, delay,
23 curtail, or otherwise impose significant costs on the siting,
24 permitting, production, utilization, transmission, or delivery of
25 energy resources." (Id.) Later, in June, President Trump
26 announced the United States would withdraw from the Paris Accord
27 and instead "negotiate a new deal that protects our country and
28

1 its taxpayers.”⁷ (Iacangelo Decl. ¶ 7, Ex. 5 at 5.)

2 On September 22, 2017, after the programs had been
3 linked, the governments of California, Quebec, and Ontario signed
4 the Agreement on the Harmonization and Integration of Cap-and-
5 Trade Programs for Reducing Greenhouse Gas Emissions to
6 memorialize their commitment to harmonizing their cap-and-trade
7 programs (“the Agreement”). (Id. ¶ 28, Ex. 26.) This Agreement
8 replaced the 2013 Agreement between California and Quebec,
9 (Agreement at 2), although the agreements mirrored each other in
10 most material respects. The Agreement contains the following
11 provisions:

12 Articles 1 and 2 set forth the Agreement’s objectives
13 and relevant definitions; Articles 3 and 4 provide for
14 consultation and regulatory harmonization to ensure the programs’
15 compatibility; Articles 5-10 discuss the compliance instruments
16 recognized by each respective cap-and-trade program and the joint
17 auction process the programs could use to sell these instruments;
18 and Articles 11-13 reinforce the parties’ commitments to
19 utilizing coordinated technical and administrative support,
20 including a “Consultation Committee” composed of one member of

21 ⁷ The United States did not submit formal notification of
22 its withdrawal from the Paris Accord until November 4, 2019.
23 (Iacangelo Decl. ¶ 8, Ex. 6.) Under the Paris Accord’s
24 withdrawal provision, a party cannot withdraw until a year after
it provides formal notice. (Id.) The United States’ withdrawal
will not take effect until November 4, 2020. (Id.)

25 The United States submitted a number of statements from
26 former Governor Brown to describe California’s response to
27 President Trump’s withdrawal from the Paris Accord and this
28 lawsuit. (Iacangelo Decl. ¶¶ 12, 14, 19.) The court recognizes
these as no more than typical political hyperbole. As such, they
are entitled to no legal effect.

1 each jurisdiction to resolve any differences between the programs
2 that could jeopardize their coordination efforts. (See Agreement
3 at 2-8.) Article 14's jurisdictional provision acknowledges that
4 the Agreement "does not modify any existing statutes and
5 regulations nor does it require or commit the Parties or their
6 respective regulatory or statutory bodies to create new statutes
7 or regulations in regulation to this Agreement," and Article 15
8 provides information exchanged between the parties will remain
9 confidential. (Id. at 9.) Article 16 commits the parties to
10 providing notice to the others before making public announcements
11 about their individual programs. (Id.) Article 17 provides the
12 parties "shall endeavor to provide" the other with 12 months'
13 notice before withdrawing; Article 18 requires amendments to the
14 Agreement to be in writing and with the consent of all parties;
15 and Article 19's accession provision permits additional
16 jurisdictions to join the Agreement upon the agreement of all of
17 the current parties. (Id. at 10-11.) Article 20 commits the
18 parties to resolving their differences by "using and building on
19 established working relationships," and the parties will
20 "communicate on matters regarding this Agreement in writing"
21 under to Article 21. (Id. at 11.) Finally, Article 22 provides
22 that the Agreement "may only be terminated by the written consent
23 of all of the Parties." (Id. at 12.) Termination of the
24 Agreement becomes effective 12 months after all parties consent,
25 but the obligations under Article 15 regarding confidentiality of
26 information would continue to remain in effect. (Id.)

27 The linkage between California, Quebec, and Ontario
28 became operational by regulation on January 1, 2018. 17 CCR §

1 95943(a)(2). However, on June 15, 2018, Ontario's then premier-
2 designate, Doug Ford, announced his intention to cancel Ontario's
3 cap-and-trade program and withdraw from both the Agreement and
4 the WCI, Inc. (Dorsi Decl. ¶ 13, Ex. 11.) On June 29, 2018, the
5 Ontario cabinet approved a regulation revoking its cap-and-trade
6 regulations and enacted the Cap and Trade Cancellation Act to
7 formally repeal its program. (Sahota Decl. ¶¶ 74-75.) At no
8 point did Ontario provide notice to California or Quebec. (Id. ¶
9 76.) While compliance instruments issued by the government of
10 Ontario before the dissolution of its cap-and-trade program may
11 still be used to satisfy compliance requirements in California,
12 Ontario is no longer recognized as a linked jurisdiction or a
13 party to the Agreement. 17 CCR § 95943(a)(2). But even after
14 Ontario's withdrawal, California and Quebec remain parties to the
15 Agreement. (Agreement at 10.)

16 On October 23, 2019, the United States brought this
17 action against the state defendants and the WCI, Inc. defendants⁸
18 seeking declaratory and injunctive relief under the Treaty
19 Clause, the Compact Clause, and Foreign Commerce Clause of the
20 United States Constitution and the Foreign Affairs Doctrine.
21 (Docket No. 1.) In its First Amended Complaint, the United
22 States specifically requested a declaration that the Agreement is
23

24 ⁸ The WCI, Inc. defendants and defendant Jared
25 Blumenfeld, in his official capacity as Secretary for CalEPA,
26 moved to dismiss the claims against them on January 6, 2020.
27 (Docket No. 25.) This court granted WCI, Inc.'s motion with
28 respect to the non-voting members of WCI, Inc.'s board, Kip
Lipper and Richard Bloom, on February 26, 2020. (Docket No. 79.)
The court denied the motion as to the other moving parties.
(Id.)

1 a "treaty" in violation of the Treaty Clause of Article I,
2 Section 10, Clause 1 and that the Agreement, along with
3 California law as applied, is a "compact" in violation of Article
4 I, Section 10, Clause 3. (FAC ¶¶ 156-164.)

5 Despite bringing additional claims under the Foreign
6 Affairs Doctrine and the Foreign Commerce Clause, the United
7 States moved for summary judgment on the Treaty Clause and
8 Compact Clause alone on December 11, 2019. (USA Mot. for Summ.
9 J. ("USA Mot.") (Docket No. 12).) The WCI, Inc. defendants and
10 the State defendants also filed cross-motions for summary
11 judgment on the Treaty Clause and Compact Clause alone on
12 February 10, 2020.⁹ (See WCI, Inc. Mot. for Summ. J. ("WCI, Inc.
13 Mot.") (Docket No. 46-1); State Mot. for Summ. J. ("CA Mot.")
14 (Docket No. 50).) Because the parties did not move for summary
15 judgment on the Foreign Affairs Doctrine or the Foreign Commerce
16 Clause, the court expresses no opinion on the merits of those
17 claims in this Order.

18 II. Legal Standard

19 A party seeking summary judgment bears the initial
20 burden of demonstrating the absence of a genuine issue of
21 material fact as to the basis for the motion. Celotex Corp. v.
22 Catrett, 477 U.S. 317, 323 (1986). A material fact is one that
23 could affect the outcome of the suit, and a genuine issue is one
24 that could permit a reasonable trier of fact to enter a verdict

25 ⁹ The Environmental Defense Fund, Natural Resources
26 Defense Council, and International Emissions Trading Association
27 were permitted to intervene as defendants on January 15, 2020.
28 (Docket No. 35.) While they did not file independent motions for
summary judgment, they filed briefs in opposition to the United
States' motion for summary judgment. (Docket Nos. 47, 48.)

1 in the non-moving party's favor. Anderson v. Liberty Lobby,
2 Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate
3 when, viewing the evidence in the light most favorable to the
4 nonmoving party, there is no genuine dispute as to any material
5 fact. Acosta v. City Nat'l Corp., 922 F.3d 880, 885 (9th Cir.
6 2019) (citing Zetwick v. County of Yolo, 850 F.3d 436, 440 (9th
7 Cir. 2017)). Where, as here, parties submit cross-motions for
8 summary judgment, "each motion must be considered on its own
9 merits." Fair Hous. Council of Riverside Cty., Inc. v. Riverside
10 Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal citations and
11 modifications omitted). "[T]he court must consider the
12 appropriate evidentiary material identified and submitted in
13 support of both motions, and in opposition to both motions,
14 before ruling on each of them." Tulalip Tribes of Wash. v.
15 Washington, 783 F.3d 1151, 1156 (9th Cir. 2015). Accordingly, in
16 each instance, the court will view the evidence in the light most
17 favorable to the non-moving party and draw all inferences in its
18 favor. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1097
19 (9th Cir. 2003) (citations omitted).

20 III. Discussion

21 A. The Treaty Clause

22 The FAC's challenge under the Treaty Clause relates
23 only to the Agreement itself. (See FAC ¶ 160 ("The Agreement
24 constitutes a "Treaty, Alliance or Confederation" in violation of
25 the Treaty Clause.") In relevant part, Article I, Section 10,
26 Clause 1 of the United States Constitution provides:

27 No State shall enter into any Treaty,
28 Alliance, or Confederation . . .

1 U.S. Const. Art. I, § 10, cl. 1.

2 The Constitution does not provide a definition of a
3 "treaty," nor does it distinguish a "treaty" from "alliance" or
4 "confederation." The records of the Constitutional Convention do
5 not include any discussion of Article I, § 10, nor do the state
6 ratification conventions. See U.S. Steel Corp. v. Multistate Tax
7 Comm'n, 434 U.S. 452, 461 n.11 (1978); see also 3 Joseph Story,
8 Commentaries on the Constitution of the United States § 1396, 270
9 (1833) ("What precise distinction is here intended to be taken
10 between treaties, and agreements, and compacts is no-where
11 explained; and has never as yet been subjected to any exact
12 judicial, or other examination.").

13 Indeed, only a handful of Supreme Court cases have
14 grappled with the meaning of the Treaty Clause, and often the
15 Treaty Clause is only considered in relation to the Compact
16 Clause of Article I, Section 10, Clause 3. See U.S. Steel Corp.,
17 434 U.S. at 460-61 (comparing the two clauses and describing how
18 "[t]he Framers clearly perceived compacts and agreements as
19 differing from treaties," although unsure as to what extent);
20 Virginia v. Tennessee, 148 U.S. 503, 519 (1893) (defining
21 "treaties" in relation to compacts and agreements in the Compact
22 Clause); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570-71 (1840)
23 (plurality) (same).

24 In Holmes v. Jennison, George Holmes, a Canadian
25 citizen, was arrested in Vermont by Vermont authorities after he
26 was indicted for murder in Quebec. 39 U.S. (14 Pet.) at 561.
27 The Governor of Vermont, John Starkweather, ordered the arresting
28 sheriff to turn Holmes over to Canadian authorities. Id. The

1 central question presented was whether a state could extradite a
2 foreign national by its own authority. Id.

3 Writing for a plurality, Chief Justice Taney rejected
4 the proposition that "treaty," "alliance," and "confederation"
5 "meant merely the same thing" and instead suggested a "treaty" is
6 "an instrument written and executed with the formalities
7 customary among nations." Id. at 571. Relying on Emerich de
8 Vattel's The Law of Nations,¹⁰ Justice Taney found treaties can
9 "only be made by the 'supreme power, by sovereigns who contract
10 in the name of the state'" to serve "the public welfare" for "a
11 considerable time" through "successive execution." Id. at 570.

12 Justice Story largely agreed with this view. In
13 Commentaries, Justice Story suggested the "sound policy" behind
14 the Treaty Clause was to prevent subverting the power of the
15 national government. 3 Story, Commentaries § 1349, 217-18. In
16 Story's view, treaties "ordinarily relate to subjects of great
17 national magnitude and importance, and are often perpetual, or
18 for a great length of time." Id. § 1401, 274. Story's
19 pontifications were given precedential effect when the Supreme
20 Court quoted Story's Commentaries in Virginia, explaining
21 "treaties" were "of a political character; such as treaties of
22 alliance for purposes of peace and war . . . in which the parties
23 are leagued for mutual government, political co-operation, and
24 the exercise of political sovereignty; and treaties of cession of

25 ¹⁰ Vattel's treatise has been described as "the most well-
26 known work on the law of nations in England and America at the
27 time of the Founding." Anthony J. Bellia Jr. & Bradford R.
28 Clark, The Law of Nations as Constitutional Law, 98 VA. L. R. 729,
749 (2012) (collecting sources). It is widely thought to have
influenced the Constitution's construction.

1 sovereignty, or conferring internal political jurisdiction, or
2 external political dependence, or general commercial privileges."
3 148 U.S. at 519 (quoting 3 Story, Commentaries § 1397, 271)
4 (internal quotations omitted).

5 Consequently, the Supreme Court has come to understand
6 that, not all "international agreements . . . constitute treaties
7 in the constitutional sense." United States v. Curtiss-Wright
8 Export Corp., 299 U.S. 304, 318 (1936); United States v. Belmont,
9 301 U.S. 324, 330 (1937); see also Virginia, 148 U.S. at 519-20.
10 While agreements may be referred to colloquially as "treaties,"
11 they are not necessarily "treaties" violative of Article I.

12 The United States argues the Agreement is an "emissions
13 treaty" prohibited by the Treaty Clause. (USA Mot. at 1 (quoting
14 Massachusetts v. EPA, 549 U.S. 497, 519 (2007).) The United
15 States claims it is "of a political character" because it is
16 binding and it "confederates the laws of the two jurisdictions in
17 an important area of commercial policy." (USA Mot. at 15-17.)

18 Conversely, California argues the Agreement does not
19 rise to the level of an Article I treaty because it "does not
20 address a matter of substantial consequence to our federal
21 structure, much less one implicating national unity." (CA Mot.
22 at 17-19.) California claims the Agreement is not binding, and
23 "merely expresses California's and Quebec's good-faith intentions
24 to continue communicating and collaborating . . . so that the
25 link between the two cap-and-trade programs may continue to
26 function properly." (CA Mot. at 19.) California primarily
27 relies upon the provisions of the Agreement that permit the
28 parties to make changes to their regulatory schemes and offers

1 Ontario's unencumbered withdrawal as evidence that California
2 could do the same. (CA Mot. at 20-23.)

3 The United States invokes dicta from the Supreme
4 Court's decision in Massachusetts v. EPA, 549 U.S. 497 (2007), to
5 stand for the proposition that this Agreement, and those like it,
6 have already been foreclosed by the Constitution as a consequence
7 of joining the union. (USA Mot. at 1.) In Massachusetts, the
8 Court considered whether Massachusetts and other states had
9 standing to challenge the Environmental Protection Agency's
10 denial of their rulemaking petition. 549 U.S. at 505. When
11 explaining why the EPA's refusal to regulate greenhouse gas
12 emissions gave Massachusetts a concrete injury sufficient for
13 Article III standing, the Court opined:

14 When a State enters the Union, it surrenders
15 certain sovereign prerogatives.
16 Massachusetts cannot invade Rhode Island to
17 force reductions in greenhouse gas
18 emissions, it cannot negotiate an emissions
19 treaty with China or India, and in some
20 circumstances the exercise of its police
21 powers to reduce in-state motor-vehicle
22 emissions might well be pre-empted.

23 549 U.S. at 519.

24 At the hearing and in the briefs, counsel for the
25 United States argued that this fleeting reference to "treaties"
26 specifically invoked Article I's Treaty Clause. (See USA Mot. at
27 1; Docket No. 88.) This court is at a loss to understand what
28 the Court meant by its statement that Massachusetts could not
negotiate an emission treaty with China or India. There was no
issue of an emissions treaty, or any other treaty, with China or
India, or with anyone else, in the Massachusetts case. Indeed,
the Court did not mention the Treaty Clause, or any other part of

1 Article I in the entirety of its opinion. Moreover, this court
2 has not been able to find any case that has relied upon or cited
3 that reference in relation to the Treaty Clause or Article I.
4 Consequently, this court cannot regard that phrase of the Court's
5 decision as anything more than a stray comment which may not be
6 taken as binding authority.

7 As the Supreme Court has taught in other cases, in the
8 Article I context, "treaty" is a term of art. Not all
9 international agreements may be "treaties" in the constitutional
10 sense. Curtiss-Wright, 299 U.S. at 318; see also Virginia, 148
11 U.S. at 519-20. In Virginia, the Supreme Court explained that
12 "treaties" within the meaning of Article I are "of a political
13 character." 148 U.S. at 519. The Court provided examples of
14 agreements that qualified as "treaties", including "treaties of
15 alliance for purposes of peace and war," "mutual government," the
16 "cession of sovereignty," and "general commercial privileges."
17 Id. By any metric, the Agreement between California and Quebec
18 falls short of these consequential agreements.

19 This Agreement is not a treaty creating an alliance for
20 purposes of peace and war. See Williams v. Bruffy, 96 U.S. 176,
21 182 (1877) (finding the Confederate States of America
22 unconstitutional under the Treaty Clause). Nor does it
23 constitute a treaty for "mutual government" or represent a
24 "cession of sovereignty." See id. To the contrary, the
25 Agreement explicitly recognizes that Quebec and California
26 adopted "their own greenhouse gas emissions reduction targets,
27 their own regulation on greenhouse gas emissions reporting
28 programs and their own regulation(s) on their cap-and-trade

1 programs." (Agreement at 1 (emphasis added).) These programs
2 are not identical, and their different aims and structures
3 undercut any mutuality argument. (Sahota Decl. ¶¶ 34-35.)

4 The programs, adopted independently and informed by
5 each jurisdiction's policy objectives, could (and have) run
6 independently of each other. Furthermore, the Agreement provides
7 it is "each Party's sovereign right and authority to adopt,
8 maintain, modify, repeal, or revoke any of their respective
9 program regulations or enabling legislation." (Agreement at 1.)
10 The Agreement does not "modify any existing statutes and
11 regulations[,] nor does it require or commit the Parties or their
12 respective regulatory or statutory bodies to create new statutes
13 or regulations." (Id. at 9.) Indeed, CARB has modified the
14 regulations governing California's cap-and-trade program more
15 than five times since it linked its program with Quebec in 2013,
16 without consulting with the province. (Sahota Decl. ¶¶ 78-80.)
17 Accordingly, there is no "mutual government" or "cession of
18 sovereignty" representative of a treaty.

19 Finally, while both California and Quebec have
20 undeniably reaped significant monetary benefits from their
21 limited commercial privileges with one another, the cap-and-trade
22 agreement is not a "general commercial privilege" prohibited by
23 the Treaty Clause. Treaties conferring "general commercial
24 privilege[s]" are treaties regarding amity and commerce and
25 encompass far more than the limited exchange here.¹¹ See Br. of

26 ¹¹ For example, the Treaty of Amity and Commerce between
27 the United States and France signed in 1778 provided for mutual
28 most favored nation status with regard to commerce and navigation
between the two countries, in addition to granting free ports and

1 Amici Curiae Professors of Foreign Relations Law (Docket No. 54)
2 at 15 n.4 (citing Sarah H. Cleveland & William S. Dodge, Defining
3 and Punishing Offenses Under Treaties, 124 YALE L. J. 2202, 2218
4 (2015).) Consequently, this court concludes that the Agreement
5 does not represent a "treaty" within Article I of the
6 Constitution. Defendants' motions for summary judgment on the
7 Treaty Clause claim must therefore be granted.

8 B. The Compact Clause

9 The parties also move for summary judgment on the
10 Compact Clause. (See USA Mot. at 18; CA Mot. at 25; WCI, Inc.
11 Mot. at 5.) The Compact Clause of Article I, Section 10, Clause
12 3 provides:

13 No State shall, without the Consent of Congress
14 . . . enter into any Agreement or Compact with
another State, or with a foreign Power . . .

15 U.S. Const. Art. I, § 10.

16 "Read literally, the Compact Clause would require the
17 States to obtain congressional approval before entering into any
18 agreement among themselves, irrespective of form, subject,
19 duration, or interest to the United States." U.S. Steel Corp.,
20 434 U.S. at 459. Rather than adopt that interpretation, the
21 Supreme Court has limited its application to agreements that
22 encroach upon federal sovereignty. See, e.g., Northeast Bancorp,
23 Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 176
24 (1985); U.S. Steel, 434 U.S. at 471; New Hampshire v. Maine, 426
25 U.S. 363, 369 (1976); Virginia, 148 U.S. at 517-18. Accordingly,
26 the court must first ascertain whether the Agreement falls within
27
28 a mutual right to trade with enemy states of the other.

1 Article I's scope.

2 In Northeast Bancorp, the Court was tasked with
3 determining whether there was an agreement between a collection
4 of New England states that amounted to a "compact." 472 U.S. at
5 175. To do so, the Court considered whether the arrangement had
6 the "classic indicia of a compact," including: (1) provisions
7 that required reciprocal action for the agreement's
8 effectiveness; (2) a regional limitation; (3) a joint
9 organization or body for regulatory purposes; and (4) a
10 prohibition on the agreement's unilateral modification or
11 termination. Id. It is indisputable that there is an agreement
12 between the parties. However, the court must ascertain whether
13 that Agreement¹² "amount[s] to a compact" first. See id.

14 The Agreement does not contain the first indicium of a
15 compact because it does not require reciprocal action to take
16 effect. Article 14 explicitly states that "this Agreement does
17 not modify any existing statutes and regulations nor does it
18 require or commit the Parties to their respective regulatory or
19 statutory bodies to create new statutes or regulations in
20 relation to this Agreement." (Agreement at 9.) While California
21 requires linking jurisdictions to have equivalent or stricter
22 enforcement goals than it does, the efficacy of the program does
23 not rise or fall with other jurisdictions adopting similar

24
25 ¹² The United States challenges the Agreement and
26 "supporting California law was applied" under the Compact Clause.
27 (FAC ¶ 164.) The court will construe that to include California
28 Code of Regulations, Title 17, Sections 95940-43 because those
mandate the general requirements for linking California's cap-
and-trade program with other jurisdictions. See 17 CCR §§ 95940-
43.

1 enforcement goals; indeed, the program could operate
2 independently of any other jurisdiction.

3 The Agreement also lacks the second indicium of a
4 compact because it does not impose a regional limitation. While
5 each cap-and-trade program can trace its roots back the
6 recommendations for a "regional" cap-and-trade program
7 promulgated by Western Climate Initiative, (Sahota Decl. ¶¶ 15-
8 16), nothing in the Agreement or California's law limits the
9 program's efficacy to a particular region. Quite the contrary --
10 the Agreement's "Accession" provision is written without regard
11 to geographical location. (Agreement at 10.)

12 The third indicium of a compact is also absent. While
13 California has adopted a "joint organization or body" in WCI,
14 Inc. to facilitate its linkage with Quebec, WCI, Inc. exercises
15 no regulatory authority under the Agreement or California law.
16 (Agreement at 8); Cal. Gov. Code § 12894.5 ("Given its limited
17 scope of activities, the [WCI, Inc.] does not have the authority
18 to create policy with respect to any existing or future program
19 or regulation"); see also Cal. Gov. Code § 12894.5(b)(3) ("[WCI,
20 Inc.] bylaws shall not allow [WCI, Inc.] to have policymaking
21 authority with respect to these programs.").

22 While WCI, Inc. admittedly provides "administrative and
23 technical support" to both jurisdictions, it "plays no role in
24 the enforcement of the cap-and-trade program of any participating
25 jurisdictions" and "exercises no regulatory powers at all."
26 (Tamblyn Decl. ¶ 6.) Indeed, it does not exercise any
27 policymaking, regulatory, or enforcement authority emblematic of
28 other "joint bodies" found to be indicative of a compact under

1 the Compact Clause. See Seattle Master Builders Ass'n v. Pac.
2 Northwest Elec. Power & Conservation Planning Council, 786 F.2d
3 1359, 1364 (9th Cir. 1986) (finding Council with policy-making
4 authority and the statutory power to take direct action was a
5 "joint body with regulatory authority"). Consequently, while it
6 is a "joint organization" it serves no "regulatory purpose"
7 indicative of a compact.

8 Finally, there is no enforceable prohibition on
9 unilateral modification or termination. As in Northeast Bancorp,
10 "each [jurisdiction] is free to modify or repeal its law
11 unilaterally." 472 U.S. at 175. Quebec and California retain
12 their "sovereign right and authority to adopt, maintain, modify,
13 repeal, or revoke any of their respective program regulations or
14 enabling legislation." (Agreement at 1.) California has
15 modified its regulations without consulting Quebec on multiple
16 occasions. (Sahota Decl. ¶¶ 78-80.) While modifications to and
17 termination of the Agreement require the consent of all parties,
18 (Agreement at 10, 12), the simple fact that California retains
19 the power to modify its enacting regulations means unilateral
20 termination of California's participation in the Agreement is
21 possible. (See Sahota Decl. ¶¶ 74-76 (discussing Ontario's
22 withdrawal from the Agreement and unilateral termination of its
23 cap-and-trade program).)

24 The United States argues that the amount of money
25 invested in the cap-and-trade program would prohibit a unilateral
26 withdrawal. (USA Mot. at 25.) But while the practical
27 consequences of withdrawal may be steep, caselaw shows this is
28 not the relevant inquiry. Northeast Bancorp, 472 U.S. at 175;

1 U.S. Steel, 434 U.S. at 473. California is "free to withdraw at
2 any time," and this freedom defeats any characterization that the
3 Agreement is binding. See U.S. Steel, 434 U.S. at 473.

4 For the foregoing reasons, all of the "classic indicia"
5 of a compact from Northeastern Bancorp are missing from the
6 Agreement and California law as applied. But "[e]ven if all
7 these indicia of compacts [were] present," only agreements that
8 tend to "increase political power in the states," such that they
9 "may encroach upon or interfere with the just supremacy of the
10 United States" fall within the scope of the Compact Clause.¹³
11 Seattle Master Builders, 786 F.2d at 1364 (citing Cuyler v.
12 Adams, 449 U.S. 433, 440 (1981)).

13
14 ¹³ Both sides acknowledge the Supreme Court has yet to
15 explicitly apply the framework used to evaluate interstate
16 agreements to those between states and foreign powers. (See USA
17 Mot. at 19; CA Mot. at 27.) However, the Court has recognized
18 that Chief Justice Taney's plurality opinion in Holmes, 39 U.S.
19 (14 Pet.) at 570-71, is "not inconsistent with the rule of
20 Virginia v. Tennessee." U.S. Steel Corp., 434 U.S. at 465 n.15.
21 Other courts to consider agreements between foreign governments
22 and states have applied the tests from Virginia and Northeast
23 Bancorp. See, e.g., McHenry v. Brady, 163 N.W. 540, 545-47 (N.D.
24 1917) (finding drainage agreement between North Dakota and
25 Manitoba did not implicate the Compact Clause under Virginia); In
26 re Manuel P., 215 Cal. App. 3d 48, 66-69 (4th Dist. 1989)
27 (finding program used to return nonresident minor aliens to
28 Mexico was not an Article I compact between California and Mexico
under Northeast Bancorp and did not encroach on federal supremacy
in violation of Virginia). The State Department has also
suggested the Court would likely adhere to the Virginia test when
evaluating agreements between states and foreign powers, and both
parties rely on that memorandum. (See Dorsi Decl. ¶ 15, Ex. 13;
2d Decl. of Rachel E. Iacangelo ("2d Iacangelo Decl.") ¶ 13, Ex.
44 (Docket No. 78-2) (both citing William H. Taft, IV, Legal
Adviser of the U.S. Dept. of State, "Memorandum," in Digest of
United States Practice of International Law 184 (Sally J. Cummins
& David P. Stewart, eds., 2001) ("Taft Memo").) This court will
do the same.

1 The United States argues that the Supreme Court's
2 decisions in American Insurance Association v. Garamendi, 539
3 U.S. 396 (2003) and Crosby v. National Foreign Trade Council, 530
4 U.S. 363 (2000) should inform the court's federal supremacy
5 analysis. (USA Mot. at 21-22.) However, those cases are unique
6 to the Foreign Affairs Doctrine, which the parties have expressly
7 not asked the court to consider in this motion. In both of those
8 cases, the Supreme Court found the state laws at issue were
9 preempted by the federal government's express foreign policy.
10 See Garamendi, 539 U.S. at 427 (invalidating California's
11 Holocaust Victim Insurance Relief Act because it conflicted with
12 the president's expressed policy); Crosby, 530 U.S. at 373-78
13 (invalidating a Massachusetts law because it compromised
14 diplomatic leverage by imposing economic sanctions against
15 Burma).

16 What is before the court now is not the question of
17 preemption but the question of whether California's power has
18 been increased such that it encroaches upon or interferes with
19 the just supremacy of the United States. For that, the Supreme
20 Court has offered guidance in United States Steel Corporation v.
21 Multistate Tax Commission.

22 In U.S. Steel, the Supreme Court offered three factors
23 which, if present in an agreement between states, could "enhance
24 state power quoad the National Government": (1) if the agreement
25 in question authorized member states to "exercise any powers they
26 could not exercise in its absence"; (2) if there was any
27 "delegation of sovereign power" to an outside organization; and
28 (3) if each state was "free to withdraw at any time." 434 U.S.

1 at 473. Factors two and three are not present in the Agreement,
2 as described in the court's analysis of the Northeast Bancorp
3 factors. See supra. The only question remaining is whether the
4 Agreement and California law as applied authorized California to
5 "exercise any powers [it] could not exercise in [the Agreement's]
6 absence." See 434 U.S. at 473.

7 "[W]hatever else may be said of the revolutionary
8 colonists who framed our Constitution, it cannot be doubted that
9 they respected the rights of individual states to pass laws that
10 protected human welfare, and recognized their broad police powers
11 to accomplish this goal." Rocky Mountain Farmers Union v. Corey,
12 913 F.3d 940, 945-46 (9th Cir. 2019). As the Supreme Court has
13 acknowledged, "[l]egislation designed to free from pollution the
14 very air that people breathe clearly falls within the exercise of
15 even the most traditional concept of what is compendiously known
16 as the police power." Huron Portland Cement Co. v. City of
17 Detroit, 362 U.S. 440, 442 (1960) (internal citations omitted).
18 It is well within California's police powers to enact legislation
19 to regulate greenhouse gas emissions and air pollution. Am. Fuel
20 & Petrochem. Mfrs. v. O'Keefe, 903 F.3d 903, 913 (9th Cir. 2018)
21 (citing Massachusetts, 549 U.S. at 522-23). Accordingly, the
22 Agreement does not allow California to exercise any power it
23 would not normally have. See U.S. Steel, 434 U.S. at 473.

24 Because each of the U.S. Steel factors weigh against
25 finding the Agreement and California law as applied enhances
26 California's power over that of the federal government, the
27 Agreement does not fall within the scope of the Compact Clause.

28 In a final attempt to persuade the court that the

1 Agreement and California law as applied violates the Compact
2 Clause, the United States argues in its reply that the court need
3 not consider the "classic indicia of a compact" from Northeast
4 Bancorp or the factors from U.S. Steel because the Clean Air Act
5 specifically provides congressional consent for "two or more
6 States to negotiate and enter into agreements or Compacts," but
7 does not explicitly provide consent to agreements between states
8 and foreign powers. (USA Reply at 43 (Docket No. 78).) Section
9 7402(c) of The Clean Air Act provides:

10 The consent of the Congress is hereby given
11 to two or more States to negotiate and enter
12 into agreements or compacts, not in conflict
13 with any law or treaty of the United States,
14 for (1) cooperative effort and mutual
15 assistance for the prevention and control of
16 air pollution and the enforcement of their
17 respective laws relating thereto, and (2)
18 the establishment of such agencies, joint or
19 otherwise, as they may deem desirable for
20 making effective such agreements or
21 compacts. No such agreement or compact
22 shall be binding or obligatory upon any
23 State a party thereto unless and until it
24 has been approved by Congress.

25 42 U.S.C. § 7402(c). The United States argues that under the
26 canon of expressio unius est exclusio alterius, the court must
27 infer that the express reference to agreements between states
28 serves to preclude agreements between states and foreign powers.
(USA Reply at 44.) In response, California argues the Clean Air
Act is irrelevant to the Compact Clause inquiry and expressio
unius is generally disfavored as an interpretative method.¹⁴ (CA

¹⁴ The State defendants have also argued that the United States improperly raised this argument in its reply and it did not allege Clean Air Act preemption in its First Amended Complaint, and for those reasons, the argument should be precluded. However, the United States resisted the state's characterization of their argument as a preemption claim at the

1 Reply at 28-29 (Docket No. 86).)

2 The court agrees that the Clean Air Act is irrelevant
3 to the Compact Clause inquiry. As the Supreme Court has
4 previously held, “[c]ongressional consent is not required for
5 interstate agreements that fall outside the scope of the Compact
6 Clause.” Cuyler, 449 U.S. at 440. However, “congressional
7 consent ‘transforms an interstate compact within the Compact
8 Clause into a law of the United States.’” New Jersey v. New
9 York, 523 U.S. 767, 811 (1998) (citing Cuyler, 449 U.S. at 438)
10 (internal modifications omitted) (emphasis added). Accordingly,
11 the court must necessarily first determine whether there is a
12 “compact” within the Compact Clause. As the court’s foregoing
13 analysis has demonstrated, the Agreement and California law as
14 applied does not qualify. Accordingly, congressional consent is
15 not necessary.

16 Similarly, the United States’ reliance on expressio
17 unius proves too much. The canon of construction “does not apply
18 to every statutory listing or grouping; it has force only when
19 the items expressed are members of an ‘associated group or
20 series’ justifying the inference that items not mentioned were
21 excluded by deliberate choice, not inadvertence.” Barnhart v.
22 Peabody Coal Co., 537 U.S. 149, 168 (2003). Critically, “[t]he
23 force of any negative implication [] depends on context.” Marx
24 v. General Revenue Corp., 568 U.S. 371, 381 (2013). The United
25 States offers no suggestion that Congress considered state
26 _____
27 hearing, and the state had an opportunity to entertain the
28 argument in its response. Accordingly, the court finds it
appropriate to consider the argument.

1 agreements with foreign entities and affirmatively chose not to
2 include them. Even if Congress affirmatively chose to exclude
3 any mention of agreements between states and foreign entities, it
4 does not follow that withholding preemptive consent from these
5 agreements amounts to a categorical bar.

6 On the motions before the court now, the court finds
7 the Agreement and California law as applied do not rise to the
8 level of a "compact" under the Compact Clause. Accordingly, the
9 court will grant defendants' motions for summary judgment as to
10 the Compact Clause. Again, the court expresses no view on
11 plaintiff's other theories, including the Foreign Affairs
12 Doctrine and the Foreign Commerce Clause.

13 IT IS THEREFORE ORDERED that the United States' motion
14 for summary judgment on the first and second causes of action of
15 the Complaint (Docket No. 12) be, and the same hereby is, DENIED;

16 AND IT IS FURTHER ORDERED that the State of California
17 and WCI, Inc.'s motions for summary judgment on the first and
18 second causes of action of the Complaint (Docket Nos. 46, 50) be,
19 and the same hereby are, GRANTED.

20 Dated: March 12, 2020



21 **WILLIAM B. SHUBB**
22 **UNITED STATES DISTRICT JUDGE**
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