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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 California<sup>1</sup> and other  
3 related individuals and entities<sup>2</sup> 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

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19  
20 <sup>1</sup> 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  
25 defendants will collectively be referred to as "State defendants"  
26 or "California."

27 <sup>2</sup> The Western Climate Initiative, Inc. defendants are the  
28 Western Climate Initiative, Inc. ("WCI, Inc."); Mary D. Nichols,  
in her official capacity as Vice Chair of WCI, Inc. and a voting  
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.<sup>3</sup>

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  
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27           <sup>3</sup> 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 provinces<sup>4</sup>

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27           <sup>4</sup> The Canadian provinces included British Columbia,  
28 Manitoba, Ontario, and Quebec.

1 and the governors of California and numerous other western  
2 states<sup>5</sup> 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  
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27 <sup>5</sup> 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.<sup>6</sup> (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

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26           <sup>6</sup> 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.”<sup>7</sup> (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 <sup>7</sup> 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. defendants<sup>8</sup>  
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

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24 <sup>8</sup> 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.<sup>9</sup> (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

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25 <sup>9</sup> 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,<sup>10</sup> 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 <sup>10</sup> 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. Bruffey, 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.<sup>11</sup> See Br. of

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26 <sup>11</sup> 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 Agreement<sup>12</sup> "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

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24  
25 <sup>12</sup> 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.<sup>13</sup>  
11 Seattle Master Builders, 786 F.2d at 1364 (citing Cuyler v.  
12 Adams, 449 U.S. 433, 440 (1981)).

13  
14 <sup>13</sup> 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 Monitoba 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.<sup>14</sup> (CA

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<sup>14</sup> 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 

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hearing, and the state had an opportunity to entertain the  
27 argument in its response. Accordingly, the court finds it  
28 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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