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

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

I. Facts & Procedural History

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

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

[2] The Western Climate Initiative, Inc. defendants are the 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 Blumenfled, in his official capacity as a board member of WCI, Inc. These defendants will collectively be referred to as "WCI, Inc. defendants."

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

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

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

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

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

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

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

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

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

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

1. The Western Climate Initiative

In 2007, the premiers of several Canadian provinces[4]

[4] The Canadian provinces included British Columbia, Manitoba, Ontario, and Quebec.

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

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

2. WCI, Inc.

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

WCI, Inc. provides technical support to its member

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

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

3. California's Cap-and-Trade Program

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

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

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

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

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

B. The Current Controversy

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

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

1. Quebec's Cap-and-Trade Program

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

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

2. The Programs are Linked

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

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

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

3. National Policy Changes & California's Program Expands

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

[6] Despite the 2013 Agreement's terms, California has modified its cap-and-trade program several times. (Sahota Decl. ¶ 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.)

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

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

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

its taxpayers."[7] (Iacangelo Decl. ¶ 7, Ex. 5 at 5.)

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

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

[7] The United States did not submit formal notification of its withdrawal from the Paris Accord until November 4, 2019. (Iacangelo Decl. ¶ 8, Ex. 6.) Under the Paris Accord's 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.)

The United States submitted a number of statements from former Governor Brown to describe California's response to President Trump's withdrawal from the Paris Accord and this 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.

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

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

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

On October 23, 2019, the United States brought this action against the state defendants and the WCI, Inc. defendants[8] seeking declaratory and injunctive relief under the Treaty Clause, the Compact Clause, and Foreign Commerce Clause of the United States Constitution and the Foreign Affairs Doctrine. (Docket No. 1.) In its First Amended Complaint, the United States specifically requested a declaration that the Agreement is

[8] The WCI, Inc. defendants and defendant Jared Blumenfeld, in his official capacity as Secretary for CalEPA, moved to dismiss the claims against them on January 6, 2020. (Docket No. 25.) This court granted WCI, Inc.'s motion with 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.)

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

Despite bringing additional claims under the Foreign Affairs Doctrine and the Foreign Commerce Clause, the United States moved for summary judgment on the Treaty Clause and Compact Clause alone on December 11, 2019. (USA Mot. for Summ. J. ("USA Mot.") (Docket No. 12).) The WCI, Inc. defendants and the State defendants also filed cross-motions for summary judgment on the Treaty Clause and Compact Clause alone on February 10, 2020.[9] (See WCI, Inc. Mot. for Summ. J. ("WCI, Inc. Mot.") (Docket No. 46-1); State Mot. for Summ. J. ("CA Mot.") (Docket No. 50).) Because the parties did not move for summary judgment on the Foreign Affairs Doctrine or the Foreign Commerce Clause, the court expresses no opinion on the merits of those claims in this Order.

II. Legal Standard

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

[9] The Environmental Defense Fund, Natural Resources Defense Council, and International Emissions Trading Association were permitted to intervene as defendants on January 15, 2020. (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.)

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

III. Discussion

A. The Treaty Clause

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

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

U.S. Const. Art. I, § 10, cl. 1.

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

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

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

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

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

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

[10] Vattel's treatise has been described as "the most well-known work on the law of nations in England and America at the time of the Founding." Anthony J. Bellia Jr. & Bradford R. 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.

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

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

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

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

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

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

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

549 U.S. at 519.

At the hearing and in the briefs, counsel for the United States argued that this fleeting reference to "treaties" specifically invoked Article I's Treaty Clause. (See USA Mot. at 1; Docket No. 88.) This court is at a loss to understand what 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

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

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

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

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

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

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

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

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

B. The Compact Clause

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

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

U.S. Const. Art. I, § 10.

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

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a mutual right to trade with enemy states of the other.

Article I's scope.

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

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

[12] The United States challenges the Agreement and "supporting California law was applied" under the Compact Clause. (FAC ¶ 164.) The court will construe that to include California 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.

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

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

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

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

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

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

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

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

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

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[13] Both sides acknowledge the Supreme Court has yet to explicitly apply the framework used to evaluate interstate agreements to those between states and foreign powers. (See USA Mot. at 19; CA Mot. at 27.) However, the Court has recognized that Chief Justice Taney's plurality opinion in Holmes, 39 U.S. (14 Pet.) at 570-71, is "not inconsistent with the rule of Virginia v. Tennessee." U.S. Steel Corp., 434 U.S. at 465 n.15. Other courts to consider agreements between foreign governments and states have applied the tests from Virginia and Northeast Bancorp. See, e.g., McHenry v. Brady, 163 N.W. 540, 545-47 (N.D. 1917) (finding drainage agreement between North Dakota and Monitoba did not implicate the Compact Clause under Virginia); In re Manuel P., 215 Cal. App. 3d 48, 66-69 (4th Dist. 1989) (finding program used to return nonresident minor aliens to 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.

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

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

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

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

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

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

In a final attempt to persuade the court that the

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

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

42 U.S.C. § 7402(c). The United States argues that under the canon of expressio unius est exclusio alterius, the court must infer that the express reference to agreements between states 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

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

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

Similarly, the United States' reliance on expressio unius proves too much. The canon of construction "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003). Critically, "[t]he force of any negative implication [] depends on context." Marx v. General Revenue Corp., 568 U.S. 371, 381 (2013). The United States offers no suggestion that Congress considered state

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

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

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

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

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

Dated: March 12, 2020

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE