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12 UNITED STATES DISTRICT COURT
13
14 EASTERN DISTRICT OF CALIFORNIA
15 SACRAMENTO DIVISION

16 UNITED STATES OF AMERICA,

17 Plaintiff,

18 v.

19 THE STATE OF CALIFORNIA; GAVIN
20 C. NEWSOM, in his official capacity as
21 Governor of the State of California; THE
22 CALIFORNIA AIR RESOURCES BOARD;
23 MARY D. NICHOLS, in her official
24 capacities as Chair of the California Air
25 Resources Board and as Vice Chair and a
26 board member of the Western Climate
27 Initiative, Inc.; WESTERN
28 CLIMATE INITIATIVE, INC.; JARED
BLUMENFELD, in his official capacities as
Secretary for Environmental Protection and as a
board member of the Western Climate
Initiative, Inc.; KIP LIPPER, in his official
capacity as a board member of the Western
Climate Initiative, Inc., and RICHARD
BLOOM, in his official capacity as a board
member of the Western Climate Initiative,
Inc.,

Defendants.

Case No. 2:19-cv-02142-WBS-EFB

PROFESSORS OF FOREIGN RELATIONS
LAW'S NOTICE OF MOTION AND
MOTION REQUESTING LEAVE TO FILE
AMICI CURIAE BRIEF; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF; AND [PROPOSED] ORDER
GRANTING MOTION FOR LEAVE TO FILE
AMICI CURIAE BRIEF OF PROFESSORS OF
FOREIGN RELATIONS LAW

Judge: Hon. William B. Shubb

Date: Not yet set

Time: Not yet set

Courtroom: 5 (14th Floor)

Action Filed: October 23, 2019

1 **NOTICE OF MOTION AND MOTION**

2 The Professors of Foreign Relations Law identified in the appendix to the accompanying,
3 proposed *Amici Curiae* brief respectfully move the Court for leave to file that *Amici Curiae* brief. The
4 motion is based on this Notice, the Memorandum of Points and Authorities, and the *Amici Curiae* brief.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 This Court may permit a non-party to participate as *amicus curiae* if it has “unique information
7 or perspective” on an issue raised by the parties, or if such an issue “has potential ramifications beyond
8 the parties....” *NGV Gaming Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061 (N.D.
9 Cal. 2005).

10 The extent, if any, to which an *amicus curiae* should be permitted to participate in a
11 pending action is solely within the broad discretion of the district court. *Pennsylvania*
12 *Environmental Defense Foundation v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa.
13 1989); *United States v. Gotti*, 775 F. Supp. 1157, 1158 (E.D.N.Y. 1991); *Leigh v. Engle*, 535 F.
14 Supp. 418, 420 (N.D. Ill. 1982). A court may grant leave to appear as an *amicus* if the information
15 offered is “timely and useful.” *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff’d mem.*,
16 782 F.2d 1033 (3rd Cir.), *cert. denied*, 476 U.S. 1141 (1986). Absent a statute to the contrary, no
17 distinction is made between the request of a private person for leave to appear as *amicus curiae*,
18 and one by an agent of the government. *Leigh*, 535 F. Supp. at 420.

19 An *amicus*, of course, is not a party to the litigation and participates only to assist the
20 Court. Nevertheless, “by the nature of things an *amicus* is not normally impartial.” *Gotti*, 755 F.
21 Supp. at 1158 (quoting *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970)). While the partiality of
22 an *amicus* is a factor to consider in deciding whether to allow participation, “there is no rule ...
23 that amici must be totally disinterested.” *Concerned Area Residents for the Environment v.*
24 *Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993) (quoting *Hoptowit v Ray*, 682 F.2d
25 1237, 1260 (9th Cir. 1982)).

26 District courts frequently welcome amicus briefs from non-parties concerning legal issues
27 that have potential ramifications beyond the parties directly involved or if the amicus has “unique
28 information or perspective that can help the court beyond the help that the lawyers for the parties

1 are able to provide.” *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (quoting *Ryan v.*
2 *Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997)).

3 The *amici* Professors of Foreign Relations Law identified individually in the appendix to the
4 accompanying, proposed *Amici Curiae* brief teach and pursue scholarship at numerous law schools
5 throughout the United States. Individually and collectively, they possess deep and longstanding
6 expertise in the fields of foreign relations law and international law, and concerning agreements of
7 various kinds between subnational governments. Specifically, they are familiar with numerous past
8 agreements between U.S. states and other jurisdictions.

9 These *amici* can provide a unique perspective regarding the kinds of agreements that are
10 properly deemed treaties under the Treaty Clause in Article I, section 10 of the U.S. Constitution. They
11 can similarly analyze what kinds of agreements are properly deemed compacts requiring congressional
12 approval under the Compact Clause in Article I, section 10 of the Constitution. *Amici* are also uniquely
13 qualified to address how this Court’s interpretation of the Compact Clause may affect the distribution
14 of authority between Congress and the executive branch with respect to foreign relations.

15 Moreover, these *amici* seek to bring to the attention of this Court numerous past agreements
16 between subnational governments in the United States and abroad that—like the California-Quebec
17 agreement at issue in this case—do not rise to the status of a treaty or compact within the meaning of
18 the Treaty and Compact Clauses of the Constitution.

19 Proposed *amici* respectfully suggest that the information and analysis contained in the attached
20 *Amici Curiae* brief may assist the Court in its deliberations in this case.

21 WHEREFORE, the identified Professors of Foreign Relations Law move for an order granting
22 leave to file their *Amici Curiae* brief.

23 Respectfully submitted,

24 Dated: February 14, 2020

25 /s/ Richard M. Frank
Richard M. Frank

26 Attorney for *Amici Curiae* Professors of
27 Foreign Relations Law

ORDER

On February 14, 2020, Professors of Foreign Relations Law filed a “Motion for Leave to File *Amici Curiae* brief” in this case. After considering the Motion and responses by the parties, the Court grants the Motion, orders the *Amici Curiae* brief to be filed, and will consider that brief in its deliberation in this case.

IT IS SO ORDERED.

Dated: _____

The Honorable William B. Shubb
United States Senior District Judge

1 USA v. State of California, et al.
2 United States District Court Eastern District of California
3 Case No. 2:19-cv-02142-WBS-EFB

4 **PROOF OF SERVICE**

5 I, Richard M. Frank, am employed in the County of Yolo. My business address is 400 Mrak
6 Hall Drive, Davis, California 95616, and email address is rmfrank@ucdavis.edu. I am over the age of
7 18 years and not a party to the above-entitled action.

8 On February 14, 2020, I served the following:

9 **PROFESSORS OF FOREIGN RELATIONS LAW'S NOTICE OF MOTION AND MOTION
10 REQUESTING LEAVE TO FILE *AMICI CURIAE* BRIEF; MEMORANDUM OF POINTS
11 AND AUTHORITIES IN SUPPORT THEREOF; AND [PROPOSED] ORDER GRANTING
12 MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF PROFESSORS OF FOREIGN
13 RELATIONS LAW**

14 **BY ELECTRONIC TRANSMISSION** by causing a true copy thereof to be electronically
15 delivered to the following person(s) or representative(s) at the email address(es) listed below,
16 via the Court's approved electronic filing service provider. I did not receive any electronic
17 message or other indication that the transmission was unsuccessful.

18 **SEE ATTACHED SERVICE LIST**

19 I declare under penalty of perjury that the foregoing is true and correct. Executed this 14th day
20 of February, 2020, at Sacramento, California.

21 _____
22 /s/ Richard M. Frank
23 Richard M. Frank
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1 USA v. State of California, et al.
2 United States District Court Eastern District of California
3 Case No. 2:19-cv-02142-WBS-EFB

4 **SERVICE LIST**

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