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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

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 capacities 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 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

BRIEF OF *AMICI CURIAE* PROFESSORS OF FOREIGN RELATIONS LAW

Judge: William B. Shubb
Courtroom: 5 (14th Floor)

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I. Interest of Amici[1]

Amici (listed in the Appendix) are Professors of Foreign Relations Law. Amici are familiar with past state agreements coordinating with other jurisdictions. Amici can provide perspective on what kinds of agreements should be deemed treaties under the Treaty Clause in Article I, § 10 of the U.S. Constitution ("No State shall enter into any Treaty, Alliance, or Confederation . . . .") and what kinds of agreements should be deemed compacts requiring congressional approval under the Compact Clause in Article I, § 10 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."). Amici can also address how the Court's interpretation of the Compact Clause may affect the distribution of authority between Congress and the executive branch with respect to foreign relations.

II. Summary of Argument

The modern era requires coordination among governments at all levels. The federal government has come to engage more and more with issues once deemed local, including environmental issues. At the same time, states have come to coordinate increasingly with each other and with transnational partners to address issues of shared regulatory concern. The Supreme Court has long recognized that such coordination, even when formalized in agreements or compacts, requires congressional approval under the Constitution's Compact Clause only when it "would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States." *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 472 (1978). California's agreement with Quebec does not encroach upon the supremacy of the United States. The executive branch's arguments to the contrary call into question a broad range of state agreements with other jurisdictions coordinating policy on questions of local concern.

Under California law, the California Air Resources Board establishes annual budgets for the total greenhouse gas emissions of all regulated sources in California and issues allowances that permit regulated sources to emit greenhouse gases in quantities equal to each established annual budget. California's annual budgets are set independently of any other governmental authority. California's

[1] No person or entity other than the amici curiae, their support staff, and their counsel authored this amicus brief in whole or in part or paid for its preparation in whole or in part.

acceptance of Quebec-issued allowances and other compliance instruments eases the compliance burden for corporations subject to California's cap-and-trade program by giving them more flexibility in buying, trading, and using allowances and other compliance instruments. This comes nowhere near to being a "Treaty, Alliance, or Confederation" in violation of the Constitution's Article I, § 10 – a designation that courts to date have applied only to the Civil War's Confederacy. *Williams v. Bruffy*, 96 U.S. 176, 182 (1877). Nor does it rise to the level of a compact or agreement requiring congressional consent. California's arrangement with Quebec is indeed between geographically distant subnational actors, includes a written agreement, and coordinates two administrative regimes in which meaningful sums of money are at stake. But this is also true of the Multistate Tax Compact upheld in *U.S. Steel Corp.* and of various other compacts that courts have held not to require congressional approval.

While the "United States" is the nominal plaintiff in this case, it bears noting that this case is entirely the initiative of the *executive branch*. Congress – the branch of the federal government constitutionally charged with reviewing state compacts – has been silent.[2] The executive branch offers no serious argument how California's arrangement with Quebec impedes U.S. foreign relations or encroaches on federal supremacy. Instead, it seeks to suppress state efforts on an issue of profound local concern simply by fiat. If accepted, this approach would effectively make the executive branch the gatekeeper to the Article I Compact Clause, increasing the power of the presidency still further with regard to both the states and Congress.

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[2] This amicus brief focuses only on the merits and does not address whether Congress's silence renders this case non-justiciable. *Cf.* Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to Senator Byron L. Dorgan (Nov. 20, 2001), *in Digest of United States Practice in International Law 2001*, at 180 (Sally J. Cummins & David P. Stewart eds., 2001) (stating that "the Constitution does not specifically assign responsibility for interpretation or enforcement of this clause to the Executive branch") [hereinafter Taft Memo]; *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring) (concluding that the issue of whether the President had the unilateral power to terminate a treaty was not ripe for review given that "Congress has taken no official action").

III. Argument

A. States and Cities Frequently Advance Local Interests by Engaging Transnationally.

In 1959, the governor of North Carolina led a trade mission to Europe. *See* Chris Whatley, Council of State Gov'ts, *State Official's Guide to International Affairs* 3 (2004), http://csg.org/knowledgecenter/docs/SOG03InternationalAffairs.pdf. Since then, state governments have entered into agreements with foreign national and subnational governments on "a wide array of subjects, including agriculture, climate change, education, energy, environmental cooperation, family support, hazardous waste, homeland security, investment, military cooperation, pollution, sister-state relations, tourism, trade, transportation, and water issues." Duncan B. Hollis, *Unpacking the Compact Clause*, 88 Tex. L. Rev. 741, 754 (2010); *see also* Michael J. Glennon & Robert D. Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* 60-76 (2016) (detailing how states and cities engage with foreign counterparts).

These developments stem from local concerns – the welfare, health, and safety of state residents. Starting early in U.S. constitutional history, states began coordinating to solve local problems. In *Virginia v. Tennessee*, the Supreme Court rejected the contention that an agreement between two states fixing their shared boundary was invalid because it had never received congressional approval. 148 U.S. 503 (1893). The Court held that the Compact Clause applies only to those agreements "directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 519. The Court indicated that agreements to cooperate around traditionally local concerns like public health would not require congressional approval. *See id.* at 518.

In today's interconnected world, the need for coordination has become far greater and less spatially focused than during the nineteenth century. Goods, services, intellectual property, technologies, money, people, corporations, diseases, and ecosystems all cross borders, and their regulation cannot be left to governments operating in isolation. This shift has led the federal government to become heavily involved in matters once thought to be mainly the domain of states, including environmental regulation. It has also led to more horizontal, vertical, and diagonal coordination among different levels of government. States routinely coordinate with cities and counties,

with other states, and with foreign counterparts, as well as with the federal government.

Over forty years ago, the Supreme Court made clear that states may coordinate without congressional approval not just on issues of bilateral concern across shared borders, but also on multilateral administrative matters. In *U.S. Steel Corp.*, the Court held that a "Multistate Tax Compact" aimed at coordinating the taxation of multistate corporations – a compact to which twenty-one states belonged at the time – did not require congressional approval. 434 U.S. at 454, 472-73, 479. Despite the Compact's creation of "an active administrative body with extensive powers delegated to it by the States," *id.* at 471, the Court rejected arguments that the Multistate Tax Compact presented problems for federal supremacy, including foreign relations, *id.* at 476-77. The Court noted that while, in the past, "most multilateral compacts [had] been submitted for congressional approval," this practice "may simply [have] reflect[ed] considerations of caution and convenience on the part of the submitting States [and] is not controlling." *Id.* at 471. Lower courts subsequently held congressional consent to be unnecessary for numerous multistate agreements, including the Master Settlement Agreement reached with tobacco companies and the Multistate Lottery Agreement.[3]

Agreements between U.S. states and foreign national or subnational governments have also become common. In a 2010 law review article, Duncan Hollis identified "over 340 concluded by forty-one U.S. states since 1955." Hollis, *supra*, at 744. Congress has reviewed fewer than a dozen of these agreements. *Id.* at 742. More than 100 of these agreements were made with China, Israel, or Japan – nations that are thousands of miles away from any U.S. state. *See id.* at 753. More than half were concluded in the decade between 2000 and 2010. *Id.* at 751. Although there has been no comprehensive update to Hollis's findings, it seems likely that many more such agreements have been made since 2010.

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[3] *See, e.g.*, *Star Sci. Inc. v. Beales*, 278 F.3d 339, 343, 360 (4th Cir. 2002) (rejecting a Compact Clause challenge to the Master Settlement Agreement between forty-six states and various tobacco companies, in which the tobacco companies committed to paying around $200 billion in exchange for liability releases); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1198 (C.D. Cal. 2000) (same); *Tichenor v. Mo. State Lottery Comm'n*, 742 S.W.2d 170, 172, 176 (Mo. 1988) (rejecting a Compact Clause challenge to the Multistate Lottery Agreement). The Council of State Governments collects information about state-to-state compacts through its National Center for Interstate Compacts, which is available at the website http://apps.csg.org/ncic/.

Examples of agreements for which congressional consent was never obtained include the following:

1. **The Conference of New England Governors and Eastern Canadian Premiers (NEG/ECP).** Established in 1973 by six New England states and five Eastern Canadian provinces, the NEG/ECP includes a coordinating committee and standing committees on cross-border issues including climate change, energy, transportation, and air quality. *Committees*, Coal. of New England Governors, https://www.coneg.org/neg-ecp/ (last visited Jan. 5, 2020). In 1998, NEG/ECP adopted the Mercury Action Plan, which set out recommended mercury emissions reduction targets, waste management protocols, and mercury stockpile management objectives, and created a task force to coordinate implementation. Comm. on the Env't, Conference of New England Governors & E. Canadian Premiers, *Mercury Action Plan 1998* (1998), https://www.mass.gov/files/documents/2016/08/op/negecp.pdf. In 2017, the NEG/ECP adopted an updated Climate Change Action Plan. Conference of the New England Governors & E. Canadian Premiers, *2017 Update of the Regional Climate Change Action Plan* (2017), https://www.coneg.org/wp-content/uploads/2019/01/2017-rccap-final.pdf.

2. **Reciprocal Agreement between the State of New York and Québec concerning Drivers' Licenses and Traffic Offenses.** Signed in 1988, this agreement between New York and Quebec allows drivers' license exchanges and requires reporting of certain traffic-related infractions between the parties. *See* Regulation respecting the Reciprocal Agreement between the State of New York and Québec concerning Drivers' Licenses and Traffic Offenses (CQLR, chapter C-24.2, r. 16) (Can.), http://legisquebec.gouv.qc.ca/en/pdf/cr/C-24.2,%20R.%2016.pdf. Other states have similar arrangements. *See, e.g.*, Ark. State Police, *Arkansas Driver License Study Guide* 6 (2019), https://static.ark.org/eeuploads/asp/ARKANSAS_DRIVER_LICENSE_manual_revision_(Corrected).pdf (referring to agreements with Manitoba, Germany, France, Taiwan, and South Korea).

3. **The Pacific NorthWest Economic Region (PNWER).** Created in 1991 by Alaska, Idaho, Oregon, Montana, Washington, Alberta, and British Columbia, the PNWER facilitates regional collaboration and coordination on international trade, economic development, the environment and natural resources, energy, and innovation. Pac. Nw. Econ. Region, *2018 Annual Report* 2 (2018), https://issuu.com/pacificnorthwesteconomicregion/docs/2018_pnwer_annual_report_-_web_vers;

History, Pac. Nw. Econ. Region, http://www.pnwer.org/history.html (last visited Jan. 4, 2020); *see also* Wash. Rev. Code § 43.147.010 (2019) (enacting the six PNWER framework articles into state law). The PNWER is governed by elected officers, executive members, and a delegate council including four legislators from each participating subdivision. *Organization Structure*, Pac. Nw. Econ. Region, http://www.pnwer.org/governance-structure.html (last visited Jan. 4, 2020).

4. **The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement.** Signed by eight states, Quebec, and Ontario in 2005, the Agreement sets standards for water use and management; creates a Regional Body to review water-use proposals and water management programs; and establishes a dispute settlement process. *See generally* Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement pmbl., Dec. 13, 2005, https://docs.ontario.ca/documents/2700/200040.pdf. In 2008, Congress consented to the Great Lakes-St. Lawrence River Basin Water Resources Compact, which is the interstate agreement that coordinates the participation of U.S. states in the Agreement and which refers to coordination with Quebec and Ontario. Pub. L. No. 110-342, 122 Stat. 3739 (2008). But congressional consent for the Agreement itself was neither sought nor provided. *See* Hollis, *supra*, at 757-58.

5. **Memorandum of Agreement Between the Consulate General of Mexico in Raleigh, North Carolina and the Government of the State of North Carolina of the United States of America Regarding Consular Notification and Access in Cases Involving Minors.** This 2015 agreement, which had an initial two-year duration, established procedures for North Carolina to notify the Mexican consulate if a Mexican minor came into its custody. Memorandum of Agreement Between the Consulate General of Mexico in Raleigh, North Carolina and the Government of the State of North Carolina of the United States of America Regarding Consular Notification and Access in Cases Involving Minors, Mex.-N.C., Mar. 25, 2015, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/moa%20%20english%20signed.pdf. At least four other states and five California counties have similar agreements in place. Office of the Assistant Sec'y for Planning and Evaluation, U.S. Dep't of Health & Human Servs., *Emerging Child Welfare Practice Regarding Immigrant Children in Foster Care: Collaborations with Foreign Consulates* 10-13 (2013), https://aspe.hhs.gov/system/files/pdf/76736/ib_MOUsWithConsulates.pdf.

6. **International Association of Insurance Supervisors (IAIS)**. Chartered in 1994 by sixteen states, the National Association of Insurance Commissioners (NAIC), and sixty-seven foreign countries, the IAIS is an international insurance standard-setting organization, to which all 50 states and more than 100 foreign countries now belong. Int'l Ass'n of Ins. Supervisors, *1994 Annual Report* pt. IV (1995), https://www.iaisweb.org/page/about-the-iais/annual-report/previous-annual-reports//file/74023/1994-annual-report; *About the IAIS*, Int'l Ass'n of Ins. Supervisors, iaisweb.org/page/about-the-iais (last visited Jan. 7, 2020). Not until sixteen years after the formation of the IAIS did Congress make any legislative reference to it – and then only to provide a federal presence at IAIS negotiations. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 502, 124 Stat. 1581 (2010).

These examples vary widely in geography, form, and magnitude. With respect to geography, one of these agreements (New York-Quebec) involves two jurisdictions that share a border. All the rest bring together at least some governments that are non-contiguous. With respect to form, a number of these agreements make substantial use of "shall," with 14 uses in the standard framework legislation for the PNWER (as adopted by Washington State); 15 uses in the New York-Quebec Agreement, and more than 150 uses in the Great Lakes Agreement. Some require waiting periods before withdrawal is permissible. The North Carolina-Mexico Agreement requires 60 days notice (art. 13); the New York-Quebec Agreement requires 90 days notice (art. 8); and the Great Lakes Agreement requires 12 months notice (art. 707). With respect to magnitude, these agreements vary widely, with some narrowly focused and others serving as platforms for substantial and ongoing regulatory cooperation.

All of these examples reflect the ways in which local issues have developed transnational dimensions over the last half-century. They do not center on war, peace, alliances, or other classic matters of high diplomacy. To the extent that they interact with policies of the federal government, it is mostly because the federal government has come to engage with what were once local issues – licensing, policing, insurance, and the environment. If the executive branch's arguments in this case were correct, each of these agreements would be potentially invalid. But the executive branch's arguments are not correct.

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B. California's Agreement with Quebec Is Not a Treaty, Alliance, or Confederation.

The Constitution places an absolute bar on states entering into treaties, alliances, or confederations. U.S. Const. art. I, § 10. This bar is an exceptionally high one. Amici are aware of only one event in U.S. history giving rise to a judicially determined violation of this clause – the Civil War's Confederacy. *See Williams*, 96 U.S. at 182. In contrast to compacts and agreements, Congress lacks the power to consent to treaties, alliances, or confederations made by states, whether these are with foreign powers or among states themselves.

California's agreement with Quebec is a far cry from a treaty, alliance, or confederation for purposes of Article I, § 10. First, this agreement is not about war or peace or other matters of high diplomacy. Rather, it is about giving corporations more flexibility in complying with a California regulatory program aimed at environmental protection. "The States have broad authority to enact legislation for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014). And the Supreme Court has long recognized that a "state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); *see also Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (quoting *Tenn. Copper Co.*, 206 U.S. at 237).

The executive branch argues that California's agreement must be a treaty because it is "of a political character." Pl. United States of America's Notice of Mot., Mot. for Summ. J., and Br. in Supp. Thereof 14, ECF No. 12 (quoting *Virginia*, 148 U.S. at 519) [hereinafter MSJ]. But the *Virginia* Court, following Justice Story, used "political character" in a very narrow sense. Noting the clause's association of the word "treaty" with "alliance" and "confederation," the Court observed that the word "treaty" must "apply to treaties of a political character; *such as* treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges." *Virginia*, 148 U.S. at 519 (emphasis added) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1403 (1833)). California's agreement with Quebec is not of a political character in any of these senses: it is not a treaty of alliance for war and peace; it is not a

confederation for mutual government; it does not cede California's sovereignty to Quebec; and it does not confer general commercial privileges.[4] California retains full regulatory authority over the emission of greenhouse gases within its territory, and California has agreed with Quebec on the mutual recognition of compliance instruments to ease the burden of compliance with California's own regulation of greenhouse gas emitters.

Indeed, California's agreement with Quebec seems no more consequential – and in some ways less consequential – than interstate agreements that have fallen below the threshold for constituting *compacts* requiring congressional approval. The executive branch points to the agreement's formal vocabulary, including the word "shall," MSJ at 16, but this same vocabulary is used over 100 times in the original Multistate Tax Compact considered in *U.S. Steel Corp*. *See* Model Multistate Tax Compact (Multistate Tax Comm'n 1966), http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model-Multistate-Tax-Compact.pdf.aspx. The executive branch also emphasizes the large sums of money at stake in the combined auctions of allotments, MSJ at 17, but these sums are likely dwarfed by the amounts affected by the Multistate Tax Compact, paid by the tobacco companies in the Master Settlement Agreement, or implicated in the Multistate Lottery Agreement. Finally, the agreement between California and Quebec has an explicit withdrawal provision, as did the Multistate Tax Compact. *See* Model Multistate Tax Compact, *supra*, art. X. If these other agreements do not even require congressional approval as compacts, it is inconceivable that California's agreement with Quebec amounts to a treaty for purposes of Article I, § 10.

The weakness of the executive branch's argument is further evidenced by its unwillingness to take its own medicine. Under executive branch practice in the modern era, most binding international agreements entered into by the United States are not joined as "treaties" pursuant to the Treaty Clause

[4] Treaties conferring "general commercial privileges" referred to treaties of amity and commerce, like those the United States concluded with France, the Netherlands, Sweden, Prussia, and Morocco in the years before adoption of the Constitution. *See* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202, 2218 (2015) (listing treaties). Such treaties granted broad rights, in stark contrast to the narrowly focused agreement between California and Quebec. The 1778 treaty with France, for example, guaranteed French subjects "all the rights, liberties, privileges, immunities, and exemptions in trade, navigation and commerce, whether in passing from one port in the said states to another, or in going to and from the same, from and to any part of the world, which [other] nations do or shall enjoy." Treaty of Amity and Commerce art. III, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12.

of Article II, § 2. From 1939 to 1999, "more than 90 percent of the international agreements concluded" were made through mechanisms other than the Treaty Clause. Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate* 40 (2001). The executive branch does not consider California's agreement with Quebec to be one that the federal government would have to conclude as a treaty. MSJ at 15. In the environmental context, the executive branch joined the United States to the 1979 Convention on Long-Range Transboundary Air Pollution, to the 2013 Minamata Convention on Mercury, and to the 2015 Paris Agreement on Climate without receiving the advice and consent of the Senate or express congressional approval. Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. Chi. L. Rev. 1675, 1737 & n.227 (2017).

To the extent that there is any distinction between "Treaty" in Article I and "Treaties" in Article II, the triggering threshold for a treaty under Article I should be *higher*. Article I, § 10 puts "Treaty" in company with "Alliance" and "Confederation," which are particularly robust forms of international commitments. Moreover, Article II, § 2 offers no explicit constitutional pathway other than "Treaties" for the federal government to use in making international agreements and compacts, suggesting a potentially more capacious concept of "Treaties." If California's agreement with Quebec would not need to be made as a treaty for Article II purposes, it follows *a fortiori* that it cannot be a treaty for Article I purposes.

C. California's Agreement with Quebec Is Not a Compact Requiring Congressional Approval.

The text of the Constitution contains a single Compact Clause applicable to agreements and compacts "with another State, or with a foreign Power." U.S. Const. art. I, § 10. The Supreme Court has signaled a cohesive approach to this clause, discussing state-to-foreign-power and state-to-state agreements without distinguishing between them. *See U.S. Steel Corp.*, 434 U.S. at 464-71 (describing the development of prior cases under the Compact Clause);[5] *see also* Hollis, *supra*, at 766-69

[5] In the lone Supreme Court case considering a potential agreement between a state and a foreign power, "[t]he members of the Court, after the fullest discussion, [were] so divided that no opinion [could] be delivered as the opinion of the Court." *Holmes v. Jennison*, 39 U.S. 540, 561 (1840) (plurality opinion) (Taney, C.J.). Chief Justice Taney and three other justices interpreted the Compact Clause capaciously in what the Court in *U.S. Steel Corp.* later termed a "neglected essay." *See* 434 U.S. at 467. The potential agreement between Vermont and Canada at issue in *Holmes* involved a

(acknowledging the broad consensus that there is a single Compact Clause although arguing for a different approach). The *Restatement (Third) of Foreign Relations Law* observes that "[b]y analogy with inter-State compacts, a State compact with a foreign power requires Congressional consent only if the compact tends 'to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States.'" Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. f (Am. Law Inst. 1987) (quoting *Virginia*, 148 U.S. at 519); *cf. Ne. Bancorp Inc. v. Bd. of Governors*, 472 U.S. 159, 175 (1985) (reasserting this test for state-to-state compacts). A 2001 State Department memo analyzing an agreement between Missouri and Manitoba indicated that "[t]he Department ordinarily looks to *Virginia v. Tennessee*, 148 U.S. 503 (1893), . . . although that case did not involve a compact with a foreign power." Taft Memo, *supra*, at 181. And significantly, the executive branch's motion for summary judgment in this case does not argue that a different standard should be applied to agreements between states and foreign jurisdictions. *See* MSJ at 18-25 (referencing *Virginia*, *U.S. Steel Corp.*, and *Northeast Bancorp*).

California's agreement with Quebec reflects what the regulations and practices of both jurisdictions already provided for (the trading of allowances, joint auctions, and the use of administrative bodies) and provides for continued communications. Notably, it "does not, will not and cannot be interpreted to restrict, limit or otherwise prevail over relevant national obligations . . . and each Party's sovereign right and authority to adopt, maintain, modify, repeal or revoke" regulations or legislation. 2017 Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions 1, Sept. 22, 2017, https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf [hereinafter California-Quebec Agreement]. Nor does it commit the parties to changing their substantive laws, provide for binding dispute settlement, or prohibit immediate withdrawal. Article 14 explicitly states that the agreement "does not modify any existing statutes and regulations nor does it require or commit the Parties . . . to create new statutes or regulations." *Id.* art. 14. Given the absence of such features, it does not cross the threshold for a

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particularly sensitive subject matter – extradition – which the Court subsequently held is "a national power; it pertains to the national government and not to the states." *Valentine v. United States* ex rel. *Neidecker*, 299 U.S. 5, 8 (1936).

compact that requires congressional consent. By contrast, an agreement under which a state made a binding and inescapable commitment to undertake specific emissions reductions would be far more problematic. *See Massachusetts*, 549 U.S. at 519 (remarking in passing that Massachusetts "cannot negotiate an emissions treaty with China or India").

Instead, California's agreement with Quebec coordinates regulatory practices and channels reciprocal behavior in a way quite similar to the Multistate Tax Compact. As in *U.S. Steel Corp.*, California's agreement "does not purport to authorize the member[s] . . . to exercise any powers they could not exercise in its absence." *U.S. Steel Corp.*, 434 U.S. at 473. California and Quebec have hired the Western Climate Initiative, Inc. (WCI, Inc.) to provide administrative and technical support, but there has been no "delegation of sovereign power" to WCI, Inc. *See id.* And as in *U.S. Steel Corp.*, California and Quebec "retain[] complete freedom" to change their laws. *See id.* Indeed, in light of these features, California's agreement with Quebec may not rise to the level of a compact at all, let alone a compact requiring congressional consent. *See Ne. Bancorp*, 472 U.S. at 175 (stating that "several of the classic indicia of a compact are missing" where, among other things, "[n]either [party's] statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally").

Furthermore, California's agreement with Quebec provides for ready withdrawal. California "may withdraw from the Agreement by giving written notice of intent to withdraw." California-Quebec Agreement art. 17. While California "shall endeavor" to provide twelve months of notice in advance of withdrawal, this is simply a call for good-faith efforts. *See id.* After withdrawal, California is subject only to an ongoing commitment to keep information shared by Quebec confidential, unless disclosure of this information is required "under a law or following a court order." *Id.* arts. 15, 17. Overall, this withdrawal provision is not much different from that of the original Multistate Tax Compact, which allowed for withdrawal but provided that "[n]o withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal." *See* Model Multistate Tax Compact, *supra*, art. X; *see also U.S. Steel Corp.*, 434 U.S. at 473 (noting that "each State is free to withdraw at any time").

California's agreement with Quebec also "does not seem functionally different than other forms

of regulatory harmonization between U.S. states and Canadian provinces, such as on the Great Lakes or concerning drivers' licenses and traffic offenses." Sharmila L. Murthy, *The Constitutionality of State and Local 'Norm Sustaining Actions' on Global Climate Change: The Foreign Affairs Federalism Grey Zone*, 5 U. Pa. J.L. & Pub. Aff. (forthcoming 2020) (manuscript at 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475475. California and Quebec do not have a shared physical border, but they do have multinational corporations in common. As with tax policy, insurance policy, and other forms of corporate regulation, there are benefits for both regulators and the regulated in jurisdictional coordination.

In asserting that California's agreement with Quebec interferes with the just supremacy of the United States, the executive branch makes two related arguments.[6] First, the executive branch argues that California is not acting out of local concern. MSJ at 20-21. As noted above, however, the Supreme Court has long recognized that states have an interest in protecting their environments. *See Tenn. Copper Co.*, 206 U.S. at 237. This remains true when harms cross borders, for "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale . . . , that the forests on its mountains . . . should not be further destroyed or threatened by acts of persons beyond its control." *Id.* at 238. Climate change is an appropriate matter of local concern for California, with its long coastline, reliance on the Sierra snowpack, and economic dependence on weather. The fact that California officials have sometimes described themselves as running their own foreign policy does not change the local nature of California's concerns. In *U.S. Steel Corp.*, the Court focused squarely on "impact," 434 U.S. at 472, and in particular on whether an agreement contained "provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States." *Id.*; *cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2418, 2420 (2018) (focusing on the substance of a regulation rather than on the intent of the President in making it). Regardless of the rhetoric of some state officials, the core question for constitutional purposes is the

[6] The executive branch also suggests that this Court should draw a negative inference from the fact that Congress has occasionally approved state-to-foreign-power compacts of less significance. MSJ at 22. As the Supreme Court found in *U.S. Steel Corp.*, however, this practice "may simply [have] reflect[ed] considerations of caution and convenience on the part of the submitting States [and] is not controlling." 434 U.S. at 471.

impact of California's agreement.

Second, the executive branch argues that California's agreement with Quebec "could complexify the federal government's ability to negotiate competitive agreements in the foreign arena with the entirety of the economy at its back." MSJ at 21. The executive branch offers no specific explanation why this might be the case, instead confining itself to the general proposition that actions taken by states inevitably reduce national leverage. This reasoning is doctrinally unmoored and, if accepted, would bar basically every kind of cross-border agreement. The executive branch inaptly points to the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). In *Garamendi*, California sought to use an insurance disclosure law to help individuals identify insurance claims stemming from the Holocaust. 539 U.S. at 408-10. Noting both the "President's authority to provide for settling claims in winding up international hostilities" and the "weakness of the State's interest" in the issue, *id.* at 424, 425, the Supreme Court held the California law preempted. In contrast to *Garamendi*, the present case does not implicate the President's authority to settle claims – a power that the Supreme Court *subsequently* described as a "narrow and strictly limited authority." *See Medellín v. Texas*, 552 U.S. 491, 532 (2008). Nor does this case raise only "weak" local concerns in light of the horrific consequences that climate change will wreak within California.

Furthermore – and also in contrast to *Garamendi* – the executive branch has no unilateral foreign affairs power to preempt California's underlying regulation, the cap-and-trade program it established through state law. *See Medellín*, 552 U.S. at 531-32 (concluding that the President's foreign affairs powers do not extend to an act that "reaches deep into the heart of the State's police powers and compels state courts to . . . set aside neutrally applicable state laws"); *cf. Massachusetts*, 549 U.S. at 533 (deeming irrelevant the executive branch's concern that "regulating greenhouse gases might impair the President's ability to negotiate"). California's cap-and-trade program exists independent of its arrangement with Quebec. That program and related California programs are the main source of whatever economic consequences stem from California's efforts to combat climate change. California's coordination with Quebec, by contrast, serves mainly to give businesses more flexibility in their compliance. As in *U.S. Steel Corp.*, the mere fact of coordination with other jurisdictions does not "encroach upon the power of the United States with respect to foreign relations." 434 U.S. at 476.

D. The Executive Branch's Attempt to Assert Congress's Prerogatives Under the Compact Clause is Problematic.

The written Constitution deliberately hedges the President in with checks and balances: Congress is entrusted with substantial powers over foreign affairs, including the power to "declare War" and to "regulate Commerce with foreign Nations," as well as the requirement that two-thirds of the Senate approve the making of treaties. U.S. Const. art. I, § 8 & art. II, § 2. Yet in practice, as Justice Jackson warned, "[t]he Constitution does not disclose the measure of the actual controls wielded by the modern presidential office." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). "Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity." *Id.*

The Compact Clause requires the "Consent of Congress" for certain state agreements with foreign powers, not the consent of the executive branch. U.S. Const. art. I, § 10. As the State Department's memorandum acknowledged in 2001, "[t]he Constitution does not specifically assign responsibility for interpretation or enforcement of this clause to the Executive branch." Taft Memo, *supra*, at 180. In this case, however, the executive branch rather than Congress is arguing for enforcement of the Compact Clause – and is doing so based on an interpretation that is in stark tension with *U.S. Steel Corp.*

The executive branch invokes the President's "'plenary and exclusive power' in conducting affairs 'as the sole organ of the federal government in the field of international relations.'" MSJ at 1 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); *see also* MSJ at 16 (citing *Curtiss-Wright*). The motion does not reveal that the Supreme Court has expressly disavowed this sweeping language. In *Zivotofsky v. Kerry*, the Court rejected the executive branch's reliance on *Curtiss-Wright*, "declin[ing] to acknowledge that unbounded power." 135 S. Ct. 2076, 2089 (2015). The Court noted: "In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. . . . It is not for the President alone to determine the whole content of the Nation's foreign policy." *Id.* at 2090; *accord id.* at 2115-16 (Roberts, C.J., dissenting) (observing that that "[t]he expansive language in *Curtiss-Wright* casting the President as the 'sole organ' of the Nation in foreign affairs certainly has attraction for members of the

Executive Branch . . . . [b]ut our precedents have never accepted such a sweeping understanding of executive power," and noting that "the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action").

In *Medellín v. Texas*, 552 U.S. 491 (2008), and *Bond v. United States*, 572 U.S. 844 (2014), the Supreme Court signaled wariness of executive branch efforts to dismiss federalism concerns through the invocation of foreign affairs. Yet in this case, the executive branch ignores the Supreme Court's warning. Instead, it seeks to strip power from the states, install itself as the gatekeeper to Article I's Compact Clause, and prevail through unsupported assertions about impacts on negotiations. In the face of congressional silence, it asks this Court to hold that states are now barred from coordinating on regulatory issues that have long been recognized as proper subjects of state attention. The executive branch's arguments are not only in tension with *Medellín* and *Bond*, but also inconsistent with *U.S. Steel Corp.* and other Compact Clause precedents from the Supreme Court. Consistent with these precedents, and the fundamental principles of structural checks and balances, this Court should reject the arguments of the executive branch.

IV. Conclusion

Climate change is a problem that is local, national, and global. California's interests in combatting it stem from concerns that are close to home – the protection of its coastline, crops, and snowpack, and the prevention of drought, extreme weather, and wildfires. California's agreement with Quebec does not threaten the supremacy of the United States. Instead, it accomplishes a far more mundane and permissible goal: easing the compliance burden for corporations subject to California's cap-and-trade program by giving them more flexibility in purchasing, trading, and using allowances and other compliance instruments. To treat this agreement as a compact requiring congressional approval would needlessly hamper states' ability to pursue their own interests and, in the process, hand even more structural power to the executive branch.

Respectfully submitted,

Dated: February 14, 2020

/s/ Richard M. Frank
Richard M. Frank

Attorney for *Amici Curiae* Professors of Foreign Relations Law

Appendix

List of Amici

Amici are listed in alphabetical order, and affiliations are given only for purposes of identification.

Evan J. Criddle is the Ernest W. Goodrich Professor at William & Mary Law School. He has published widely on international law and U.S. foreign relations law, including in the *American Journal of International Law*, the *European Journal of International Law*, the *Virginia Journal of International Law*, and the *Yale Journal of International Law*. He chairs the International Legal Theory Interest Group of the American Society of International Law.

Kristina Daugirdas is Professor of Law at the University of Michigan Law School. She has written extensively about international law, international institutions, and U.S. foreign relations law, and is a member of the Board of Editors of the *International Organizations Law Review*. Before joining the Michigan faculty, she served as an Attorney-Adviser in the Office of the Legal Adviser at the U.S. Department of State.

William S. Dodge is Martin Luther King, Jr., Professor of Law and John D. Ayer Chair in Business Law at the University of California, Davis, School of Law. His scholarship on foreign relations law has appeared in the *Columbia Law Review*, the *Harvard Law Review*, and the *Yale Law Journal*. From 2011 to 2012, he served as Counselor on International Law to the Legal Adviser at the U.S. Department of State. From 2012 to 2018, he served as Co-Reporter for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018).

Jean Galbraith is Professor of Law at the University of Pennsylvania Carey Law School. She has published widely on U.S. foreign relations law, including in the *Cornell Law Review*, the *Harvard Law Review*, the *Michigan Law Review*, the *NYU Law Review*, the *University of Chicago Law Review*, and the *Virginia Law Review*. She currently serves as the Editor of the Contemporary Practice of the United States (CPUS) section of the *American Journal of International Law*.

Michael J. Glennon is Professor of International Law at the Fletcher School of Law and Diplomacy, Tufts University. He is the author of *Constitutional Diplomacy* (1990) and co-author, with

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Monica Hakimi is the James V. Campbell Professor of Law at the University of Michigan Law School, where she has also served as the Associate Dean for Academic Programming. She has written extensively on issues relating to U.S. war powers. Before entering academia, she was an Attorney-Adviser in the Office of the Legal Adviser at the U.S. Department of State.

Sharmila L. Murthy is an Associate Professor at Suffolk University. Her recent research has focused on foreign affairs federalism in the context of climate change, including a forthcoming article in the *University of Pennsylvania Journal of Law & Public Affairs*. She has also written extensively about international environmental law and its intersection with human rights law, with articles appearing in the *Berkeley Journal of International Law*, the *Duke Journal of Comparative & International Law*, and the *Virginia Environmental Law Journal*.

John T. Parry is Associate Dean of Faculty and Edward Brunet Professor of Law at Lewis & Clark Law School. He has written several law review articles and book chapters on U.S. foreign relations law and transnational criminal law, including in the *Boston University Law Review*, the *Georgetown Law Journal*, the *Journal of National Security Law*, and the *Virginia Journal of International Law*. He is a member of the American Law Institute and was a member of the Members' Consultative Group for the *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018).

Kal Raustiala is the Promise Institute Professor of Comparative and International Law at UCLA Law School and Director of the UCLA Ronald W. Burkle Center for International Relations. His scholarship has appeared in the *American Journal of International Law*, the *European Journal of International Law*, the *NYU Law Review*, the *Virginia Law Review*, the *Texas Law Review*, and many others. A graduate of Harvard Law School, he is a life member of the Council on Foreign Relations and past Vice President of the American Society of International Law.

Robert D. Sloane is Professor of Law and R. Gordon Butler Scholar in International Law at Boston University School of Law. He has published widely in diverse areas of international law and

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David L. Sloss is the John A. and Elizabeth H. Sutro Professor of Law at Santa Clara University, where he teaches courses on both international law and constitutional law. He has published numerous law review articles on U.S. foreign relations law, including articles in the *Stanford Law Review*, the *Cornell Law Review*, the *Yale Journal of International Law*, and the *Harvard International Law Journal*. He is the author of *The Death of Treaty Supremacy: An Invisible Constitutional Change* (2016), which presents a comprehensive historical analysis of the relationship between treaties and state law in the U.S. constitutional system.

Peter J. Spiro is Charles Weiner Professor of Law at Temple University Law School. He has written on issues relating to international agreements and foreign relations federalism in such journals as the *Stanford Law Review*, the *Texas Law Review*, the *Colorado Law Review*, and *Law and Contemporary Problems*, as well as the *New York Times* and the *Wall Street Journal*. He is a former member of the U.S. Department of State's Advisory Committee on Diplomatic Documentation.

Beth Van Schaack is the Leah Kaplan Visiting Professor in Human Rights at Stanford Law School where she teaches a range of international law courses. Her scholarship covers issues of U.S. foreign policy, human rights, and international law. She is a member of the U.S. State Department's Advisory Committee on International Law and a former Principal Deputy Assistant Secretary of State.

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

PROOF OF SERVICE

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

On February 14, 2020, I served the following:

BRIEF OF *AMICI CURIAE* PROFESSORS OF FOREIGN RELATIONS LAW

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

SEE ATTACHED SERVICE LIST

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

/s/ Richard M. Frank
Richard M. Frank

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

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