A. Marisa Chun (SBN 160351)
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: 415.986.2800
MChun@crowell.com

Harold Hongju Koh (*pro hac vice* pending)
YALE LAW SCHOOL
PETER GRUBER RULE OF LAW CLINIC
P.O. Box 208215
New Haven, CT 06520
Telephone: 203.432.4932
harold.koh@ylsclinics.org

Attorneys for Amici Curiae
Former U.S. Diplomats and Government Officials

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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 board member of the 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.

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

NOTICE OF MOTION AND CONSENT MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FORMER U.S. DIPLOMATS AND GOVERNMENT OFFICIALS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Proposed] Order Concurrently Lodged

Judge: Hon. William B. Shubb
Date: February 24, 2020
Time: 01:30 p.m.
Crtrm.: 5, 14th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 24, 2020 at 01:30 p.m. or as soon as the matter may be heard before the Honorable William B. Shubb, in Courtroom 5 of the U.S. District Court for the Eastern District of California, 501 I Street, Sacramento, California 95814, proposed *amici curiae* Former U.S. Diplomats and Government Officials (identified in the Appendix to the accompanying proposed *amici curiae* brief as Susan Biniaz, Antony Blinken, Carol M. Browner, William J. Burns, Stuart Eizenstat, Avril D. Haines, John F. Kerry, Gina McCarthy, Jonathan Pershing, John Podesta, Susan E. Rice, Wendy R. Sherman and Todd D. Stern), by and through undersigned counsel, will and hereby do respectfully move for leave to file the accompanying *amici curiae* brief in support of the State Defendants'[1] Opposition to Plaintiff's Summary Judgment Motion and their Cross-Motion for Summary Judgment (Dkt. Nos. 49, 50, 50-1), pursuant to this Court's Scheduling Order of February 6, 2020. (Dkt. No. 43). All parties have consented to this motion and a Joint Stipulation to Shorten Time for Hearing of Motions of Proposed Amici for Leave to File Briefs for the February 24 hearing date has been filed. (Dkt. No. 63). A copy of the proposed brief of *amici curiae* is attached as Exhibit A to this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD FOR MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

District courts enjoy broad discretion to permit non-parties to participate in an action as *amici curiae* and, generally, courts have exercised "great liberality" in permitting the filing of *amicus* briefs. *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C06-1254 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007). Accordingly, this Court has granted motions for leave to file *amicus curiae* briefs, especially when the unique interests and perspective of *amici* are appropriate for consideration and may substantially assist the Court's decision-making process.

[1] The State Defendants are 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 Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

As Judge O'Neill observed, "[P]articipation of amicus curiae may be appropriate where legal issues in a case have potential ramifications beyond the parties directly involved." *Rocky Mountain Farmers Union v. Goldstene*, No. CV-F-09-2234 LJO DLB, 2010 WL 1949146, at *2 (E.D. Cal. May 11, 2010). *Amici* fulfill the "classic" role of *amicus curiae* by "assisting in a case of general public interest, supplementing the assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration." *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citing *Miller-Wohl Co. v. Comm'r of Labor Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)). In this case, this Court has indicated its willingness to entertain *amicus* briefs in connection with the parties' cross-motions for summary judgment. *See* Order Re: Cross-Motions for Summary Judgment Scheduling Order, Dkt. No. 43 (ordering that "amici, if any, shall submit briefs" by February 18, 2020).

II. THE EXPERIENCE AND EXPERTISE OF *AMICI CURIAE* WILL ASSIST THE COURT IN ITS CONSIDERATION OF THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Proposed *amici* are former United States diplomats and government officials. They have served under presidents from both major political parties to shape U.S. foreign and climate policy over many decades, including by negotiating treaties and international climate agreements. Proposed *amici* believe in, and have long worked for, federal programs, policies, negotiations, and prerogatives to address the dangers of climate change. The Appendix to the proposed brief of *amici curiae*, which is attached hereto as Exhibit A, lists their qualifications.

The former United States diplomats and government officials can offer a unique perspective on the issues presented here, thereby assisting the Court in resolving them. Based on their decades of real-world experience as federal officials and negotiators, *amici* explain why Plaintiff cannot sustain its unsubstantiated claims that Defendant State of California's "linkage memorandum" and regulations authorizing a cap-and-trade program linked with Quebec's program would interfere with foreign affairs, foreign commerce, United States diplomacy or negotiations, or federal constitutional prerogatives, particularly the Compact and Treaty Clauses of the United States Constitution. If granted leave to file, the former United States diplomats and

government officials can lend their unique perspective with regards to the impact, if any, of subnational environmental programs on the negotiation and operation of international climate agreements.

For these reasons, the former United States diplomats and government officials respectfully request that this Court grant their unopposed motion for leave to file their attached *amici curiae* brief.

Dated: February 18, 2020

Respectfully submitted,

/s/ A. Marisa Chun

A. Marisa Chun
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: 415.986.2800
MChun@crowell.com

Harold Hongju Koh
YALE LAW SCHOOL
PETER GRUBER RULE OF LAW CLINIC
P.O. Box 208215
New Haven, CT 06520
Telephone: 203.432.4932
harold.koh@ylsclinics.org

Attorneys for Amici Curiae
Former U.S. Diplomats and Government Officials

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically transmitted to the Clerk's Office using the U.S. District Court for the Eastern District of California's CM/ECF System for filing. Notice of this filing will be served by e-mail to all parties by operation of the Court's electronic filing system or by mail as indicated on the Notice of Electronic Filing.

Dated: February 18, 2020

/s/ A. Marisa Chun
A. Marisa Chun

EXHIBIT A

A. Marisa Chun (SBN 160351)
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: 415.986.2800
MChun@crowell.com

Harold Hongju Koh (*pro hac vice* pending)
YALE LAW SCHOOL
PETER GRUBER RULE OF LAW CLINIC
P.O. Box 208215
New Haven, CT 06520
Telephone: 203.432.4932
harold.koh@ylsclinics.org

Attorneys for Amici Curiae
Former U.S. Diplomats and Government Officials

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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 board member of the 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.

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

BRIEF OF *AMICI CURIAE* FORMER U.S. DIPLOMATS AND GOVERNMENT OFFICIALS IN SUPPORT OF (1) STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND (2) STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Judge: Hon. William B. Shubb
Date: March 9, 2020
Time: 01:30 p.m.
Crtrm.: 5, 14th Floor

I. INTEREST OF *AMICI CURIAE**

Amici curiae Susan Biniaz, Antony Blinken, Carol M. Browner, William J. Burns, Stuart Eizenstat, Avril D. Haines, John F. Kerry, Gina McCarthy, Jonathan Pershing, John Podesta, Susan E. Rice, Wendy R. Sherman, and Todd D. Stern are former United States diplomats or government officials (collectively "*amici*"). They have worked under presidents from both major political parties to shape U.S. foreign and climate policy over many decades, including by negotiating treaties and international climate agreements.[1] *Amici* believe in, and have long worked for, federal programs, policies, negotiations, and prerogatives to address the dangers of climate change. Their extensive experience as federal officials leads them to reject Plaintiff's unsubstantiated claims that California's[2] regulations authorizing a cap-and-trade program linked with Quebec's would interfere with foreign affairs, foreign commerce, federal constitutional prerogatives, or U.S. diplomacy or negotiations.

II. SUMMARY OF ARGUMENT

In 2006, California's legislature enacted and then-Governor Arnold Schwarzenegger signed the Global Warming Solutions Act of 2006 (GWSA). That state law authorized defendant the California Air Resources Board (CARB) to promulgate a set of local solutions to address global warming, including a California cap-and-trade program on all "covered sources" that took effect in 2013.[3] Pursuant to CARB "linkage regulations," starting in 2014, CARB began

---

* Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *Amici* certify that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money intended to fund the preparation or submission of this brief.

[1] *Amici*'s qualifications are listed in the Appendix.

[2] The State Defendants are 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 Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

[3] State cap-and-trade programs seek to control carbon emissions by setting an upper emissions limit that "caps" the amount of carbon emissions regulated sources may produce, in the aggregate, and allows regulated entities to "trade" for greater capacity to emit, by buying unused emissions allowances from other such entities that have not used their full allowance, as permitted by the state regulatory cap. *See generally* U.S. Envtl. Prot. Agency, *Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control* (2003), https://www.epa.gov/sites/production/files/2016-03/documents/tools.pdf.

accepting emissions allowances from the Canadian province of Quebec as essentially equivalent to those issued by California itself.[4] California and Quebec memorialized their commitment to continued cooperation in a non-binding memorandum ("linkage memorandum").[5]

California's regulations serve traditional local market-regulation goals. When CARB promulgated the regulations, it observed that "[e]xpanding the number of sources that are able to trade allowances will reduce the overall cost of achieving the desired level of emission reductions."[6] Allowing linkage permits California businesses, at a lower cost, to achieve the emissions cuts required by both the GWSA and the cap-and-trade program. By decreasing the overall costs of its cap-and-trade program, linkage promotes growth of local commerce and fosters compliance with a lawful and beneficial state regulatory program. Finally, linkage reduces the market power of large buyers and sellers, preventing distortions that lead businesses to make inefficient investment decisions.[7]

The United States claims that the linkage regulations and memorandum interfere with U.S. foreign policy on greenhouse gas regulation, specifically: (1) the Administration's announced withdrawal from the Paris Climate Agreement, (2) its obligations under the United Nations Framework Convention on Climate Change (UNFCCC), and (3) the future negotiation of a more "competitive" climate agreement.

Based on their decades of experience, as a matter of fact, *amici* find all three harms implausible. In *amici*'s experience, international climate negotiations have not sought to micromanage subnational environmental policy in this way. Nor, in *amici*'s experience, have international climate negotiations ever addressed compliance with state or subnational targets,

---

[4] Cal. Code Regs. tit. 17, § 95943.

[5] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Cal.-Quebec-Ontario, pmbl. ¶ 8, Sept. 22, 2017 [hereinafter Linkage Memorandum], https://ww3.arb.ca.gov/cc/capandtrade/linkage/2017_linkage_agreement_ca-qc-on.pdf.

[6] Cal. Envtl. Prot. Agency Air Res. Bd., Amendments to California's Cap-and-Trade Program: Final Statement of Reasons 27, 67, 95 (May 10, 2013) [hereinafter CARB Statement of Reasons], https://ww3.arb.ca.gov/regact/2012/capandtrade12/linkfsor.pdf.

[7] *See generally id.* at 35.

and most likely never will. The State's linkage policy addresses a narrow local issue: how sources of greenhouse gas emissions can comply with California state law. For many of the *amici*, our time as climate negotiators overlapped with California's linkage policy, which in no way interfered with our efforts to conduct U.S. foreign policy. Nor did it interfere with our discussions under the UNFCCC or the negotiation of the Paris Agreement, under which each nation may set a non-binding target for emissions reductions. To the contrary, in our experience as climate negotiators, state and local efforts to reduce emissions *enhanced* our effectiveness by increasing the credibility of the United States as a negotiating partner genuinely determined to address climate change. So the regulations and memorandum would not interfere with—and indeed might further—such talks if the federal government were to restart international negotiations.

For these reasons, *amici* believe that, on these cross-motions for summary judgment, Plaintiff's inability to prove state interference with the supremacy of the United States' federal interests must prove fatal to all of its legal theories. Given that these state practices do not interfere with any federal foreign affairs activity, California's regulations and memorandum cannot constitute either a forbidden state Compact or Treaty. The lack of any actual conflict between state and federal policy also precludes the federal government's additional claims that California's lawful actions are preempted by the foreign affairs doctrine and the dormant Foreign Commerce Clause.

III. ARGUMENT

A. California's Linkage Regulations and Memorandum Do Not Interfere with United States' Climate Change Policy or Practices.

1. California's Linkage Regulations and Memorandum Do Not Interfere with Withdrawal from the Paris Agreement.

First, California's linkage regulations and memorandum are irrelevant to the withdrawal of the United States from the Paris Agreement. California's linkage regulations and memorandum cannot prevent the United States from withdrawing from that Agreement, which provides that parties may withdraw "by giving written notification to the [Secretary-General of the United

Nations]."[8] The Administration transmitted such notice on November 4, 2019. Under the terms of the Agreement, withdrawal takes effect "one year from the date of receipt."[9] Thus by its own terms, the withdrawal instrument is intended to take effect without further executive action on November 4, 2020.[10] The United States offers no explanation as to how California's lawful linkage regulations and memorandum could interfere with a chain of events that has already been set into motion, notwithstanding the operation of the state cap-and-trade program.

2. California's Linkage Regulations and Memorandum Do Not Interfere with U.S. Participation in the UNFCCC.

Second, California's linkage practices do not affect the federal government's ability to negotiate international agreements under the UNFCCC. To the extent that the linkage regulations and memorandum cut emissions in California, Plaintiff claims that California's program leaves the United States with less "leverage" to trade for cuts abroad.[11] But this ignores the reality that the Administration has taken no steps to renegotiate the Paris Agreement or to negotiate a successor agreement. The real obstacle to a more "competitive" international agreement is not linkage, but Plaintiff's apparent lack of interest in climate negotiations.

More fundamentally, even assuming there were international discussions to disrupt, Plaintiff's "leverage" theory does not reflect how—in *amici*'s direct experience—international climate negotiations actually work. The United States has not been in the business of negotiating reciprocal emissions targets since the 1997 Kyoto Protocol, which the United States ultimately rejected.[12] In fact, Plaintiff's argument has it exactly backwards: in our experience as climate

[8] U.N. Framework Convention on Climate Change, *Paris Agreement* art. 28, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (Jan. 29, 2016) [hereinafter Paris Agreement].

[9] *Id.*

[10] Press Statement, Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019) [hereinafter Pompeo Press Statement], https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/.

[11] Pl.'s Mot. for Summ. J. (Docket No. 12) at 10 [hereinafter Dkt. No. 12 (MSJ)] ("Diplomacy is often a matter of leverage . . . . 'Quite simply, if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.'") (alteration in original) (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S 396, 424 (2003)).

[12] S. Res. 98, 105th Cong. (as passed by Senate, July 25, 1997).

negotiators, state and local efforts to reduce emissions *enhanced* our effectiveness by increasing the credibility of the United States as a negotiating partner genuinely determined to address climate change. For *amici* whose time as climate negotiators overlapped with California's linkage policy, that policy never interfered with our work under the UNFCCC. Linking California's emissions to Quebec's does not reduce federal negotiating leverage; it simply expands cost-reduction opportunities for parties regulated under those programs. Any impact that California's policy might have on the United States' "leverage" within the UNFCCC framework would be attributable not to the linkage regulations and memorandum, but to a 14-year-old state law, California's GWSA, and a state cap-and-trade program that could not—and have never before been found by any court to—have the effect Plaintiff seeks to attribute to them.

Indeed, Plaintiff's own briefing reveals that, as a party to the UNFCCC, the United States' official policy is to continue cutting emissions to stabilize greenhouse gas concentrations.[13] Given that policy, it makes little sense for the federal government to now suggest that California must do the opposite. Holding states' emission reductions in abeyance, or making cuts more expensive, in order to increase federal negotiating "leverage" would be inconsistent with the United States' own official policy.

Finally, California's linkage regulations and memorandum cannot interfere with the President's negotiation of a more competitive agreement under the UNFCCC for the simple reason that "[f]ederal power in the relevant areas remains plenary."[14] In the Supreme Court's decision in *U.S. Steel Corp. v. Multistate Tax Commission*, a multistate agreement's joint body "denounced [a] tax treaty already signed with Great Britain (though not yet ratified)" and "pledged continued opposition to specific bills introduced in Congress."[15] The dissent argued that the agreement would interfere with just supremacy if an agreement made it more politically

[13] Dkt. No. 12 (MSJ), *supra* note 11, at 10 ("By entering into the UNFCCC, the federal government undertook obligations to its foreign treaty partners with respect to the 'stabilization of greenhouse gas concentrations in the atmosphere . . . .'") (quoting U.N. Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107).

[14] *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 479 n.33 (1978).

[15] *Id.* at 487-88 (White, J., dissenting).

difficult for the federal government to join a treaty or pass legislation.[16] But the majority disagreed, holding that the multistate agreement did not interfere with "just supremacy" because "no action authorized by the Constitution is foreclosed to the Federal Government acting through Congress or the treaty-making power."[17]

Similarly, here, California's linkage regulations and memorandum "foreclose" nothing: the federal government remains free to withdraw from the Paris Agreement, to renegotiate it, or to negotiate an entirely new agreement if it chooses to do so. Until the United States finally withdraws from the Paris Agreement, the Agreement empowers the President to unilaterally revise the prior Administration's non-binding nationally determined contribution to any level he finds appropriate.[18] Nothing—whether linkage or anything else—prevents the President from announcing a nationally determined contribution that he believes is more "fair to the United States, its businesses, its workers, its people, its taxpayers."[19] If the President wanted a more lenient target for the United States, he could accomplish that goal today by mailing a letter to the UNFCCC Secretariat. Nothing in California's linkage regulations and memorandum would interfere with, much less foreclose, the President's freedom to do so.

3. California's Linkage Regulations and Memorandum Do Not Interfere with U.S. Negotiation of Future Climate Agreements.

Third, Plaintiff's claims that California's program will disrupt future negotiation of a more

---

[16] *Id.* at 491-92 (White, J., dissenting).

[17] *Id.* at 479 n.33 (internal quotation omitted).

[18] Paris Agreement, *supra* note 8, art. 4.2 ("Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve."); Ctr. for Climate & Energy Sol., Legal Issues Related to the Paris Agreement 1 (2017), https://www.c2es.org/site/assets/uploads/2017/05/legal-issues-related-paris-agreement.pdf ("The option of legally prohibiting a 'downward' revision was discussed and supported by some, but rejected.").

[19] Dkt. No. 12 (MSJ), *supra* note 11, at 2 (quoting Press Statement, Donald J. Trump, President, United States (June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/).

"competitive" climate agreement are entirely hypothetical.[20] As already noted, there are no ongoing climate negotiations to disrupt. The current Administration has taken no steps to renegotiate the Paris Agreement or to initiate negotiations on a successor agreement. Nor do California's linkage regulations and memorandum challenge the federal government's right or ability to do either. Instead they leave the federal government free to negotiate any agreement with any party on any dimension of climate policy. By its terms, the Paris Agreement already permits Administration officials to revise our emissions target, unilaterally and instantaneously, to whatever they believe is fair.

Finally, Plaintiff's claim on this point is entirely academic.[21] In *amici*'s experience, international climate negotiations have never addressed compliance with state or subnational targets, and most likely never will. So even if, against all likelihood, the United States were to negotiate an international agreement governing the use of subnational compliance instruments that directly conflicted with any state laws, no actual conflict would ever materialize. Under both the Supremacy Clause and California's linkage memorandum—which fully acknowledges that each party's "national obligations"[22] will be supreme over contrary state law—that hypothetical new agreement would preempt any contrary state actions.[23]

B. Because The Linkage Regulations and Memorandum Do Not Interfere with Any Federal Prerogative, They Cannot Be An Unconstitutional Compact Or Treaty.

The absence of genuine interference as a matter of fact is fatal to all of Plaintiff's theories as a matter of law. The State's linkage regulations and memorandum are consistent with the Compact Clause of the Constitution because they do not "encroach upon or interfere with the just

---

[20] Plaintiff claims that California's linkage plan "complexifies and burdens the United States' task" of negotiating a new agreement that is more "competitive." First Am. Compl. (Docket No. 7), ¶ 3 [hereinafter Dkt. No. 7 (FAC)].

[21] In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, 472 U.S. 159, 176 (1985), the Supreme Court similarly rejected as "academic" a Compact Clause claim premised on hypothetical future conflicts, given the availability of preempting federal law.

[22] Linkage Memorandum, *supra* note 5, pmbl. ¶ 8.

[23] U.S. Const. art. VI, cl. 2. (Supremacy Clause); *Garamendi*, 539 U.S. at 425 (finding foreign affairs preemption when there was an "express federal policy" and a "clear conflict").

supremacy of the United States."[24] Under the Supreme Court's test in *U.S. Steel v. Multistate Tax Commission*, a Compact Clause action fails unless the state's alleged interference with just supremacy is "attributed to the Compact."[25]

Amici need not define the uncertain boundary between Article I, Section 10 Compacts, which are allowed with congressional consent, and Article II Treaties, which are reserved to the federal government. Under principles of international law, treaties are legally binding.[26] Since the linkage memorandum is not even legally binding or a Compact, *a fortiori*, it cannot be an Article I "Treaty" requiring the advice and consent of the Senate.[27]

C. Because the Linkage Regulations and Memorandum Address Local Concerns That Do Not Conflict with Federal Policy, They Do Not Interfere with the United States' Foreign Affairs Authority.

1. The Linkage Regulations and Memorandum Do Not Conflict with U.S. Foreign Policy.

Plaintiff alleges that California's actions are preempted because they "interfere with the United States' foreign policy on greenhouse gas regulation, including but not limited to the United States' participation in [the] UNFCCC and announcement of its intention to withdraw

---

[24] *U.S. Steel*, 434 U.S. at 471 (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976)). The Compact Clause prohibits U.S. states from making "any Agreement or Compact with . . . a foreign Power" absent congressional consent. U.S. Const. art. 1, §10, cl. 3.

[25] *U.S. Steel*, 434 U.S. at 475.

[26] Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, S. Treaty Doc. No. 92-12, 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *see also* Restatement (Third) of Foreign Relations Law §301, cmt. a (Am. Law. Inst. 1987) (describing treaties as a form of international agreement and defining international agreements as "legally binding" under international law). *See* Memo. of Ps and As in Support of State Defs.' Cross-Motion for Summary Judgment and Opp. to Pltf.'s Summary Judgment (Dkt. No. 50-1) at 24.

[27] U.S. Const. art. I, §10, cl. 1 provides that "[n]o State shall enter into any Treaty, Alliance or Confederation" with a foreign nation. The Supreme Court stated, "[w]hatever distinct meanings the Framers attributed to the [various] terms in Art. I, § 10, those meanings were soon lost." *U.S. Steel*, 434 U.S. at 463. But Article I, section 10's grouping of "treaties" with "alliances and confederations," while pairing of compacts with simple agreements, reinforces the textual inference that an arrangement that does not rise to the level of foreign Compact, *a fortiori*, cannot be a Treaty. Peter J. Spiro, Treaties, Executive Agreements, and Constitutional Method, 79 Tex. L. Rev. 961, 977 (2001).

from the [Paris] Accord."[28] However, both Plaintiff's Amended Complaint and its brief in support of its motion for summary judgment go on to quote Secretary of State Michael R. Pompeo as stating that "[i]n international climate discussions," despite withdrawing from the Paris Agreement, "the United States will continue to research, innovate, and grow our economy while reducing emissions and extending a helping hand to our friends and partners around the globe."[29]

Foreign affairs preemption turns on whether a challenged state action interferes with federal policy and whether the state action occurs in an area of "traditional competence."[30] When a state acts within its "'traditional competence' but in a way that affects foreign relations," the Supreme Court's *Garamendi* test requires "a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted" for the federal government's foreign affairs authority to preempt the state action.[31] Even if a state "act[s] outside an area of traditional state responsibility," the Ninth Circuit has held, "[t]o intrude on the federal government's foreign affairs power, a [state's action] must have 'more than some incidental or indirect effect on foreign affairs."[32] California's incidental decision to link its program with Quebec's is not preempted because it serves traditional state ends and creates no conflict with any clearly established United States' foreign policy on climate change.

Amici respectfully submit that this test requires rejection of the federal government's assertion that California's program presents any conflict with U.S. foreign policy. Negotiations at recent Conferences of the Parties—in which a number of the *amici* have participated—have all

---

[28] Dkt. No. 7 (FAC), *supra* note 20, ¶ 178; *accord* Dkt. No. 12 (MSJ), *supra* note 11, at 26-27.

[29] *Id.*, ¶ 50; Pompeo Press Statement, *supra* note 10.

[30] *Garamendi*, 539 U.S. at 419 n.11, 420 (2003); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012). Conflict preemption requires "a state law [to] yield when it conflicts with an express federal foreign policy." *Id.* at 1071. Field preemption arises "when a state law (1) has no serious claim to be addressing a traditional state responsibility *and* (2) intrudes on the federal government's foreign affairs power." *Id.* at 1074 (emphasis added); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013).

[31] *Garamendi*, 539 U.S. at 419 n.11, 420.

[32] *Gingery v. City of Glendale*, 831 F.3d 1222, 1230 (9th Cir. 2016) (alteration in original) (quoting *Cassirer*, 737 F.3d at 617).

favorably contemplated subnational efforts that support the parties' UNFCCC obligations.[33] If anything, state programs like California's, which reduce operating costs and increase compliance flexibility for businesses, bolster the United States' climate negotiating posture.

Linking parallel subnational programs yields numerous local benefits. California's linkage regulations are designed not to reduce emissions directly, but to lower compliance costs by expanding the market for emissions trading.[34] Mitigating the impacts of climate change helps California to meet such pressing local goals as preventing wildfires, avoiding drought, protecting Californian ecosystems and wildlife, avoiding dangerous heat waves, and protecting local property from rising seas.[35]

No federal policy requires that it be more expensive for California to carry out valid state-law policies such as cap-and-trade. Nor is there any federal policy declaring that it should be more expensive or unpredictable for private businesses to operate in California. If anything, the opposite is true: the federal government works continually to make it easier for private enterprise to satisfy regulatory requirements and to increase regulatory certainty.[36] Indeed, President Trump

---

[33] U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its Twenty-First Session, ¶¶ 134-35, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter UNFCCC 2016 Report]; *see also* U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its Twenty-Third Session, ¶ 5, U.N. Doc. FCCC/CP/2017/11/Add.1., Decision 2/CP.23 (Feb. 8, 2018) (operationalizing the local communities and indigenous peoples platform "to strengthen the knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, to facilitate the exchange of experience and the sharing of best practices and lessons learned related to mitigation and adaptation in a holistic and integrated manner and to enhance the engagement of local communities and indigenous peoples in the UNFCCC process").

[34] Dkt. No. 12 (MSJ), *supra* note 11, at 20.

[35] *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 858 (2014) (identifying "titles to real estate" and "land and water use" as "areas of traditional state responsibility"); *cf. Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("[T]he States' interests in conservation and protection of wild animals [are] legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens."); *Massachusetts v. E.P.A.*, 549 U.S. 497, 522–23 (2007) (holding that Massachusetts has a particular interest in preserving its coastline from the harm of sea level rise), *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (noting that the Court has 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.").

[36] *See, e.g.*, Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada, U.S.-Mex-Can., pmbl. ¶¶ 11, 8, Dec. 13, 2019, https://ustr.gov/trade-agreements/free-trade-agreements/united-

(Continued…)

declared that withdrawal from the Paris Agreement was prudent precisely to reduce costs on American business and to make it easier for U.S. companies to do business here.[37]

These state policies conflict with no federal policy. As Plaintiff acknowledges, "[b]y entering into the UNFCCC, the federal government undertook obligations to its foreign treaty partners with respect to the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'"[38] Withholding states' emissions cuts, or making them more costly, would undermine America's compliance with the UNFCCC's goal of stabilizing atmospheric greenhouse gas concentrations. California's program, which has existed since 2013, is fully consistent with this unambiguous federal policy. If state authorization of cost-saving features in their cap-and-trade programs were deemed to interfere with U.S. foreign policy, so too would such obviously benign programs as state subsidies for energy-efficient lightbulbs that also reduce emissions.

2. The Linkage Regulations and Memorandum Do Not Conflict with the Foreign Commerce Clause.

Finally, while Plaintiff has not moved for judgment on its last cause of action, given its statement that it is nonetheless "not abandon[ing]" its claim that California's cap-and-trade program violates the dormant Foreign Commerce Clause[39] by discriminating against foreign

---

states-mexico-canada-agreement/agreement-between ("preventing, identifying, and eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting good regulatory practices" and "[e]stablish[ing] a clear, transparent, and predictable legal and commercial framework for business planning").

[37] Press Statement, Donald J. Trump, President, United States (June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ ("The United States, under the Trump administration, will continue to be the cleanest and most environmentally friendly country on Earth. We'll be the cleanest. We're going to have the cleanest air. We're going to have the cleanest water. We will be environmentally friendly, but we're not going to put our businesses out of work and we're not going to lose our jobs."); Pompeo Press Statement, *supra* note 10 ("[T]he United States will continue to research, innovate, and grow our economy while reducing emissions and extending a helping hand to our friends and partners around the globe.").

[38] Dkt. No. 12 (MSJ), *supra* note 11, at 10 (quoting U.N. Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107).

[39] Dkt. No. 12 (MSJ) at 3, n.1 ("The United States does not abandon its remaining two causes of action."), referring, *inter alia*, to Dkt. No. 7 (FAC), ¶¶ 179-187.

commerce[40] or by impairing "the Federal Government's capacity to 'speak with one voice when regulating commercial relations with foreign governments,'"[41] a brief response is warranted. Even assuming *arguendo* that emissions offsets and allowances are articles of commerce,[42] Plaintiff identifies no "substantially similar" instruments against whom the CARB is supposedly discriminating. California differentiates among articles of foreign commerce based on their nature, not place of origin, to further a compelling state interest: the integrity of its valid cap-and-trade program. California's eligibility criteria for compliance instruments are origin-neutral, precisely the kind of product-based differentiation that is permitted under the Foreign Commerce Clause.[43]

Nor can the federal government plausibly suggest that California's linkage with Quebec violates the dormant Foreign Commerce Clause's "one voice" requirement. Any federal policy requiring uniformity in commerce must arise from congressional enactment.[44] But as noted

---

[40] *Barclays Bank PLC v. Franchise Tax Board* stated the Foreign Commerce Clause test as follows: "Absent congressional approval, however, a state tax on such commerce will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State." 512 U.S. 298, 310-11 (1994) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)); *see also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

[41] *Barclays*, 512 U.S. at 311 (quoting *Japan Line*, 441 U.S. at 449); Dkt. No. 7 (FAC), *supra* note 20, ¶ 132 ("The Agreement and supporting California law as applied . . . have the effect of undermining the ability of the federal government as a whole, and the President in particular, to speak for the United States with one voice on a variety of complex and sensitive subjects of foreign policy."). *See also id.*, ¶¶ 182, 186.

[42] Dkt. No. 7 (FAC), *supra* note 20, ¶ 183.

[43] *Kraft Gen. Foods v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 78 (1992); *Amerada Hess Corp. v. Director*, 490 U.S. 66, 78 (1989) (upholding a state policy that results in differential treatment "solely from differences between the nature of their businesses, not from the location of their activities"); *see also Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 8 (1986) (evaluating claims of discrimination against foreign commerce using the same criteria applied to claims of discrimination against out-of-state commerce).

[44] *Barclays*, 512 U.S. at 329; *see also Japan Line*, 441 U.S. at 448. Thus, executive statements of policy are irrelevant to resolving dormant Foreign Commerce Clause claims. *See Barclays*, 512 U.S. at 329 ("That the Executive Branch proposed legislation to outlaw a [challenged] state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation's ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others."); *see also Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring in part and concurring in judgment) (Continued…)

above, the UNFCCC framework, adopted by Senate advice and consent and subsequent legislative enactments, expressly contemplates state action like California's cap-and-trade program.[45] The federal government can identify no conflict between any congressional actions and California's cost-saving program, because California's program is entirely consistent with Congress's pronouncements and enactments in this area.[46]

IV. CONCLUSION

Given that Plaintiff's contentions rely on an erroneous understanding of the negotiation and operation of international climate agreements, *amici* respectfully urge this Court to deny Plaintiff's Motion for Summary Judgment and to grant State Defendants' Cross-Motion for Summary Judgment.

Dated: February 18, 2020

Respectfully submitted,

/s/ A. Marisa Chun

A. Marisa Chun
CROWELL & MORING LLP
3 Embarcadero Center, 26th Floor
San Francisco, CA 94111
Telephone: 415.986.2800
MChun@crowell.com

Harold Hongju Koh
YALE LAW SCHOOL
PETER GRUBER RULE OF LAW CLINIC
P.O. Box 208215
New Haven, CT 06520
Telephone: 203.432.4932
harold.koh@ylsclinics.org

Attorneys for Amici Curiae
Former U.S. Diplomats and Government Officials

(noting that "only Congress" can decide "which state regulatory interests should currently be subordinated to our national interest in foreign commerce").

[45] *See, e.g.*, UNFCCC 2016 Report, *supra* note 33.

[46] U.N. Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

APPENDIX

LIST OF *AMICI CURIAE*[*]

Susan Biniaz served in the Legal Adviser's office at the State Department from 1984 to 2017, was Deputy Legal Adviser, and was the principal U.S. government lawyer on the climate change negotiations from 1989 through early 2017.

Antony Blinken served as Deputy Secretary of State from 2015 to 2017. He previously served as Deputy National Security Advisor to the President from 2013 to 2015.

Carol M. Browner served as Director of the White House Office of Energy and Climate Change Policy from 2009 to 2011 and previously served as Administrator of the Environmental Protection Agency from 1993 to 2001.

William J. Burns served as Deputy Secretary of State from 2011 to 2014. He previously served as Under Secretary of State for Political Affairs from 2008 to 2011, as U.S. Ambassador to Russia from 2005 to 2008, as Assistant Secretary of State for Near Eastern Affairs from 2001 to 2005, and as U.S. Ambassador to Jordan from 1998 to 2001.

Stuart Eizenstat served as the chief U.S. government negotiator and head of the U.S. delegation for the Kyoto Protocols as Under Secretary of State for Economic, Business & Agricultural Policy in the Clinton Administration.

Avril D. Haines served as Deputy National Security Advisor to the President from 2015 to 2017. From 2013 to 2015, she served as Deputy Director of the Central Intelligence Agency.

John F. Kerry served as Secretary of State from 2013 to 2017.

Gina McCarthy served as Administrator of the Environmental Protection Agency from 2013 to 2017. She is currently the President and Chief Executive Officer of the Natural Resources Defense Council (NRDC).

Jonathan Pershing served as United States Special Envoy for Climate Change from 2016 to early 2017.

John Podesta served as Counselor to the President with respect to matters of climate change from 2014 to 2015 and White House Chief of Staff from 1998 to 2001.

Susan E. Rice served as U.S. Permanent Representative to the United Nations from 2009 to 2013 and as National Security Advisor to the President from 2013 to 2017.

///

[*] Institutional affiliations provided for identification purposes only.

Wendy R. Sherman served as Under Secretary of State for Political Affairs from 2011 to 2015.

Todd D. Stern served as United States Special Envoy for Climate Change from 2009 to 2016.

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically transmitted to the Clerk's Office using the U.S. District Court for the Eastern District of California CM/ECF System for filing. Notice of this filing will be served by e-mail to all parties by operation of the Court's electronic filing system or by mail as indicated on the Notice of Electronic filing.

Dated: February 18, 2020

/s/ A. Marisa Chun
A. Marisa Chun